Turning Over The Reins: The Abolition Of The Mandatory Appellate Jurisdiction Of The Supreme Court

By JOHN M. SIMPSON*

Introduction

The papers for 4704 cases were filed during the Supreme Court's October, 1977 Term,[1] as compared with only 1426 filed in the 1948-1949 session.[2] Despite this enormous rise in the number of requests for review, the Court has consistently handed down approximately 150 opinions each year,[3] and has managed to fully dispose of its docket by the end of each term. The dramatic increase in the quantity of cases filed, coupled with the number actually receiving plenary consideration, has convinced many members of the legal community that the exigencies of the current caseload are forcing the Court to "ration justice."[4] Justice Douglas was accurate to a degree when he asserted that many areas of the law once serving as abundant sources of litigation have now become fallow under the weight of settled precedent.[5] Yet, in light of the growing complexity of the state and federal legal systems and the general increase in constitutional litigation,[6] it has become apparent that not every case the Court declines to review is either frivolous or of no national importance.

Against this background, several proposals to reform the appellate

* A.B., Harvard University, 1972; J.D., Columbia University, 1978. The author wishes to express his appreciation to Professor Louis Henkin of the Columbia Law School for his inspiration and thoughtful criticism in the preparation of this article.

1. *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57,332 (1978).
2. *The Supreme Court, 1948 Term*, 63 HARV. L. REV. 119, 121 (1949).
3. Rehnquist, *Whither the Courts*, 60 A.B.A.J. 787, 789 (1974).
4. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 340 (1975).
5. Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 411-12 (1960).
6. *See* Rehnquist, *supra* note 3, at 788.

jurisdiction of the Supreme Court have been advanced.[7] On May 18,

7. Past landmark reforms, spawned by concern over the federal court caseload, structure and jurisdiction, have included: the Circuit Court of Appeals Act (Evarts Act), ch. 517, 26 Stat. 826 (1891) (codified in scattered sections of 28 U.S.C.), which established both the present system of circuit courts of appeals and introduced discretionary review by certiorari, and the Judges' Bill of 1925, ch. 229, § 1, 43 Stat. 936 (codified in scattered sections of 11, 28, & 48 U.S.C.), which narrowed the scope of mandatory review and broadened that of Supreme Court review by certiorari. *See generally* P. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 5-14,109 (1973); F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT (1927) [hereinafter cited as FRANKFURTHER & LANDIS]; Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895 (1973); Surrency, *A History of Federal Courts*, 28 MO. L. REV. 214 (1963); Note, *Congressional Prerogatives, the Constitution and a National Court of Appeals*, 5 HASTINGS CONST. L.Q. 715 (1978).

The major contemporary concern has been the burgeoning number of cases handled by the national judiciary. The general goal of the proposed changes is to improve the judicial decision-making process by lessening or diffusing federal judicial responsibilities. Such reforms ostensibly would improve the judicial process first by relieving the Supreme Court of part of its caseload, thus allowing the Court to devote more time and energy to its remaining cases, and second, by creating new tribunals to handle the diverted cases and to make the decisions necessary for the maintenance of a coherent body of national law and precedent.

A full description of all recent proposals is beyond the scope of this article, but the work of two groups, the Federal Judicial Center Study Group on the Caseload of the Supreme Court (chaired by Paul Freund) [hereinafter cited as Freund Study Group] and the U.S. Commission on Revision of the Federal Court Appellate System (chaired by former Senator Roman L. Hruska) [hereinafter cited as Hruska Commission], typify current suggestions.

The Freund Study Group, appointed by Chief Justice Burger in 1971, studied the Supreme Court's workload and concluded that the Court was overburdened. Their recommendations included (1) the formation of a National Court of Appeals, sitting above the circuit courts of appeals but below the Supreme Court, to screen petitions for certiorari and resolve federal circuit court conflicts not meritorious of Supreme Court review, and (2) the curtailment of mandatory Supreme Court appellate jurisdiction. *See* FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, *reprinted at* 57 F.R.D. 573 (1972). *See also* A. BICKEL, THE CASELOAD OF THE SUPREME COURT (1973); H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 49-53 (1973); Alsup, *A Policy Assessment of The National Court of Appeals*, 25 HASTINGS L.J. 1313 (1974); Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883 (1974); Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Freund, *A National Court of Appeals,* 25 HASTINGS L.J. 1301 (1974); Goldberg, *One Supreme Court,* THE NEW REPUBLIC, Feb. 10, 1973, at 14; Poe, Schmidt & Whalen, *A National Court of Appeals: A Dissenting View*, 67 NW. U.L. REV. 842 (1973); *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A. J. 721 (1973).

The Hruska Commission, established by order of Congress, Act of Oct. 13, 1972, Pub. L. No. 92-489, § 31, 86 Stat. 807, *as amended by* Act of Sept. 19, 1974, Pub. L. No. 93-420, 88 Stat. 1153, was prevented by its charter from considering questions of federal court jurisdiction. It did, however, propose a National Court of Appeals to handle cases presently being denied Supreme Court review due to simple lack of capacity and also, in a different phase of its work, proposed splitting both the Fifth and Ninth Circuit Courts of Appeals to better handle increasing caseloads in those areas. *See* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975), *reprinted at* 67 F.R.D. 195 (1975). *See also Hearings Before the*

1978, Senator DeConcini[8] introduced Senate bill 3100, the proposed Supreme Court Jurisdiction Act of 1978, which was designed to eliminate the major portion of the Court's obligatory appellate jurisdiction.[9] On July 13, 1978, the Senate Judiciary Committee reported favorably on the bill,[10] with the following comment:

> The long historic experiment of imposing on the Supreme Court an obligation to resolve appeals taken to it as of right has utterly failed. The modern problems and practices of the Court simply do not permit the luxury of determining the merits of all cases within any designated jurisdictional class. To survive as a viable institution, to control its docket to perform its great mission, the Supreme Court must be given total freedom to select for resolution those few hundred cases—out of the several thousands that are filed each year—that are found truly worthy of review. S. 3100 will help to achieve that goal by reducing the needless mandatory burdens virtually to the vanishing point.[11]

Commission on Revision of the Federal Court Appellate System, Second Phase, (1974-75); Alsup, *Reservations on the Proposal of the Hruska Commission to Establish a National Court of Appeals*, 7 U. TOL. L. REV. 431 (1976); Feinberg, *A National Court of Appeals?*, 42 BROOKLYN L. REV. 611 (1976); Hruska, *The National Court of Appeals: An Analysis of Viewpoints*, 9 CREIGHTON L. REV. 286 (1975); Levin, *Do We Need a New National Court?*, TRIAL, Jan. 1976, at 32; Owens, *The Hruska Commission's Proposed National Court of Appeals*, 23 U.C.L.A. L. REV. 580 (1976); Swygert, *The Proposed National Court of Appeals: A Threat to Judicial Symmetry*, 51 IND. L.J. 327 (1976).

Although neither proposed National Court plan has made much headway, the calls for curtailment of mandatory Supreme Court appellate jurisdiction met with some success when Congress abolished direct appeals to the Supreme Court from most three-judge district courts. Act of Aug. 12, 1976, Pub. L. No. 94-381, §§ 1, 2, 5, 90 Stat. 1120 (repealing 28 U.S.C. §§ 2281, 2282, 2403).

8. Senator Dennis DeConcini (Dem., Arizona) is a member of the Senate Committee on the Judiciary, and is chairman of the Subcommittee on Improvements in Judicial Machinery.

9. S. 3100, 95th Cong., 2d Sess., 124 CONG. REC. S7748-49 (1978). Of the categories of compulsory appellate jurisdiction described in note 14 *infra*, S. 3100 preserves only appeals from three-judge district courts and the certified question provisions.

S. 3100 is the successor to a similar but less comprehensive measure introduced by Senator Bumpers in early 1977, S. 83, 95th Cong., 1st Sess., 123 CONG. REC. S284 (1977). Although the Senate failed to act upon S. 3100 before the end of the ninety-fifth Congress, the same measure has been introduced by Senators DeConcini and Bumpers in the form of the proposed Supreme Court Jurisdiction Act of 1979, S. 450, 96th Cong., 1st Sess., 125 CONG. REC. S1666, S1671-72 (daily ed. Feb. 22, 1979).

10. 124 CONG. REC. S10683 (1978).

11. SENATE COMM. ON THE JUDICIARY, THE SUPREME COURT JURISDICTION ACT OF 1978, S. REP. NO. 95-985, 95th Cong., 2d Sess. 8 (1978) [hereinafter cited as 1978 SENATE REPORT]. The report outlined six principal reasons for abolishing the Court's mandatory appellate jurisdiction: "First, it is unnecessary to the Court's performance of its role in our society. Second, it impairs the Court's ability to select the right time and the right case for the definitive resolution of recurring issues. Third, it imposes burdens on the Justices that may hinder the Court in the performance of its function as expositor of the national law. Fourth, the existence of the obligatory jurisdiction has made it necessary for the Court to

Hearings conducted on Senate bill 3100 revealed no opposition from academic, government or judicial quarters or from the bar,[12] and the bill has received the unanimous and unqualified endorsement of the Supreme Court.[13]

This article will focus on the merits of eliminating the Supreme Court's mandatory appellate jurisdiction over state court decisions raising federal issues.[14] Part I will examine the origins of obligatory review and the historical underpinnings of the present legislative framework. Part II will focus on the current practice of the Supreme Court and the problems stemming from the exercise of its mandatory jurisdiction.

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hand down summary dispositions that create confusion for lawyers, for lower court judges and for citizens who must conform their conduct to the requirements of federal law. Fifth, the obligatory jurisdiction creates burdens for lawyers seeking Supreme Court review. Finally, even if the idea of having an obligatory jurisdiction were sound, there is no practical way of describing, in legislation, the kinds of cases that should fall within it." *Id.* at 2.

12. *Supreme Court Jurisdiction Act of 1978: Hearings on S. 3100 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978) [hereinafter cited as *DeConcini Committee Hearings*].

13. Letter from the Supreme Court to Senator DeConcini (June 22, 1978), *reprinted in* 1978 SENATE REPORT, *supra* note 11, at 15-16 app. I.

14. The present jurisdictional scheme is embodied in 28 U.S.C. § 1257 (1976): "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 as follows: (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity. (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. (3) 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 State statute 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, treaties or statutes of, or commission held or authority exercised under, the United States. For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

The remaining instances of obligatory Supreme Court review include: (i) cases to which the United States is a party, wherein a federal court declares a federal law unconstitutional, 28 U.S.C. § 1252 (1976); (ii) cases in which a federal court declares a state statute unconstitutional, 28 U.S.C. § 1254(2) (1976); (iii) appeals under 28 U.S.C. § 1253 of decisions of three-judge courts convened to consider apportionment matters, 28 U.S.C. § 2284(a) (1976); extraordinary matters arising under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-5(b), 2000e-6(b) (1976); various cases under the Voting Rights Act of 1965 and related statutes, 42 U.S.C. §§ 1971(g), 1973(b)-(c) (1976); and actions brought under the Presidential Election Campaign Fund Act, 26 U.S.C. § 9010(c) (1976); (iv) certified questions from the federal courts of appeals and the Court of Claims, 28 U.S.C. §§ 1254(3), 1255(2) (1976); (v) appeals from the Supreme Court of Puerto Rico, 28 U.S.C. § 1258(1)-(2) (1976); (vi) certified questions from district courts involving construction of the Federal Election Campaign Act Amendments of 1974, 2 U.S.C. § 437h(b) (1976); (vii) actions in the Court of Claims concerning appropriation of certain Indian lands, 25 U.S.C. § 652 (1976), (viii) challenges to construction authorizations under the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652(d) (1976).

Part III will assess the effect of Senate bill 3100, outlining and discussing possible objections to that bill.

I. Historical Antecedents And Evolution Of The Statutory Framework

A. Early Developments

Although the delegates to the Constitutional Convention advanced a wide variety of proposals concerning the structure of the national judiciary, the record of that gathering demonstrates widespread agreement that the Supreme Court should be vested with the power to review state court decisions on matters of federal concern.[15] One participant observed that, in the absence of a supreme national tribunal, "the judicial authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor."[16] Cognizant of this problem and pursuant to its authority under the "exceptions and regulations" clause,[17] the first Congress prescribed the appellate authority of the Supreme Court over state cases in section 25 of the Judiciary Act of 1789.[18] Under this provision, writs of error were to issue to state courts in three situations: (i) where a state tribunal invalidated a federal statute, treaty or authority; (ii) where a state statute or authority was sustained against a challenge based upon the federal constitution, laws or treaties; and (iii) where the construction of a federal constitutional, statutory or treaty provision was called into question, and the title, right, privilege or exemption thereunder was denied by the state court.[19]

15. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 12 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

16. THE FEDERALIST No. 82 at 456 (rev. ed. 1901) (A. Hamilton). *See also* 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 18 (1926); FRANKFURTER & LANDIS, *supra* note 7, at 190-91.

17. U.S. CONST. art. III, § 2, cl. 2: "In all the other Cases, before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

18. Act of Sept. 24, 1789, 1 Stat. 73, 85-87.

19. Section 25 of the Judiciary Act of 1789 provided as follows: "Sec. 25. *And be it further enacted*, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such

> As Professor Warren aptly described it, the 1789 Act was
> a measure in the nature of a compromise between the extreme Federalist view that the full extent of judicial power granted by the Constitution should be vested by Congress in the Federal Courts, and the view of those who feared the new Government as a destroyer of the rights of the States, who wished all suits to be decided first in the State Courts, and only on appeal by the Federal Supreme Court.[20]

In section 25, this compromise was reflected specifically in the selection of the common law writ of error as the exclusive mode of review. In the contemporaneous English practice, the writ of error allowed the courts of King's Bench to review lower court decisions only as to questions of law; the procedure was designed simply to affirm or deny the existence of error in the trial proceedings.[21] In the courts of Chancery however, the appeal carried both facts and legal theory to the higher court. In the absence of trial by jury in equity practice, the appellate judge was free to consider the facts *de novo* in determining whether the chancellor below had arrived at a just result.[22] During the ratification debates on the Constitution, a major attack had been leveled against the article III provision permitting Supreme Court review of issues of law and fact. To its antagonists, this broadened scope of review appeared to abrogate the common law practice of commending factual determinations exclusively to the jury. This criticism not only led to the inclusion of the Seventh Amendment in the Bill of Rights, but it also shaped the drafting of section 25. Eager to provide some assurance that the right to trial by jury would be preserved, the draftsmen of section 25 employed the writ of error and delimited the ambit of Supreme

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clause of the said constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute." *Id.* (footnotes omitted).

20. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 131 (1923).

21. Sunderland, *A Simplified System of Appellate Procedure*, 17 TENN. L. REV. 651, 652 (1943).

22. *Id.* at 653-54.

Court review in all cases to questions of law.[23]

In view of the foregoing, it is clear that the utilization of the writ of error in section 25 was not motivated by considerations of whether or not the Supreme Court should exercise discretion in reviewing state court decisions. Although the writ of error in England had for centuries issued *ex debito justitiae*, as an obligation of justice, and although the equity appeal was available only as a matter of royal grace,[24] this distinction played no role in the drafting of section 25. The central concern was the possible erosion of the right to trial by jury, and the concept of obligatory review was implanted in the jurisdictional statute as an accoutrement of proceedings in error, with no real consideration of the merits of mandatory versus discretionary jurisdiction.

Even though the presence of the writ of error in section 25 embodied only the unitary concern for the scope of Supreme Court review, the Court in its earliest terms adopted the full panoply of English writ of error procedures. In 1792, the Court promulgated the following rule: "The Court considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary."[25] The Court thereby incorporated the English notion that writs of error issued as of right. It should be noted that even though the Court embraced the obligatory aspects of the writ of error, it was not necessarily compelled to do so, as the eighteenth century experience in the colonies demonstrates. In colonial Connecticut and Virginia, for example, the writ of error was a

23. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 102 (1923). In 1803, Congress reinstated the practice of reviewing law and fact in equity and admiralty cases. Act of Mar. 3, 1803, ch. 40, 2 Stat. 244. In the wake of congressional attacks on the appellate jurisdiction of the Supreme Court in the 1950's and 1960's, some commentators pointed to the use of the writ of error in section 25 as evidence of a general limitation on congressional power under the exceptions and regulations clause. It has been argued that the exceptions and regulations clause appeared in article III merely to provide Congress with a method of limiting the scope of Supreme Court review and that use of the writ of error in section 25 represented an exercise of this narrow congressional power. Consequently, it was said to be grossly overstating the case to contend that Congress had authority to effect fundamental changes in the Court's jurisdiction. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 57, 63-68 (1962).

24. Thompson, *The Development of the Anglo-American Judicial System*, 17 CORNELL L.Q. 395, 427-29 (1931).

25. 2 U.S. (2 Dall.) 414 (1792). The English writ of error issued out of the writ office of Chancery, and since there was no federal chancery, writs of error under section 25 were to issue out of the Supreme Court clerk's office. West v. Barnes, 2 U.S. (2 Dall.) 400, 401 (1792).

discretionary writ and not one of right.[26] In Connecticut, only the court rendering the judgment complained of could grant a writ of error, and that would transpire only upon a demonstration of good grounds. In Virginia, where cases were reviewed by the governor and the judges of the General Court (the legislature), the reviewing authority could reject the writ of error as it saw fit.[27] Therefore, even though precedent existed in colonial practice for infusing the common law writ of error with a measure of judicial discretion, the Court resorted to the more formalized English version. This coincided with the trend in most state courts. Although early colonial appellate practice was a variegated construct of homemade procedures,[28] the tendency in the late eighteenth century was toward a more complete acceptance of the English common law model. This was attributable in large part to the inherent distrust of courts of equity, especially in New England. At the time of the Revolution, the writ of error was almost universally regarded in those jurisdictions which employed it as a writ of right. In the early nineteenth century, some states proceeded to guarantee it by constitutional provision. Even if proceedings in error were not provided for by statute, as part of the received common law, actions at law were reviewable as of right by writ of error.[29]

The mandatory nature of the writ of error had its roots firmly entrenched in English jurisprudence. Under the colonial system, the monarch reserved the right to entertain appeals from colonial courts of last resort, and, notwithstanding any monetary limitation imposed by colonial legislatures, the crown regarded the writ of error as an inherent right.[30] As Justice Story characterized it, the writ of error "was deemed rather a protection than a grievance"[31] for three apparent reasons:

> (1) That, otherwise, the law appointed or permitted to such inferior dominion might be considerably changed without the assent of the superior dominion; (2) Judgments might be given to the disadvantage or lessening of the superiority, or to make the superiority of the king only, and not of the crown of England; and, (3) That the practice has been accordingly.[32]

26. R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 89 (1941).

27. *Id.*

28. R. POUND, *supra* note 26, at 72-105; Frank, *Historical Bases of the Federal Judicial System*, 13 L. & CONTEMP. PROB. 3, 5 (1948).

29. R. POUND, *supra* note 26, at 116.

30. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 175 (4th ed. 1873) (citation omitted).

31. *Id.* § 176.

32. *Id.* § 175 (citations omitted).

Yet, as the practice developed in the United States, the compulsory nature of proceedings in error stemmed more from the rigidities which cut across all common law forms of action than from protective notions derived from the common law. Throughout the nineteenth century, appeal by way of error was an action wholly separate from the proceedings in the trial court. Derived from the ancient action for false judgment, whereby the trial judge who rendered the allegedly erroneous judgment was made the subject of a semi-criminal action, the writ of error initiated a completely new proceeding in the higher court.[33] The parties prepared a new set of pleadings, and their positions often varied from those taken in the lower court.[34] Proceedings in error involved a complicated series of procedural steps,[35] yet the formalities of common law pleading cut both ways. Although the plaintiff in error might be frustrated by nonsuit at several stages in the action for the barest irregularity, once he had complied with all procedural requirements the appellate tribunal had no choice but to hear the case.[36]

While the Supreme Court adopted the notion that a writ of error would issue to a state court as a matter of right in a proper case, in practice, the writ was not allowed simply as a matter of course.[37] Section 25 of the 1789 Act required that the chief judge or judge or chancellor below sign the writ of error coming from the Supreme Court, and the Court interpreted this to require that an appeal be applied for and allowed by the lower court.[38] A party whose application for a writ of error had been denied by the state court could then apply to the justice who sat in the federal judicial circuit where the state court was situated. That justice might grant or deny the application or refer it to the entire Court for consideration.[39] In *Twitchell v. Commonwealth of*

33. Sunderland, *supra* note 21, at 651.

34. R. POUND, *supra* note 26, at 47.

35. *Id.* at 47-48; Thompson, *supra* note 24, at 425 n.525.

36. This is illustrated by an 1884 decision of the Supreme Court of Tennessee: "A writ of error is in the nature of a new suit, and may be obtained as of right by any person entitled to it, just exactly as he may sue out a summons in an ordinary action upon compliance with the prescribed requirements. . . . [T]he writ is a matter of right . . . when the party shows himself entitled to it, whether the applicant can obtain any relief or not." Ridgely v. Bennett, 81 Tenn. 206, 208, 210 (1884) (citations omitted). For similar statements, see McCreary v. Rogers, 35 Ark. 298 (1880); Hall v. Thode, 75 Ill. 173 (1874); Ricketson v. Compton, 23 Cal. 636 (1863); Thompson v. M'Kin, 6 H. & J. 249 (Md. 1825); Skipwith v. Hill, 2 Mass. 35 (1806).

37. R. ROBERTSON & F. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §§ 377-378 (2d ed., R. Wolfson & P. Kurland ed. 1951) [hereinafter cited as ROBERTSON & KIRKHAM].

38. Havnor v. New York, 170 U.S. 408, 410 (1898).

39. ROBERTSON & KIRKHAM, *supra* note 37, § 378.

Pennsylvania,[40] Chief Justice Chase spoke of the screening function performed by this procedure:

> [W]rits of error to State courts have never been allowed, as of right. It has always been the practice to submit the record of the State courts to a judge of this court, whose duty has been to ascertain upon examination whether any question, cognizable here upon appeal, was made and decided in the proper court of the State, and whether the case upon the face of the record will justify the allowance of the writ.
>
> In general, the allowance will be made where the decision appears to have involved a question within our appellate jurisdiction; but refusal to allow the writ is the proper course when no such question appears to have been made or decided; and also where, although a claim of right under the Constitution or laws of the United States may have been made, it is nevertheless clear that the application for the writ is made under manifest misapprehension as to the jurisdiction of this court.[41]

In a handful of cases, the Court actually heard oral argument and wrote opinions on whether the application for the writ should be allowed.[42] A practice soon developed whereby the Court would reject the application if allowance of the writ would only result in affirmation of the state court's decision.[43]

In addition to the foregoing shift in procedures, the Supreme Court amended its rules in 1876 to provide that when the defendant in error united a motion to affirm with a motion to dismiss the writ of error for want of jurisdiction, the Court would generally grant the motion to affirm when the record manifestly demonstrated that the state court's decision had been correct.[44] It should be noted, however, that this and the previously outlined procedures involved an approach quite different from the certiorari-like treatment that many commentators contend is accorded appeals today.[45] With these early screening techniques, the Court was determining whether the plaintiff in error had made out a prima facie case under the jurisdictional statute. Most of these cases presented no federal question whatsoever; no federal statute had been invalidated and no state law had been challenged on federal

40. 74 U.S. (7 Wall.) 321 (1868).

41. *Id.* at 324-25. *Accord*, Butler v. Gage, 138 U.S. 52, 55 (1891); Bartemeyer v. Iowa, 81 U.S. (14 Wall.) 26, 27 (1871); Hartford Fire Ins. Co. v. Van Duzer, 76 U.S. (9 Wall.) 784 (1869); Gleason v. Florida, 76 U.S. (9 Wall.) 779, 783 (1869).

42. *In re* Buchanan, 158 U.S. 31 (1895); *In re* Kemmler, 136 U.S. 436 (1890); Spies v. Illinois, 123 U.S. 131 (1887).

43. ROBERTSON & KIRKHAM, *supra* note 37, § 378.

44. Amendment to Sup. Ct. R. 6, 91 U.S. vii (1876).

45. *See* notes 88-92 and accompanying text *infra*.

grounds. The process of determining whether "a question cognizable here was made and decided in the State court"[46] is quite distinct from deciding whether a federal question properly raised below is substantial enough to warrant Supreme Court resolution.

B. Birth of the Modern Statutory Regime

With the exception of certain variations not central to this discussion,[47] state court decisions were reviewed under section 25 and its successor provisions without change for 125 years. In 1914, however, Congress initiated a series of enactments which brought about a fundamental restructuring of the Supreme Court's appellate jurisdiction over state and federal cases. Whereas review in the nineteenth century had proceeded almost exclusively by writ of error, these early twentieth century reforms vested the Court with a greater degree of discretion in handling its docket. By dividing the cases into two distinct categories of appellate jurisdiction—mandatory appeal and discretionary certiorari—Congress began to differentiate among various types of cases on the basis of their national importance. In the process, the category of cases triggering obligatory review was steadily narrov ed.

In 1911, the New York Court of Appeals held in *Ives v. South Buffalo Railway Co.*[48] that the New York workmen's compensation law constituted a deprivation of property without due process of law in violation of the Fourteenth Amendment. Because the state statute had been invalidated on federal grounds, the case was not cognizable under section 237 of the Judicial Code (the successor provision to section 25). Sensitive to the outrage engendered by the merits of the New York decision,[49] and to the fact that the people of New York were bound by

46. Butler v. Gage, 138 U.S. 52, 55 (1891).

47. In 1867, the last sentence of section 25 was deleted. Act of Feb. 5, 1867, § 28, 14 Stat. 385, 386. That Congress did not intend thereby to enlarge the scope of Supreme Court review was settled in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). The 1867 statute was carried over into Rev. Stat. § 709 (1875) without significant change. Section 709 was amended and incorporated into section 237 of the Judicial Code in 1911. Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1156.

Two significant developments in the late nineteenth century should be noted. In 1875, Congress gave the circuit courts federal question jurisdiction. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 471. In 1891, the Evarts Act established the federal circuit courts of appeals. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826. Under the Evarts Act, certiorari made its first appearance in federal practice. Although writs of error still issued to the courts of appeals, the Supreme Court was given certiorari authority over cases based upon diversity, revenue and patent laws, federal criminal statutes and admiralty law. HART & WECHSLER, *supra* note 15, at 40-41.

48. 201 N.Y. 271, 94 N.E. 431 (1911).

49. *See* SENATE COMM. ON THE JUDICIARY, ENLARGEMENT OF THE APPELLATE JURIS-

an interpretation of the Fourteenth Amendment "more drastic and restrictive" than that established by any previous Supreme Court opinion,[50] Congress enlarged the Court's appellate jurisdiction for the first and only time since 1789.[51] The Act of December 23, 1914, gave the Court certiorari jurisdiction over cases in which a federal statute, treaty, authority or right had been sustained in a state court, or in which a state statute had failed to withstand a federal challenge in a state court proceeding.[52]

Although certiorari had been employed in the Evarts Act[53] in establishing the federal circuit courts of appeals, the 1914 Act marked the first appearance of this discretionary mode of review in the Court's appellate jurisdiction over state cases. The legislative history of the statute demonstrates that the decision to use certiorari rather than obligatory review was based upon a consideration of the relative importance of cases such as *Ives*. It also indirectly indicates how significant Congress regarded the cases which remained within the mandatory classification:

> The committee considers that this [use of certiorari] will secure a review in all cases which have any public importance whatever and at the same time will protect the calendar of the Supreme Court of the United States from being overburdened with a multitude of cases in which appeals are taken for the purposes of delay.[54]

A second major congressional alteration of the Court's appellate jurisdiction over the states occurred in 1916. After the *Employers' Liability Cases*,[55] the coverage of the Federal Employers' Liability Act turned on whether the injured employee had been engaged in interstate or intrastate commerce. The difficulty of making this distinction stimulated a spate of litigation in state and lower federal courts. Because these cases involved complicated factual issues, which were rarely of any general importance, their review by the Supreme Court placed a substantial and unnecessary burden on that tribunal's obligatory juris-

DICTION OF THE SUPREME COURT OF THE UNITED STATES, S. REP. NO. 161, 63d Cong., 2d Sess. 2 (1914); HOUSE COMM. ON THE JUDICIARY, AMENDING AN ACT ENTITLED "AN ACT TO CODIFY, REVISE AND AMEND THE LAWS RELATING TO THE JUDICIARY," H.R. REP. NO. 1222, 63d Cong., 3d Sess. 2 (1914).

50. S. REP. NO. 161, *supra* note 49, at 2.
51. FRANKFURTER & LANDIS, *supra* note 7, at 198.
52. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.
53. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.
54. S. REP. NO. 161, *supra* note 49, at 2.
55. 207 U.S. 463 (1908).

diction.[56] Seizing upon the *Employers' Liability Cases* as a predicate,[57] Congress effected a significant curtailment of the Court's obligatory jurisdiction. Under the Act of September 6, 1916, writs of error under section 237 were available in only two situations: (i) when a federal authority or constitutional, statutory or treaty provision was stricken down in a state court; and (ii) when a state law or authority was upheld against a federal attack.[58] All other cases fell within the certiorari category. This was a significant departure from prior practice, for in all cases involving a title, right, privilege or exemption specially set up under federal law, the Supreme Court now had certiorari jurisdiction—regardless of how the state court had ruled.

Since the 1916 Act was intended primarily to cure the problem posed by the Employers' Liability litigation, Congress may not have completely considered the broader implications of the measure. This becomes apparent when one realizes that this legislation, which fundamentally altered a jurisdictional framework that had prevailed since 1789, passed through both houses without debate.[59] Nevertheless, the Senate report accompanying the bill shows that the basic distinctions drawn by the statute were grounded upon the national significance of certain kinds of cases:

> This section [addressed to state appeals] leaves unchanged the absolute right to sue out writs of error in the first two classes of cases provided for by Section 237, and it permits in all other cases from State courts which may now be reviewed by the Supreme Court to be brought up by certiorari only. A great number of cases included within the terms of the third class but not of general importance are being brought to the Supreme Court. This is especially true of suits based upon the Employers' Liability Act. Many of these cases ought not to be reviewed; the delays are unfortunate, and the time that should be devoted to important subjects is much trenched upon.[60]

The 1916 Act temporarily diminished the stream of cases coming to the Supreme Court by writ of error, but the period after the First

56. This additional burden was reflected in the number of cases on the Court's docket, which grew from 509 in 1910 to 647 in 1916. FRANKFURTER & LANDIS, *supra* note 7, at 205-06.

57. *See* SENATE COMM. ON THE JUDICIARY, RELIEF OF THE SUPREME COURT, S. REP. NO. 775, 64th Cong., 1st Sess. 2 (1916); HOUSE COMM. ON THE JUDICIARY, AMENDMENT OF JUDICIAL CODE IN RELATION TO UNITED STATES SUPREME COURT, H.R. REP. NO. 794, 64th Cong., 1st Sess. 2 (1916).

58. Act of Sept. 6, 1916, ch. 448, 39 Stat. 726.

59. FRANKFURTER & LANDIS, *supra* note 7, at 213.

60. S. REP. NO. 775, *supra* note 57, at 2.

World War witnessed a dramatic rise in the Court's caseload.[61] The extensive cancellation of government war contracts and the new prohibition laws contributed prolifically to the crush of litigation, especially in federal courts. By the beginning of the October, 1925, Term, the appellate backlog in the Supreme Court had reached crisis proportions. Cases on writ of error accounted for better than eighty per cent of the Court's calendar,[62] and delays of eighteen to twenty-four months between docketing and oral argument were not uncommon.[63]

Chief Justice Taft had campaigned vigorously for comprehensive judicial reform before coming to the Court,[64] and upon his appointment in 1921, he called upon a committee of the justices to assist in drafting remedial legislation.[65] Under the guidance of Justice Van Devanter, the committee focused on two particular facets of writ of error practice: (i) the time absorbed by cases which, after oral argument, turned solely on questions of jurisdiction and (ii) the ease with which the writ of error could become an instrument of delay.[66] The screening mechanisms which evolved during the nineteenth century[67] had deteriorated. Most state judges approved applications for writs of error with little more than perfunctory examination of the case; a great number of meritless appeals found their way to the docket, and their frivolity was not revealed until oral argument.[68]

The successful operation of certiorari under the Evarts Act had a

61. In the 1916 Term, the Court decided 157 cases on error to state courts; by 1920, the number had dwindled to 75. FRANKFURTER & LANDIS, *supra* note 7, at 255. In 1916, 1169 cases were docketed and 637 were disposed of during the session. In 1925, the figures were 1282 and 844 respectively. *Id.* at 256 n.5.

62. Burton, *"Judging is Also Administration": An Appreciation of Constructive Leadership*, 33 A.B.A. J. 1099, 1102 (1947).

63. Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742, 748 n.23 (1964).

64. Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3 (1916). In this address, the Chief Justice indicated what he felt the Court's obligatory jurisdiction should be confined to: "[T]he only jurisdiction that [the Supreme Court] should be obliged to exercise, and which a litigant may, as a matter of course, bring to the court, should be questions of constitutional construction. By giving an opportunity to litigants in all other cases to apply for a writ of certiorari to bring any case from a lower court to the Supreme Court, so that it may exercise absolute and arbitrary discretion with respect to all business but constitutional business, will enable the court so to restrict its docket that it can do all its work, and do it well." *Id.* at 18.

65. The committee originally consisted of Justices McReynolds and Day, and Chief Justice White as member ex officio. Justices Van Devanter and Sutherland were added by Chief Justice Taft. Burton, *supra* note 62, at 1102 n.19.

66. *Procedure in Federal Courts: Hearings on S. 2060 and S. 2061 Before a Subcomm. of the Senate Comm. on the Judiciary*, 68th Cong., 1st Sess. 25-26, 34 (1924) (statement of Justice Van Devanter) [hereinafter cited as *Judges' Bill Hearings*].

67. *See* notes 38-43 and accompanying text *supra*.

68. *Judges' Bill Hearings, supra* note 66, at 26.

profound effect upon the committee of justices; they approached their task free of the conservative view that the Supreme Court should be the only source of finality. As a result, the Act of February 13, 1925,[69] also known as the Judges' Bill, liberally employed certiorari as a substitute for great portions of the Court's obligatory jurisdiction. Of the fourteen classes of federal court cases which had previously qualified for writ of error, only five remained.[70] As the report prepared by the justices stressed, the central theme of the Judges' Bill was the conservation of the Supreme Court as the arbiter of issues of national importance:

> The primary object of the bill is to relieve the congestion resulting from the present overcrowded docket of the Supreme Court, and thus enable a more expeditious disposition of the cases which that court is called upon to decide, by restricting the obligatory appellate jurisdiction of the court to cases and proceedings of a character and importance which render a review of right in the Supreme Court desirable from the public point of view.[71]

Although the Judges' Bill concentrated principally on shutting the doors of the Court to federal cases of minor importance, the legislation also touched upon writs of error issued to state courts. The 1925 Act carred over the framework established in 1916 with one further contraction.[72] Under the 1916 law, cases in which the "validity" of a federal authority had been challenged were deemed to merit review by writ of error; while situations involving an "exercise" of the same authority were reviewable only by certiorari. In the interest of clarity, the Judges' Bill placed both cases under the certiorari heading.[73] In addition, an amendment was added to minimize the significance of the hazy distinction between certiorari and writ of error. Since 1916, attorneys who were uncertain as to which route to pursue frequently employed certiorari and writ of error simultaneously. The 1925 Act permitted review by either method in cases of overlapping jurisdiction.[74]

69. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936.

70. Obligatory jurisdiction now only extended to: (i) equity actions brought by the United States to enforce the Interstate Commerce Act and the antitrust laws; (ii) criminal cases brought by the United States where the government loses and where the defendant has not been acquitted or exposed to jeopardy; (iii) interlocutory injunctions against enforcement of a state statute or against the exercise of a state authority; (iv) interlocutory and final decrees of injunctions and suspensions of orders of the Interstate Commerce Commission; (v) cases in the courts of appeals involving invalidation of a state statute. *Id.*

71. *Judges' Bill Hearings, supra* note 66, at 6-7. *See also* HOUSE COMM. ON THE JUDICIARY, JURISDICTION OF THE CIRCUIT COURTS OF APPEALS AND THE SUPREME COURT, H.R. REP. NO. 1075, 68th Cong., 2d Sess. 3 (1925).

72. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, 937.

73. Taft, *The Jurisdiction of the Supreme Court under the Act of February 13, 1925*, 35 YALE L.J. 1, 8-9 (1925).

74. FRANKFURTER & LANDIS, *supra* note 7, at 276.

The Judges' Bill marked the culmination of efforts, begun in 1914, to identify a class of cases which, in light of the Court's burgeoning caseload, were important enough to call for mandatory review. Some commentators have suggested that the certiorari/appeal distinction is "no more than an historical accident, stemming from the fact that the appeal provision was a feature of the original jurisdictional scheme, while certiorari was introduced relatively late in the Court's history."[75] The Senate debates[76] on the Judges' Bill do not support this argument. Indeed, they indicate that Congress was not only aware of the residuum of cases left in the obligatory category, but made that classification based upon what were conceived to be important considerations of federalism. This conclusion is borne out by the debate over cases coming from circuit courts of appeals in which a state statute had been invalidated. The original draft of the Judges' Bill gave the Supreme Court no obligatory jurisdiction over the courts of appeals. When the measure reached the Senate floor, Senator Copeland of New York suggested that this might create a disparity in view of the two classes of mandatory jurisdiction over state decisions. Quoting from a report prepared by an advisor, he observed that " 'the bill gives the circuit court of appeals appellate jurisdiction and makes it the court of last resort in an important class of cases in which a State supreme court is in effect only an intermediate tribunal.' "[77] Senator Copeland then read into the record certain correspondence he had conducted with Chief Justice Taft. Because Senator Copeland believed the Judges' Bill raised the dignity of the courts of appeals over that of the state courts, he proffered two solutions: (i) permit a writ of error to issue to a court of appeals when a state statute has been overturned; or (ii) make all Supreme Court review discretionary. Rejecting both suggestions, the Chief Justice sought to justify the distinction contained in the original bill:

> We would have been glad to make the same rule requiring certiori to permit review of State decisions and would be glad now to have the rule uniform as to the two courts, but we felt that there would be objection if one interested in the validity of a Federal treaty or statute set aside by a State court could not of right come to our court or where against a claim of conflict with the Federal Constitution the State court had affirmed the validity of a State

75. Note, *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, 514-15 (1976) [hereinafter cited as Note, *Hicks v. Miranda*].

76. In contrast, in the House of Representatives, "[a] few minutes of desultory discussion led to its passage in the first instance." FRANKFURTER & LANDIS, *supra* note 7, at 279.

77. 66 CONG. REC. 2921 (1925).

> statute. On the other hand, with respect to a decision of a circuit court of appeals on a similar question such a court would be more likely to preserve the Federal view of the issue than the State court, at least to an extent to justify making a review of its decision by our court conditioned upon our approval.[78]

Notwithstanding Chief Justice Taft's remarks, the Senate adopted the first of Senator Copeland's solutions. According to Senator Walsh, the Senate thereby

> intended to put the two on a perfect parity, allowing a writ of error from the circuit court of appeals under conditions exactly the same except reversed, and allowing a writ of certiorari in the one case as in the other case, so that the two would be entirely harmonious.[79]

The foregoing discussion illustrates that the final version of the Judges' Bill was more than a one-dimensional response to the problems of the Court's caseload. Indeed, had that been the only consideration, Congress might very well have pursued Senator Copeland's suggestion and made all review discretionary through certiorari. Chief Justice Taft indicated that he might have advanced such a solution had he not anticipated serious political resistance.[80] The same could be said of the Senate's action, but the statute that emerged embodied more than mere political expediency. The final legislation represented an effort to relieve the heavy burden on the Court, but in a way that remained attuned to those important issues of federalism which arise when a state court invalidates a federal statute or sustains its own law, or when a federal court strikes down a state law.[81]

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78. *Id.* at 2922.

79. *Id.* at 2923.

80. At the outset, the Chief Justice was faced with substantial opposition from the Senate Judiciary Committee, the members of which had reservations about the degree of judicial participation in the drafting process. Chief Justice Taft's remarks to Senator Copeland may indicate that although he favored dispensing with obligatory review altogether, he did not press the point for fear that the reforms which had been included in the bill would not pass through Congress. For a background discussion of the political history of the Judges' Bill, see A. MASON, WILLIAM HOWARD TAFT, CHIEF JUSTICE 109-13 (1964).

81. The observations of Senator George evince the tone of the 1925 law: "Under the general scheme contemplated in this act . . . and as it has manifested itself from the time of the enactment of the judiciary act in 1789 to the present, the citizen asserting a right under a State law has preserved to him the right to maintain the dignity of his own constitution. Similarly, the citizen asserting that the Federal Constitution is being undermined has had the right preserved to him to maintain that Constitution. In other words, the whole system of review has constantly in mind this principle—that the State could not destroy the Federal Constitution and the Federal courts could not destroy the State laws. There is a balance there, and there is not an unrestricted right of appeal, and there never has been an unrestricted right of appeal as a matter of right.

"Perhaps it would have been wisest and best in the beginning to have left all decisions,

A few technical changes following the enactment of the Judges' Bill completed the statutory evolution. In 1928, the term "appeal" was substituted for "writ of error" without substantively altering the statute.[82] In that same year, the Court promulgated Rule 12 of the Rules of the Supreme Court, which was designed to differentiate between frivolous and meritorious appeal.[83] By requiring an appellant to file a jurisdictional statement, Rule 12 enabled the Court to determine, on the basis of the papers, whether an appeal raised an issue worthy of its consideration. In 1936, the Court amended Rule 12 to reflect its already well established practice of hearing only those appeals presenting substantial federal questions.[84] This amendment, however, provided no definition of the word "substantial." The foregoing developments, together with the Judges' Bill, form the bases of the Supreme Court's appellate practice today.[85]

II. Problems In Current Practice

A. Has Obligatory Appellate Jurisdiction Vanished?

In theory, certiorari and appeal encompass different factors.

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either of State courts or of lower Federal courts to review on writs of certiorari. That was the logical process. But there was the apprehension that the State courts might not be duly regardful of rights under the Federal Constitution, and therefore when there was a decision in a State court sustaining a law which was said to be violative of the Federal Constitution, the Supreme Court of the United States had the right to review that decision.

"In a broad way, we naturally think that a litigant should have the unrestricted right of appeal, whether the decision be for or against the validity of the law, but when we think of it from a practical point of view, since there must be some restriction of the right of appeal because it is always possible to bring a Federal question into any sort of litigation—since there must be some restrictions growing out of the practical necessities, it seems that these restrictions are justified." 66 CONG. REC. 2924 (1925).

82. Act of Jan. 31, 1928, ch. 14, 45 Stat. 54, *as amended by* Act of Apr. 26, 1928, ch. 440, 45 Stat. 466.

83. Sup. Ct. R. 12, 275 U.S. 603, 603-04 (1928) (amended by Sup. Ct. R. 15, 398 U.S. 1024, 1024-27 (1970)).

84. 297 U.S. 733 (1936). This practice was derived from cases such as Milheim v. Moffat Tunnel Improvement Dist., 262 U.S. 710, 717 (1923); Zucht v. King, 260 U.S. 174, 176-77 (1922); Equitable Life Assurance Soc'y v. Brown, 187 U.S. 308 (1902). *See generally* Ulman & Spears, *"Dismissed for Want of a Substantial Federal Question,"* 20 B.U. L. REV. 501, 514-23 (1940); Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 29-30 (1954); Note, *The Insubstantial Federal Question*, 62 HARV. L. REV. 488, 489-91 (1949).

85. In 1926, section 237 of the Judicial Code was carried into 28 U.S.C. § 344 without change. Act of June 26, 1926, ch. 9, § 344, 44 Stat., pt. I, 1, 906. By the Act of June 25, 1948, Title 28 of the U.S.C. was revised to produce the current 28 U.S.C. § 1257(1)-(3) (1976). Act of June 25, 1948, ch. 646, 62 Stat. 869. A 1970 amendment provided that the term "highest court of a State" would include the District of Columbia Court of Appeals. *See* District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 173, 84 Stat. 590.

While certiorari review in practice is limited to cases presenting conflicts among lower courts or issues of general importance, review by appeal tends to have a broader sweep, taking in cases as long as they do not involve settled issues, are not frivolous or are of consequence to others besides the individual parties.[86] Perhaps, again only in theory, the two types of review pose quite distinct problems for the litigant. With certiorari, a petitioner must not only convince the Court that the case ought to be heard on the merits, but if that requirement is satisfied, he must show that the case warrants plenary consideration. An appellant does not face the first obstacle, for once the statutory criteria are met the decision whether or not to grant review on the merits is foreclosed by congressional direction. The appellant's task is thus reduced to that of persuading the Court to give his appeal plenary consideration.[87]

Despite these theoretical dissimilarities, the enormous growth in the Court's workload and its evolving tactics of "self-defense" have somewhat blurred the certiorari/appeal distinction.[88] Chief Justice Marshall once declared that the Court has "no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given."[89] Recent experience, however, casts considerable doubt on the present viability of the Chief Justice's pronouncement. Today, it is frequently argued that eliminating the appeal/certiorari distinction would conform theory to practice because the Court has assimilated essentially all of the certiorari criteria into the standards for the disposition of appeals. As Francis R. Kirkham has stated:

> With few exceptions, the Court—driven by sheer necessity to ration justice—has taken upon itself to rewrite the statute [dealing with obligatory review] and to treat most appeals as the equivalent of petitions for certiorari, subject only to discretionary review. With few exceptions, these appeals, without hearing, are

86. *Symposium, Should the Appellate Jurisdiction of the United States Supreme Court Be Changed? An Evaluation of the Freund Report Proposals*, 27 RUTGERS L. REV. 878, 890 (1974) [hereinafter cited as *Rutgers Symposium*]; Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U. L. REV. 373, 394-95 (1972) [hereinafter cited as Note, *Summary Disposition*]. *Compare* Sup. Ct. R. 19 *with* Sup. Ct. R. 15.

87. *Rutgers Symposium, supra* note 86, at 890; Note, *Summary Disposition, supra* note 86, at 395.

88. Today, the jurisdictional statement and the petition for certiorari perform largely the same screening function by forcing the appellant or petitioner to make out a compelling case for review in a few pages. The 1967 amendments to the Supreme Court Rules also placed appeal and certiorari on the same time schedule. Boskey & Gressman, *The 1967 Changes in the Supreme Court's Rules*, 42 F.R.D. 139, 142 (1967).

89. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

> affirmed or are dismissed with only the routine phrase "for want of a substantial Federal question."[90]

Concurring in this analysis, Dean Griswold also points out that virtually every case heard in the Supreme Court arrives there solely by the grace of that tribunal.[91] Both appellate and original jurisdiction have become subject to discretionary control; in the latter context, the Court has declined to hear cases which fall squarely within its original jurisdiction.[92]

One of the strongest arguments supporting the view that appeals have become discretionary is based on the manner in which the Court has used the concept of substantiality. For quite some time, the Court has insisted that cognizable appeals raise substantial federal questions, but it has never defined the term "substantial." The vague parameters of substantiality have led some commentators to conclude that the concept is wholly subjective and therefore discretionary.[93] Yet despite this lack of definition, substantiality involves no greater mix of subjective and objective factors than that involved in any case where a judge must apply an abstract rule of law to concrete facts. It certainly does not afford the Court license to resort to the full range of certiorari considerations. Justice Frankfurter's characterization of substantiality, suggesting the presence of a limited form of discretion, is particularly instructive:

> Plainly, the criterion of substantiality is neither rigid nor narrow. The play of discretion is inevitable, and wherever discretion is operative in the work of the Court the pressure of the docket is bound to sway its exercise. To the extent that there are reasonable differences of opinion as to the solidity of a question presented for decision or the conclusiveness of prior rulings, the

90. *National Court of Appeals Act: Hearings on S. 2762 and S. 3423 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 117, 120 (1976) (statement of Francis R. Kirkham) [hereinafter cited as *Judicial Improvement Hearings*]. For similar positions, see Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L. J. 883, 887-88 (1974); Frank, *The United States Supreme Court: 1950-1951*, 19 U. CHI. L. REV. 165, 231 (1952); Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 44-45 (1949); Poe, Schmidt & Whalen, *A National Court of Appeals: A Dissenting View*, 67 NW. L. REV. 842, 842 (1973); Strong, *The Time Has Come to Talk of Major Curtailment in the Supreme Court's Jurisdiction*, 48 N.C. L. REV. 1, 16-17 (1969).

91. *Judicial Improvement Hearings, supra* note 90, at 67 (statement of Erwin H. Griswold). *See also* Griswold, *supra* note 4, at 345.

92. *See* United States v. Nevada, 412 U.S. 534 (1973); Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971).

93. *Judicial Improvement Hearings, supra* note 90, at 67 (statement of Erwin H. Griswold); Griswold, *supra* note 4, at 345; Note, *The Insubstantial Federal Question*, 62 HARV. L. REV. 488, 492 (1949).

> administration of Rule 12 [now Rule 15] operates to subject the obligatory jurisdiction of the Court to discretionary considerations not unlike those governing certiorari.[94]

Another aspect of appellate practice related to substantiality and bearing upon the issue of discretion is illustrated by *Rescue Army v. Municipal Court*.[95] The Court in *Rescue Army* admittedly had jurisdiction over the appeal, but it nevertheless declined to decide the case. Referring to the principles outlined by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*,[96] Justice Rutledge dismissed the case without prejudice because he felt the opinion of the state court had left unclear its construction of the challenged state statute.[97] This deviation from obligatory review may have been justified on the ground that appellant in *Rescue Army* was not running the risk of having coercive governmental action taken directly against him. In this context, postponement for clarification of the record and granting appellant the option to return seem reasonable.

In two decisions since *Rescue Army*, however, the Court may have extended the doctrine of that case beyond its intended scope. In *Poe v. Ullman*,[98] the Court invoked *Rescue Army* to avoid rendering a decision even though there was no doubt what construction the lower court had given the Connecticut statute regulating the use of contraceptives. Justice Frankfurter relied heavily upon the fact that prosecutions under the law had been rare.[99] In *Naim v. Naim*,[100] the Court dismissed an

94. Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 12-14 (1930). After the Supreme Court promulgated Rule 12, Justice (then Professor) Frankfurter observed: "This [Rule 12 requirement of substantiality] serves formal notice of the discretionary ingredient even in review as of right. A claim of unsubstantiality inevitably invokes judgment, even in those cases where the question is whether its solidity has evaporated in the course of prior decisions." Frankfurter & Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 583-84 (1938).

95. 331 U.S. 549 (1947).

96. 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

97. 331 U.S. at 578-82. For a recent case adopting an approach similar to that taken in *Rescue Army*, see Southern & N. Overlying Carrier Chapters of the Cal. Dump Truck Owners Ass'n v. Public Util. Comm'n of Cal., 434 U.S. 9 (1977).

The doctrine of *Rescue Army* is generally related to justiciability concepts such as ripeness, mootness and the political question doctrine. *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1581-652 (9th ed. 1975). To the extent that the Court is employing these concepts in closing its doors, they are related indirectly to the matter of discretion in the disposition of appeals. However, since *Rescue Army* is more closely connected as a gloss on the jurisdictional statute itself, it was included in this study and the other ideas are regarded as peripheral.

98. 367 U.S. 497 (1961).

99. *Id.* at 502-09.

100. 350 U.S. 891 (1955).

appeal from a conviction under a Virginia miscegenation statute because of an "inadequate record," even though clearly substantial federal questions were raised and even though appellant faced immediate, coercive governmental action.[101] Fortunately, dispositions such as these have been rare.

A third major indicium of discretion in the disposition of appeals is embodied in the "rule of four." In order to obtain plenary consideration, an appellant must secure the affirmative votes of at least four justices. The origins of the rule of four are unclear, but it was first publicly articulated by Justice Van Devanter in the hearings on the Judges' Bill.[102] Initially employed by the Court in processing petitions for certiorari, the rule now also applies to appeals.[103] The rule of four infuses the appellate process with a degree of discretion: to the extent that six justices can vote against noting probable jurisdiction, the Court has introduced a limited, discretionary avoidance of full consideration of the issues presented.[104] If briefing and oral argument would have made any difference in the decision to decline review, then a certain amount of arbitrariness has crept into the procedure.

The opinions and public statements of the justices vary and are inconclusive as to the exact measure of discretion present in the disposition of appeals. In a frequently cited speech to the American Law Institute in 1954, Chief Justice Warren asserted:

> It is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari. As regards appeals from state courts our jurisdiction is limited to those cases which present substantial federal questions. In the absence of what we consider substantiality in the light of prior decisions, the appeal will be dismissed without opportunity for oral argument.[105]

More recently, Justice Clark stated that while he served on the Court, "appeals from state court decisions received treatment similar to that

101. *Id.* The issues in *Poe* and *Naim* were indeed substantial, for the Court later declared the same statutes unconstitutional in Griswold v. Connecticut, 381 U.S. 479 (1965) and Loving v. Virginia, 388 U.S. 1 (1967), respectively.

102. *Hearings on H.R. 8206 Before the House Judiciary Committee*, 68th Cong., 2d Sess. (1925) (testimony of Justice Van Devanter). *See* Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 981 (1957).

103. Ohio *ex. rel.* Eaton v. Price, 360 U.S. 246, 247 (1959); R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 5.16 (5th ed. 1978) [hereinafter cited as STERN & GRESSMAN].

104. *See* Note, *Summary Disposition, supra* note 86, at 398.

105. Address by Chief Justice Warren, American Law Institute (May 19, 1954), *quoted in* Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 51 (1954).

accorded petitions for certiorari."[106] Generally concurring in this appraisal, Justice Brennan has observed that "behind our summary dispositions of appeals lie many of the same considerations that account for denials of certiorari."[107] In this regard, it is useful to note that recent cases have shown greater resort to certiorari-like factors in the noting of probable jurisdiction.[108] Perhaps indicative of the position of other members of the Court, Justice Rehnquist has characterized the Court's task as not that of uncovering the meritorious request for review, but of choosing a limited number of cases from a pool of several hundred, "all of which have arguably strong claims."[109] Other members of the Court have recognized more force in the certiorari/appeal distinction, however. Justice Douglas has contended that the large number of appeals summarily decided "does not mean that the Court has converted an obligatory jurisdiction into a discretionary one. It means merely that the fields involved in these appeals do not need the delineation that was once necessary."[110]

The preceding discussion suggests that a degree of discretion has crept into the disposition of appeals; however, the extent of discretion is hard to determine. Theoretically, the Court should be exercising discretion only in deciding whether to permit counsel to submit briefs and engage in oral argument. Yet it is probably safe to assume that every docketing decision, regardless of the type of case, is somewhat colored by the reality that practical limitations will compel rejection of most requests for review. It is difficult to determine whether the Court has made a practical equation between certiorari and appeal. Although often cited as evidence of such an equation, Chief Justice Warren's 1954 American Law Institute address merely states that while appeal may lie as of right, it does not necessarily include the right to oral argument or to a full opinion. This is more than a mere subtlety, considering that dispositions of appeals, unlike denials of certiorari, are adjudications on the merits.[111]

It seems fair to say that despite the concept of substantiality, the doctrine of *Rescue Army* and the rule of four, the Court approaches appeals and petitions for certiorari differently. The reticence of the

106. Hogge v. Johnson, 526 F.2d 833, 836 (4th Cir. 1975), *cert. denied*, 428 U.S. 913 (1976) (Clark, J., concurring; sitting by designation).

107. Sidle v. Majors, 429 U.S. 945, 948 (1976) (Brennan, J., dissenting).

108. *See, e.g.*, Ludwig v. Massachusetts, 427 U.S. 618, 623-24 (1976); Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974).

109. Rehnquist, *supra* note 3, at 789.

110. Douglas, *supra* note 5, at 411.

111. *See* notes 119-25 and accompanying text *infra*.

Court to make a straightforward statement of what it is actually doing is at best ambiguous. It could be inferred that the Court is enforcing the appellate statute according to its letter, but this is undoubtedly naive in light of the very compelling cases which have failed to negotiate the gauntlet of substantiality.[112] Something more than literal application of the statute is obviously involved. It is also arguable that the justices have covertly subsumed the review of all cases under one discretionary heading and have skirted the matter in their opinions to avoid the appearance of deliberately subverting the legislative command. This serious allegation has been disputed by at least one commentator.[113] For the litigant, his assessment of how much discretion the Court will employ should probably be made in this manner: The appellant begins with a theoretically absolute right to review which the Court has made more inaccessible through an exercise of limited discretion. The petitioner however, knows that his papers will be treated with a maximum of discretion, although the basic guidelines contained in Rule 19 and interpretive cases prevent that disposition from becoming completely arbitrary.

B. The Precedential Value of a Summary Disposition

Apart from plenary consideration, appeals coming from lower courts meet with five possible fates: (i) dismissal for want of jurisdiction; (ii) remand; (iii) summary reversal; (iv) dismissal for want of a substantial federal question; or (v) summary affirmance. Dismissals for want of jurisdiction and remands are the least controversial, for they enable the Court to winnow out the appeals in which jurisdiction is lacking or in which other factors should have been considered below.[114] As with denials of certiorari, they have no effect on the merits of the case.[115] Although summary reversals are adjudications on the merits, they are infrequently used. The Court will not usually resort to this method unless it believes the lower court's opinion to be frivolous or in clear conflict with a decision directly on point.[116] In addition, the summary reversal imparts an element of unfairness, for the Supreme Court

112. *See* notes 126-27 and accompanying text *infra*.

113. *See, e.g.*, Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043 (1977). "It is simply inadmissible that the highest court of law should be lawless in relation to its own jurisdiction." *Id.* at 1061.

114. *Rutgers Symposium, supra* note 86, at 958.

115. Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 914 n.1 (1976) (Brennan, J., dissenting).

116. STERN & GRESSMAN, *supra* note 103, at § 5.19.

Rules provide no warning to the unwary appellee who neglects to file papers in opposition.[117] The fourth and fifth categories, however, have engendered a heated debate and have become prime focal points for those who would abolish obligatory jurisdiction.[118]

1. The rule in Hicks v. Miranda

In *Miller v. California (Miller II)*,[119] the Supreme Court dismissed for want of a substantial federal question an appeal from a state court challenging a state obscenity statute. A year later, a three-judge district court was presented with an attack on the same law and, failing to find any significance in the *Miller II* dismissal, declared the statute unconstitutional. In *Hicks v. Miranda*,[120] the Supreme Court reversed the three-judge panel and prescribed the governing rule:

> [T]he District Court was in error in holding that it could disregard the decision in *Miller II*. That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U.S.C. § 1257(2), and we 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. We were not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. The three-judge court was not free to disregard this pronouncement.[121]

As a result, dismissals for want of a substantial federal question are adjudications on the merits and, under the supremacy clause,[122] bind state and lower federal courts as completely as full opinions.

The principal effect of Justice White's majority opinion in *Hicks* was to resolve the debate among state and lower federal courts over the deference which should be accorded the summary disposition of cases reaching the Supreme Court under its obligatory jurisdiction. At the same time, however, Justice White endeavored to restrict the broad implications of the *Hicks* rule. In a footnote, he indicated that a summary

117. *Id.*; HART & WECHSLER, *supra* note 15, at 647.

118. *Judicial Improvement Hearings*, *supra* note 90, at 273-74 (statement of Paul A. Freund); *id.* at 93 (statement of Justice Goldberg); *Rutgers Symposium, supra* note 86, at 969; Note, *Hicks v. Miranda, supra* note 75, at 527.

119. 418 U.S. 915 (1974).

120. 422 U.S. 332 (1975).

121. *Id.* at 343-44.

122. U.S. CONST. art. VI, cl. 2.

disposition should control in a subsequent case only if the issues in both cases are "sufficiently the same."[123] A lower court must discern "what issues had been properly presented . . . and declared by this Court to be without substance."[124] Unfortunately, this qualification has gone largely unnoticed, and the major emphasis has been upon the strongly worded passage in the text of the opinion.[125]

2. Problems generated by Hicks v. Miranda

The rule of *Hicks* has spawned a wide spectrum of difficulties and has become the focus of critical comment by scholars, lower court judges and even members of the Court. One question, present before the decision in *Hicks* and perhaps made more critical by that ruling, is whether the summary disposition is a proper mode of decision. Nearly twenty years ago, Professor Hart, observing the increased frequency in dismissals for want of a substantial federal question, remarked,

> [I]t has long since become impossible to defend the thesis that all the appeals which the Court dismisses on this ground are without substance. And any pretense that jurisdictional statements are concerned only with jurisdiction vanished when the Court began to affirm and even reverse judgments on the basis of them.[126]

This statement appears no less accurate today. In *Doe v. Commonwealth's Attorney*,[127] the Court affirmed the decision of a three-judge panel rejecting the challenge to a Virginia sodomy law tendered by a group of homosexuals. Major constitutional issues were presented in the case, but the Court's disposition indicates that the question was so clear that briefing and oral argument were not necessary.

Summary dispositions of state appeals such as *Doe* carry an institutional ambiguity that the rule in *Hicks* only compounds. When the Supreme Court determines that a state appeal presents no substantial federal question, substantiality may assume one of two meanings: either (i) appellant has not demonstrated the existence of a nonfrivolous federal question in his case; or (ii) there is a cognizable federal question, but the Court agrees with its disposition below. A dismissal of cases of the first variety for want of jurisdiction would obviate confusion, but the Court has dismissed both types for want of a substantial

123. 422 U.S. at 345 n.14.

124. *Id.*

125. Note, *The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question by the Supreme Court after Hicks v. Miranda and Mandel v. Bradley*, 64 VA. L. REV. 117, 122 (1978) [hereinafter cited as Note, *Summary Affirmances*].

126. Hart, *The Supreme Court—1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 89 n.13 (1959).

127. 425 U.S. 901 (1976).

federal question.[128] This treatment of state appeals should be contrasted with that accorded appeals from the lower federal courts. If the Court believes the federal question to be insubstantial, in that it agrees with the decision below, it will summarily affirm, even though the same issue would have warranted a dismissal had it appeared in a case appealed from a state court. This anomaly has largely historical origins, but it is partially explicable on jurisdictional grounds. To avoid a dismissal, an appellant in a state court must clear two hurdles by showing: (i) that the federal question is substantial, and (ii) that it merits plenary consideration.[129] The federal appellant, however, need only overcome the second barrier, for the existence of a federal question is assumed. Therefore, with the summary affirmance, the Court may effectively screen clearly colorless federal appeals without having to determine whether the federal question was one meeting the requirements for invocation of the lower court's original federal question jurisdiction.[130]

Even if the Court were to abandon the illogical terminology employed in its disposition of state and federal appeals which do not call for plenary consideration, the precedential force conferred by *Hicks* still has the potential for creating uncertainty. When a lower court's opinion rests on several alternative grounds, it is no simple task to discern the exact basis for the Court's decision to dismiss or affirm. Examination of the jurisdictional statement often provides little guidance in view of the Supreme Court practice of construing the statement to include "every subsidiary question fairly comprised therein."[131] Additionally, in light of the functioning of the rule of four, no clear rationale can emerge when six justices can vote to dispose of the case summarily without agreeing on the grounds. Empathizing with state and federal judges who are faced with the prospect of unravelling the holding of a summary disposition, Justice Brennan has observed:

> When presented with the contention that our unexplained dispositions are conclusively binding, puzzled state and lower court judges are left to guess as to the meaning and scope of our unexplained dispositions. We ourselves have acknowledged that summary dispositions are "somewhat opaque," . . . and we cannot deny that they have sown confusion.[132]

128. Note, *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).

129. SUP. CT. R. 15(e).

130. STERN & GRESSMAN, *supra* note 103, at § 5.18; *Rutgers Symposium, supra* note 86, at 959.

131. Sup. Ct. R. 15(c).

132. Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 919 (1976) (Brennan, J., dissenting) (citation omitted).

Although the basis for a summary decision may be fairly ascertainable in some instances,[133] the binding effect prescribed by *Hicks* may foreclose any further dialogue on the particular matter among state and lower federal courts. Several federal courts have expressly foregone consideration of what they regarded as meritorious federal issues because similar claims had been raised in prior appeals to the Supreme Court, only to be dismissed for want of a substantial federal question.[134] Precluding debate among lower courts on important constitutional issues is a consequence that should follow only when the Supreme Court announces what is to become the law of the land in a fully considered opinion.[135]

A further difficulty engendered by *Hicks* and closely related to the problem of foreclosing dialogue is that of overgeneralization. Con-

133. The rule in *Hicks* has functioned fairly satisfactorily in cases applying summary dispositions wherein the jurisdictional statement raised a single, well-defined issue. In Amos v. Sims, 409 U.S. 942 (1972), the Court summarily affirmed a decision awarding attorney's fees in actions against a state or state officer acting in his official capacity. Inferring that *Sims* was based on a determination that such awards do not transgress the Eleventh Amendment, other courts have permitted similar awards. Bond v. Stanton, 528 F.2d 688 (7th Cir.), *vacated & remanded on other grounds*, 429 U.S. 973 (1976); Newman v. Alabama, 522 F.2d 71 (5th Cir. 1975); Gates v. Collier, 70 F.R.D. 341 (N.D. Miss. 1976).

Similarly, in Kimbell, Inc. v. Employment Sec. Comm'n, 429 U.S. 804 (1976), appellant argued that federal labor laws had preempted the field, prohibiting states from granting unemployment compensation to striking employees. The appeal was dismissed for want of a substantial federal question. Viewing as the predicate for the *Kimbell* dismissal the conclusion that federal labor policy did not preclude the payment of such compensation, other courts have sustained similar laws. New York Tel. Co. v. New York State Dep't of Labor, 566 F.2d 388 (2d Cir. 1977), *cert. granted*, 435 U.S. 941 (1978); Super Tire Eng'r Co. v. McCorkle, 550 F.2d 903 (3d Cir.), *cert. denied*, 434 U.S. 827 (1977). For other cases employing the *Hicks* rationale in similar fashion, see Government of Virgin Islands v. 19.623 Acres of Land, 536 F.2d 566 (3d Cir. 1976); Americans United for the Separation of Church and State v. Blanton, 433 F. Supp. 97 (M.D. Tenn.), *aff'd mem.*, 434 U.S. 803 (1977). For additional citations on the same point, see Note, *Summary Affirmances, supra* note 125, at 124-25.

134. In Sidle v. Majors, 536 F.2d 1156 (7th Cir.), *cert. denied*, 429 U.S. 945 (1976), the court refused to consider the constitutionality of a state guest-passenger statute. Although the court expressed the view that substantial constitutional issues were presented, it felt precluded from addressing them because of the prior summary dismissal of similar claims in Cannon v. Oviatt, 419 U.S. 810 (1974). For cases reaching similar results due to the preclusive effect of prior summary decisions, see Whitlow v. Hodges, 539 F.2d 582 (6th Cir.), *cert. denied*, 429 U.S. 1029 (1976); Hogge v. Johnson, 526 F.2d 833 (4th Cir. 1975), *cert. denied*, 428 U.S. 913 (1976); Archibald v. Whaland, 418 F. Supp. 991 (D.N.H. 1976), *rev'd on other grounds*, 555 F.2d 1061 (1st Cir. 1977).

135. In this regard, Justice Brennan has observed: "[I]t is a consequence that must bode ill for developing constitutional jurisprudence. If significant constitutional issues are to be decided summarily without any briefing or oral argument, and with only momentary and offhanded Conference discussion, and if these summary dispositions nevertheless bind the courts of the 50 States and all lower federal courts, respect for our constitutional decisionmaking must inevitably be impaired." Sidle v. Majors, 429 U.S. 945, 948 (Brennan, J., dissenting).

scious of the admonitory language in *Hicks*, some courts have tended to regard summary dispositions as conclusive on issues which in fact may not have been considered. In *Evans v. Buchanan*,[136] a case involving the desegregation of the Delaware public schools, the district judge found eight separate constitutional violations and fashioned an interdistrict desegregation remedy, which was summarily affirmed by the Supreme Court.[137] On remand to the Third Circuit, the controversy focused on which of the eight violations had been affirmed on appeal. Regarding the matter as precluded by the *Hicks* rule, the court simply assumed that the Supreme Court's summary action had embraced all eight findings. The court asserted that steps to divine the precise grounds of the Court's decision "would become a highly speculative exercise, if indeed, this court has the power to attempt a modification of the Supreme Court's judgment."[138]

3. *Qualification of the* Hicks *rule:* Mandel v. Bradley

Despite misgivings reflected in various dissenting opinions over the principle enunciated in *Hicks*,[139] the Court continued to apply that precedent without substantial qualification.[140] A departure came with *Mandel v. Bradley*,[141] wherein the Court articulated important limitations on the precedential value of summary dispositions. Appellant Bradley, an independent Maryland candidate for the United States Senate, had challenged the Maryland statute governing access to the ballot. The statutory procedure requires an individual to submit petitions signed by three per cent of the state's registered voters at least seventy days in advance of the date on which party primaries are to be

136. 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975).

137. Buchanan v. Evans, 423 U.S. 963 (1975).

138. Evans v. Buchanan, 555 F.2d 373, 377 (3d Cir. 1977).

139. Although Justice Brennan has voiced the most vigorous criticism of summary dispositions, his views are shared by other members of the Court. See, for example, Justice Rehnquist's dissent in Buchanan v. Evans: "My dissent from that sort of affirmance here is based on my conviction that it is extraordinarily slipshod judicial procedure as well as my conviction that it is incorrect." 423 U.S. at 975 (Rehnquist, J., dissenting, joined by Burger, C.J. & Powell, J.).

140. *See, e.g.*, Tully v. Griffin, Inc., 429 U.S. 68 (1976); McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976). It should be noted that in *Tully*, the majority opinion endorsed the passing statement of Justice Rehnquist in Edelman v. Jordan, 415 U.S. 651 (1974), that insofar as they bind the Supreme Court, summary dispositions "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Id.* at 671. In light of the relative impotence of *stare decisis* in constitutional adjudication, however, *see, e.g.*, United States v. Maine, 420 U.S. 515 (1975), the *Edelman* qualification seems to lose much of its significance.

141. 432 U.S. 173 (1977).

held. After the State Administrative Board of Elections had determined that Bradley had failed to provide the requisite signatures, he pressed his claim before a three-judge district court, contending that the Maryland law imposed unconstitutional burdens on his associational and voting rights under the First and Fourteenth Amendments. Relying upon a summary affirmance in *Tucker v. Salera*,[142] which struck down certain Pennsylvania ballotting procedures as applied to independents, the court held for Bradley.

On appeal, the Supreme Court vacated the judgment and remanded for further consideration.[143] In a *per curiam* opinion, the Court explained that the lower court's reliance on *Tucker* had been misplaced. The Pennsylvania statute in *Tucker* contained both an early filing deadline and a brief period during which the candidate could garner voter signatures. These differences were significant enough to distinguish *Tucker*, and the Court admonished the three-judge panel that the precedential significance of any summary disposition "is to be assessed in the light of all of the facts of that case."[144] Adopting a statement of Chief Justice Burger in *Fusari v. Steinberg*,[145] the *Mandel* Court stated that "a summary affirmance is an affirmance of the judgment only" and not necessarily a ratification of the reasoning underlying that judgment.[146] The Court then placed a major modification on the scope of *Hicks*:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. . . . Summary actions, however, . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.[147]

In his concurring opinion, Justice Brennan perceived a more significant erosion of the *Hicks* doctrine:

> After today, judges of the state and federal systems are on notice that, before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the

142. 424 U.S. 959 (1976).
143. 432 U.S. at 179.
144. *Id.* at 177.
145. 419 U.S. 379, 391 (1975) (Burger, C.J., concurring).
146. 432 U.S. at 176.
147. *Id.*

> constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible. In other words, after today, "appropriate, but not necessarily conclusive, weight" is to be given this Court's summary dispositions.[148]

It is difficult to assess the precise impact of *Mandel* on the precedential role of summary dispositions. In many respects, *Mandel* is not a significant departure, for it merely underscores the limiting language of Justice White's footnote in *Hicks*.[149] At the same time, *Mandel* is not an unqualified endorsement of *Hicks*, for it reflects the Court's growing disenchantment with the effects of summary dispositions. Lower courts have been instructed to establish factual and legal parallels between cases *sub judice* and prior summary dispositions before applying the latter as controlling authority. More significantly, *Mandel* cautions state and federal judges against assuming too readily that summary actions have broken "new ground;" such decisions should be interpreted as "applying principles established by prior decisions to the particular facts involved."[150]

Recent cases suggest that *Mandel* may have diminished some of the difficulties associated with *Hicks*, especially the foreclosure of debate on important constitutional issues among lower courts. In *State v. Saunders*,[151] the New Jersey Supreme Court sustained an attack on the New Jersey fornication statute as an infringement of the constitutional right of privacy. Although the court drew heavily upon mainstream privacy decisions,[152] it did not overlook the summary disposition in *Doe v. Commonwealth's Attorney*,[153] which presumably upheld the Virginia sodomy statute as applied to sexual conduct among consenting adults. Following the direction in *Mandel*, the court noted that "[W]e are not inclined to read this controversial decision [*Doe*] too

148. *Id.* at 180 (Brennan, J., concurring).

149. *See* notes 123-24 and accompanying text *supra*.

150. 432 U.S. at 176. Prior to *Mandel*, some lower courts had devised theories for alleviating the rigors of a strict application of *Hicks*. B & P Dev. v. Walker, 420 F. Supp. 704 (W.D. Pa. 1976), set forth two possible situations in which a lower court might feel free to disregard a summary disposition: (i) significant factual differences between the two cases involved; and (ii) apparent doctrinal changes in subsequent opinions of the Court. *Id.* at 707-08.

151. 75 N.J. 200, 381 A.2d 333 (1977).

152. *E.g.*, Carey v. Population Serv. Int'l., 431 U.S. 678 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965).

153. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

broadly."[154] Thus, for courts willing to take strides in advancing the development of constitutional law, *Hicks* no longer compels the blind acceptance of summary dispositions as conclusive authority.[155]

III. Should Obligatory Jurisdiction Be Retained?

Current proposals to eliminate the mandatory jurisdiction of the Supreme Court inevitably stem from a concern over the Court's current workload. Sometimes advanced only as a corollary to suggestions for more drastic structural alterations,[156] the argument for eliminating obligatory review ultimately rests on the assumption that such a change will resolve the problems engendered by an overcrowded calendar and that any justification for preserving review by appeal must be weighed against the consequences of that caseload.[157] But any forthright ap-

154. 75 N.J. at 207, 381 A.2d at 341.

155. The New Jersey Supreme Court took a similar view of a prior summary disposition in K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 381 A.2d 774 (1977). Other courts have also detected the shift of emphasis embodied in *Mandel*. In Drumright v. Padzieski, 436 F. Supp. 310 (E.D. Mich. 1977), the court observed that "[s]ummary affirmances should be narrowly limited to the issues in their jurisdictional statements." *Id.* at 316. For other preliminary indications of the flexibility that *Mandel* has introduced into the rule of *Hicks v. Miranda*, see Pollard v. Cockrell, 578 F.2d 1002, 1010-11 (5th Cir. 1978); Plante v. Gonzalez, 575 F.2d 1119, 1125-26 (5th Cir. 1978); Bangor & A.R.R. v. ICC, 574 F.2d 1096, 1104 (1st Cir. 1978); Moritt v. Governor of New York, 42 N.Y.2d 347, 352-53, 366 N.E.2d 1285, 1288, 397 N.Y.S.2d 929, 932 (1977) (Fuchsberg, J., dissenting).

156. *See, e.g.*, Freund Study Group, *supra* note 7, at 36-37.

157. At the root of many of the more sweeping proposals for Supreme Court reform (such as creation of an additional judicial tier between lower tribunals and the Court or taking from the Court some of its major categories of jurisdiction) is the assumption that the Court's caseload will continue to burgeon as the population and economy expand. *E.g.*, Freund Study Group, *supra* note 7, at 3. In a statistical study of the subject, Professors Casper and Posner have demonstrated that the foregoing characterization of the Court's caseload may be inaccurate. Focusing on the trend between the October, 1957, and October, 1971, Terms, the authors attributed the rise in cases filed to the Court's substantive and procedural rulings, not to advances in population or national income. Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUDIES 339, 360 (1974) [hereinafter cited as Casper & Posner, *1957-1971 Terms*]. Moreover, the authors predicted a long term diminution in the Court's caseload. They reasoned that the value of seeking review is partly a function of the probability of obtaining it. Consequently, "as that probability declines over time due to increases in the number of cases filed coupled with the Court's inability to increase significantly the number of cases that it accepts for review, the value of seeking review will fall, and, other things being equal, the number of cases should decline." *Id.* at 361. In light of these observations, the authors saw no justification for radical alterations of the Court's jurisdiction.

Updating their original study in 1977, Professors Casper and Posner noted that there had indeed been no growth in the number of annual filings between the 1974 and 1976 Terms. Casper & Posner, *The Caseload of the Supreme Court: 1975 and 1976 Terms*, 1977 SUP. CT. REV. 87, 95 [hereinafter cited as Casper & Posner, *1975 & 1976 Terms*]. The two scholars were reluctant to generalize, but they did speculate that this leveling off stemmed

praisal of obligatory review must be divorced from the temporal dimension for two reasons. In the first instance, an end to compulsory appeals will probably have no appreciable effect on the volume of papers filed with the Court each term. The litigious client who goes to the expense of having his attorney prepare a tenuous jurisdictional statement in a last-ditch effort to avoid an adverse judgment will not be deterred in his attempt to secure Supreme Court review simply because the only available procedure is certiorari. Because the Court presumably does read each petition received, the burden of sifting through colorless requests will remain. Although others have ignored this aspect, the proponents of Senate bill 3100 do recognize the bill's minimal effect on the Court's caseload.[158]

Secondly and more importantly, an innovation in the jurisdictional framework motivated solely by the heavy volume of cases reaching the Court could obscure the significant congressional policies reflected in jurisdictional legislation. If one is willing to accept that the Supreme Court will probably never be capable of hearing all of the cases it should, uniform discretionary review would be an effective stopgap measure, at least for eradicating the problems created by *Hicks v. Miranda*.[159] Viewing the matter from this perspective, there would be little difficulty in dismissing the current statutory regime as an incoherent patchwork of efforts to deal with the Court's workload instituted at various points in history. And respectable authority may be relied upon for doing so.[160] However, if one believes that the present burden on the Court can be eased and that the change will come at other points in the judicial system, then the near-term benefits of discarding mandatory review are of only secondary importance, if not irrelevant.

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from a balancing of factors such as termination of litigation related to the Vietnam War and the establishment of precedent in areas such as elections. *Id.* at 97. Although this represented but a brief trend, the authors still found "no evidence of a worsening crisis requiring precipitate measures." *Id.*

The Casper and Posner studies put the Court's caseload into perspective, but they do not detract from the thrust of measures such as S. 3100. Although the authors forecast no long range caseload expansion, they have not disputed the fact that the Court's existing burden is onerous. Casper & Posner, *1957-1971 Terms* 362; Casper & Posner, *1975 & 1976 Terms* 97. Additionally, the conclusions in these studies do not bear on the problems posed by *Hicks v. Miranda*, *see* notes 126-38 and accompanying text *supra*, nor are they helpful in resolving the question of whether the continuation of mandatory review would really foster important policies.

158. 124 CONG. REC. S7748 (daily ed. May 18, 1978) (statement of Senator DeConcini); *DeConcini Committee Hearings, supra* note 12, at 10 (statement of Assistant Attorney General Meador); *id.* at 22 (statement of Eugene Gressman).

159. 422 U.S. 332 (1975). *See* notes 126-38 and accompanying text *supra*.

160. FRANKFURTER & LANDIS, *supra* note 7, at 42.

The advisability of retaining appeal as of right must be viewed apart from the problem of docket congestion and against the backdrop of the policies which undergird compulsory review in our appellate process. The remainder of this article is devoted to a discussion of those policies and to an analysis of possible objections to abandoning obligatory jurisdiction.

A. Vesting "Trust" in State Courts

As was previously demonstrated,[161] the 1925 Court probably seemed as ominously overburdened to the sixty-eighth Congress as today's Court appears to the sponsors of Senate bill 3100.[162] The resulting legislative palliative was motivated principally by a desire for more expeditious and authoritative Supreme Court review. The legislative history of the Judges' Bill suggests, however, that the measure may have been more than a unitary response. Although obligatory jurisdiction, through the writ of error, had been transplanted into our jurisprudence for reasons unrelated to the propriety of discretionary review,[163] Congress began utilizing mandatory jurisdiction as an instrument for singling out those cases which required a decision by the highest tribunal. The discussions in the period immediately prior to adoption of the 1925 Act in its final form indicate that Congress did not delete certain classes of cases from the appeal category merely for reasons of expediency without reflecting upon the types of cases remaining in the mandatory classification. Rather, the final form of the Judges' Bill suggests that Congress focused upon all cases then reviewable by appeal and determined that important values were perpetuated by the lines which were ultimately drawn between mandatory and discretionary review.

It will be recalled that Chief Justice Taft defended the initial draft of the 1925 Act with the questionable proposition that when presented with a choice between local and national interests, a federal court would be more likely to preserve the federal view than would a state court.[164] The Senate disregarded this argument and amended the law to provide for writs of error to a court of appeals which invalidates a state statute.[165] It is often hazardous to infer legislative intent from the

161. *See* notes 61-81 and accompanying text *supra*.

162. Although the 1925 Court was faced with barely half the caseload of today, that Court had not yet instituted the jurisdictional statement as a screening device.

163. *See* notes 20-24 and accompanying text *supra*.

164. *See* note 78 and accompanying text *supra*.

165. *See* notes 77-79 and accompanying text *supra*.

refinements and modifications of a bill as it winds its way through the legislature. Yet, these changes by the Senate indicate that the framers of the Judges' Bill were not willing to trust state judiciaries to the extent of relinquishing mandatory review of cases in which a state statute is sustained against federal attack or in which a state tribunal invalidates a federal law. Similarly, the Senate could not accept the Chief Justice's argument that, as between state and federal courts, the latter would more predictably arrive at results which achieve a proper accommodation of federal and state interests. When either court is presented with challenges to the laws of the other sovereignty, neither could be fully trusted to the extent of making its decisions final with review only by leave of the Supreme Court.

Senate bill 3100 would remove both of these categories from the Court's obligatory jurisdiction. The bill's sponsors and others of a similar view contend that the implicit distrust of state courts manifested in the 1925 Act no longer supports the appeal/certiorari distinction. This position is typified by a recent Department of Justice Report:

> Nor is there sufficient reason to require the Supreme Court to review on the merits all cases in which the highest court of a state invalidates a federal law or upholds a state statute in the face of a federal constitutional attack. Mandatory Supreme Court review in these circumstances implies that we cannot rely on state courts to reach the proper result in such cases. This residue of implicit distrust has no place in our federal system. State judges, like federal judges, are charged with upholding the federal constitution.[166]

The interaction between the state and federal governments today may produce fewer clashes than in earlier, more sectionally divisive years. Yet, one commentator has observed that current decisions of the Supreme Court indicate that it is not convinced that the present accommodation between federal and state interests warrants relinquishing special controls.[167] It has been argued that in the federal sector, the renewed enthusiasm for the doctrine of *Younger v. Harris*[168] suggests a view on the Court that federal judges still do not show a proper respect for state interests before intervening in state proceedings. Moreover,

166. DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, THE NEEDS OF THE FEDERAL COURTS 13 (1977). *See also DeConcini Committee Hearings, supra* note 12, at 21 (statement of Eugene Gressman).

167. Tushnet, *The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments*, 46 U. CIN. L. REV. 347, 354-56 (1977).

168. 401 U.S. 37 (1971). "[A] federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution. Such circumstances exist only when there is a threat of irreparable injury 'both great and immediate.'" (footnote omitted). *Id.* at 56.

Oregon v. Hass[169] is said to show that the Court will carefully scrutinize a state court decision when it believes that the state tribunal is not according sufficient weight to current interpretations of the Constitution.[170]

Activity in a separate but not unrelated area of federal law is also claimed to cast doubt on the propriety of placing greater trust in the states through uniform discretionary review. The majority position today seems to be that local prejudices, against which federal diversity jurisdiction was designed to protect the non-resident litigant, no longer exist; even if they do, diversity jurisdiction is still an ill-conceived safeguard.[171] But even the limited curtailment of diversity jurisdiction suggested by the American Law Institute generated a vigorous reply from distinguished quarters that the prospect of local prejudice was significant enough to counsel retention of diversity jurisdiction in its present form.[172] Justice Jackson once remarked that the two most critical federal intrusions on state sovereignty contained in the Judiciary Act of 1789 were review of state court decisions by the Supreme Court and diversity jurisdiction.[173] This suggests a possible institutional interrelation between the two controls, and perhaps any decision to constrict one of these inroads should be made only upon considering the impact on the other. If substantial doubt still exists that the states can be trusted to the extent of abolishing diversity jurisdiction, Congress might well reflect on whether it should manifest a similar trust by making Supreme Court review of state cases permissive. Even if diversity should be done away with, it may be argued that it is undesirable to place a trust in the states at two points in the federal system by abolishing mandatory Supreme Court review.

The preceding discussion of whether the states may be trusted to the extent of converting the present categories of obligatory appeal into review by certiorari is derived from arguments which are disingenuous at best. If there is a valid concern that a state judge will not abide by his oath to enforce the Constitution, the availability of certiorari would provide an adequate safeguard against serious federal/state collisions.

169. 420 U.S. 714 (1975). Ironically, the state court in *Hass* was balking at application of the Court's more restricted version of the *Miranda* rule.

170. Tushnet, *supra* note 167, at 355.

171. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 L. & CONTEMP. PROB. 216, 234-40 (1948).

172. For authorities opposing and supporting the A.L.I. proposals, see Shapiro, *Federal Diversity Jurisdiction: A Survey and A Proposal*, 91 HARV. L. REV. 317, 318 n.8 (1977).

173. R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 33 (1957).

The apparent subversion of federal law by a state court would certainly be an element in the Court's judgment in granting or denying certiorari. In support of this position, two scholars have concluded:

> By completely eliminating the right of appeal, it may be thought that civil rights would be imperilled, particularly where the state court has denied the federal claim and sustained the state statute. But the Supreme Court has been particularly watchful where civil rights have been involved, and it can be relied on in these situations, as in all others, to review cases that are worthy of its consideration. If the ranking Court can be trusted to decide cases—to establish the supreme law of the land, it can surely be trusted to determine what cases it should decide.[174]

This type of statement has become a stock response to the argument that mandatory jurisdiction should exist for the disposition of important classes of cases.[175] Perhaps the proponents of this thesis should heed the admonition of one federal judge that "[t]he constitutionality of [a] procedure should not rest on the dubious assumption that discretion will always be exercised as the Constitution demands."[176] But it does seem reasonable to assume that any case significant enough to claim an obligatory appeal would fulfill the criteria set out in Rule 19 for discretionary review.

The hypothesis that the *Younger* line of "abstention" cases and *Oregon v. Hass* demonstrate a belief on the Court that there has not been an accomodation of federal and state interests sufficient to abandon special controls is also unpersuasive. The Court has actually manifested a willingness to give state judiciaries a freer hand in the development of constitutional principles.[177] In a recent opinion, Justice Powell specifically addressed the issue of placing trust in state judges:

> Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State

174. Moore & Vestal, *supra* note 90, at 45.

175. Freund Study Group, *supra* note 7, at 37; Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 74 (1964); Note, *The Insubstantial Federal Question, supra* note 84, at 494.

176. Minichiello v. Rosenberg, 410 F.2d 106, 122 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969) (Anderson, J., dissenting).

177. With the tendency of the current Court to foreclose federal remedies, this trust vested in state courts assumes critical importance. As Justice Brennan has stated: "With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. . . . With federal scrutiny diminished, state courts must respond by increasing their own." Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

> courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.[178]

Senate bill 3100 is consistent with Justice Powell's observations and accurately reflects the current accommodation of state and federal interests. By eliminating the mandatory Supreme Court review of state cases raising federal issues, Senate bill 3100 vests a degree of trust in state courts which properly discounts any lingering misgivings about the fidelity of state jurists to the principles of the supremacy clause. Moreover, Senate bill 3100 comports with the scheme of federalism contemplated by the Constitution. In view of the fact that the Constitution does not mandate the establishment of lower federal courts, it is clear that the framers anticipated that most, if not all, federal questions would be initially litigated in state tribunals with ultimate review by the Supreme Court.[179] Therefore, state judiciaries were envisioned as the primary guarantors of constitutional rights.[180] Senate bill 3100 complements this principle by mitigating the lack of trust which inheres in the concept of compulsory review.

B. "Trusting" the Supreme Court

It has been posited by one writer that the line of reasoning pointing to the total elimination of appeal as of right depreciates important aspects of separation of powers.[181] The wholesale substitution of discretionary review would invest sole authority in the Court for deciding which classes of cases are worthy of its attention. Under its current exercise of certiorari jurisdiction, the Court is making distinctions based upon importance only as to *individual* cases; completely turning over to the Court the task of identifying important *classes* of cases for its review may be an impermissible surrender of a legislative prerogative. The current range of mandatory appeals is based primarily upon cases involving the invalidation of state and federal legislation. Implementation of universal discretionary review would allow the Court to distinguish among statutes on the basis of that tribunal's notions of national significance. This may put the Court in the position of making essentially political judgments and is an area in which lines drawn by Congress may be more acceptable than those drawn by judges.[182]

178. Stone v. Powell, 428 U.S. 465, 494 n.35 (1976).

179. This is also borne out by the fact that Congress did not confer general federal question jurisdiction on the lower federal courts until the latter part of the nineteenth century. *See* note 47 *supra*.

180. HART & WECHSLER, *supra* note 15, at 359-60.

181. Tushnet, *supra* note 167, at 358-65.

182. *Id.*

Senate bill 3100 and other broadly based proposals calling for the total abandonment of mandatory jurisdiction either discount or completely ignore these "separation of powers" objections. In defense of the reformists' position, however, the preceding "separation of powers" considerations are probably more supposed than real. In any dispute over the Supreme Court's appellate jurisdiction, Congress, under the exceptions and regulations clause, will have the final word. In recent years, the constitutional debate has centered upon how far Congress may go in controlling the Supreme Court by putting certain types of cases beyond its purview. Most proposals of this stripe collapsed under intense political resistance, and the constitutional power of Congress to regulate the Court remains somewhat uncertain.[183] Undoubtedly, there are limits to the exceptions and regulations clause at both ends of the spectrum, but the shift from obligatory to discretionary review does not appear to be an abdication of congressional power.[184] There may be practical objections to making all Supreme Court review optional, for if the Court exercises permissive review in a manner that proves undesirable, legislative inertia may make it difficult for Congress to undo what it has done. However, this practical observation hardly rises to the stature of a constitutional prohibition.

Any defense or condemnation of obligatory jurisdiction ultimately reveals its exponent's conception of the role of the Supreme Court in our system of government, and the putative separation of powers argument essentially expresses an unwillingness to place complete trust in the Court as an institution. If this distrust stems from a deep-seated concern over the frailties of human-designed institutions, it is an objection not easily answered. On this level of analysis, ultimate reliance must be placed on "a judiciary of high competence and character and the constant play of an informed professional critique upon its work"[185] to insure the proper functioning of a standard under which the jurist must exercise discretion. On the other hand, if these misgivings have a limited basis and grow only out of the notion that a congressional directive is needed to restrain the Court, a sufficient reply seems available. Professor Wechsler has insisted that the courts do not

183. HART & WECHSLER, *supra* note 15, at 360-65.

184. The drafters of S. 3100 have kept this proposition firmly in view: "In establishing the Court's appellate jurisdiction under Article III, Congress can confer as much or as little compulsory jurisdiction as it deems necessary and proper, including such exceptions as Congress thinks appropriate. If Congress wants to make the Court's appellate jurisdiction totally discretionary or totally obligatory in nature, nothing in the Constitution says 'no.'" 1978 SENATE REPORT, *supra* note 11, at 3 (citation omitted).

185. Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951).

have a "discretion to abstain or intervene when constitutional infringements are established in cases properly before them in the course of litigation."[186] If this judicial duty is embedded in the Constitution, then it should not necessitate legislative action to ensure its observance.

As a practical matter, perhaps Congress should employ obligatory review to correlate the constitutional duty of the Court more fully with the types of cases which are coming before it.[187] In this connection, it might be useful to consider one scholar's reservations about the reach of the Judges' Bill. Although Justice (then Professor) Frankfurter favored the increased use of certiorari, he was not entirely convinced that writ of error should not lie when a federal court declares a federal statute unconstitutional. If the variety of cases now contained in section 1257 is seen as critical enough to require compulsory review, the justice's remarks are particularly appropriate:

> To be sure, there is little likelihood that the Supreme Court would withhold permissive review of a case in which a circuit court of appeals invalidated an act of Congress. But a scientifically framed judicial code ought to give formal as well as practical expression to the governing ideas of a judicial system. If the invalidation of an act of Congress by a lower federal court is, as a matter of fact, one of the clearest cases for invoking the judgment of the Supreme Court, the opportunity for review should be explicit and not left to discretion.[188]

In light of the foregoing, it seems clear that Congress, through Senate bill 3100, has outlined the appropriate role for the Supreme Court in reviewing state decisions raising federal issues. Replacing appeals as of right with discretionary review is not an abdication of congressional power under the exceptions and regulations clause, but rather expresses a sound interpretation of the Supreme Court's obligations under the supremacy clause.

C. The Problem of Summary Dispositions

The most serious objection to retaining obligatory review stems from the inevitable resort by the Court to summary dispositions and the precedential weight accorded such treatment of appeals. The difficulties created by the rule in *Hicks v. Miranda*[189] are a principal target of Senate bill 3100. The elimination of mandatory jurisdiction would

186. Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1011 (1965).

187. *See* Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 89 n.89 (1968); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 10 (1959); Shanks, Book Review, 84 HARV. L. REV. 256, 258 n.17 (1970).

188. FRANKFURTER & LANDIS, *supra* note 7, at 286.

189. 422 U.S. 332 (1975). *See* notes 126-38 and accompanying text *supra*.

reduce the inflexibility that *Hicks* introduced into the process of interpreting Supreme Court decisions. All summary dispositions would have only the effect of a denial of certiorari which "carries with it no implication whatever regarding the Court's views on the merits."[190] State and lower federal judges would not be compelled under the supremacy clause to adhere to precedents, the reasoning of which cannot be ascertained.

Even in this context, however, the abolition of the right of appeal would have a questionable impact. Much of the opposition to *Hicks* as the inevitable consequence of obligatory review grows out of the ambiguity that that rule produces in the law. But it is difficult to accept the proposition that equating summary dispositions with denials of certiorari will impart greater certainty. Denials of certiorari are rarely accompanied by explanatory remarks. Dissents from such refusals may cast some light on the reasons for the Court's disposition, but since Justice Douglas' retirement, the volume of these dissenting opinions has steadily decreased. Nor would making all review permissive reduce the stimulus for relitigating unresolved issues; summary dispositions with no binding effect might even foster more litigation. The certiorari process encompasses a wide range of variables, for Rule 19 is only a nonexclusive list of factors drawn upon by the Court. As Justice Harlan noted, "[I]f a lawyer cannot assess with some degree of confidence the imponderables involved it is quite understandable that he should conceive it to be his duty to try for certiorari."[191]

On a more elevated plane of analysis, the emphasis on certainty may be misplaced, for similarly to the one-dimensional concern for caseload, it minimizes the overriding policies reflected in obligatory review. Even with cases receiving plenary consideration which result in opinions absorbing several hundred pages of the *United States Reports*, it is sometimes difficult to divine just what the Court held.[192] This observation is certainly no argument for promoting needless legal complexities, for while the vagaries in the law may intrigue the academician, they often frustrate the practitioner trying to advise a client. But the fact that the judicial process inevitably results in a certain

190. Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950).

191. Harlan, *Manning the Dikes*, 13 RECORD OF N.Y.C.B.A. 541, 549 (1958). *See also* Prettyman, *Petitioning the Supreme Court—A Primer for Hopeful Neophytes*, 51 VA. L. REV. 582, 583 (1965).

192. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*; five separate opinions); New York Times v. United States, 403 U.S. 713 (1971) (*per curiam*; six concurring and three dissenting opinions).

lack of clarity indicates that the interest in certainty should not be the sole determinant in the debate over obligatory review.

The advantages of repealing mandatory jurisdiction in terms of the resulting certainty in the law are unclear. If important values are perpetuated by the retention of obligatory review, the specific problem posed by *Hicks* could be remedied by less drastic means. *Mandel* is an indication that the Court has already gravitated to a position which accords summary dispositions less precedential weight than full opinions, even with respect to their binding effect on lower courts.[193] This theory of limited precedential effect may prove difficult to administer without destroying the significance of mandatory jurisdiction, but if obligatory review furthers important policies in our scheme of government, this approach is well worth investigating.

D. Should Any Form of Mandatory Jurisdiction Survive?

1. The present structure

In recent years, Congress has embarked on a program of constricting the scope of the Court's mandatory jurisdiction. In 1971, direct appeals from district court invalidations of federal indictments were discontinued.[194] In 1974, Congress repealed the requirement contained in the Expediting Act of immediate Supreme Court review of government antitrust cases.[195] That same year witnessed the elimination of three-judge review of certain Interstate Commerce Commission orders.[196] In 1976, Congress narrowed the requirement that challenges to state statutes be brought before three-judge district courts; these panels are now convened only in civil rights cases and cases involving congressional redistricting or state legislative reapportionment.[197] Despite these substantial excisions, Congress retained review by appeal for three-judge district court decisions.[198]

193. *See* notes 139-55 and accompanying text *supra*.

194. Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 14, 84 Stat. 1890.

195. Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, § 5, 88 Stat. 1709.

196. Act of Jan. 2, 1974, Pub. L. No. 93-584, 88 Stat. 1917.

197. Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119.

198. 28 U.S.C. § 1253 (1976). It should be noted that S. 3100 would also retain this category of obligatory appeals. 1978 SENATE REPORT, *supra* note 11, at 10-11. Preserving the mandatory review of three-judge panels is explicable on grounds quite distinguishable from the policies undergirding obligatory review of state court decisions. The three-judge procedure might be viewed as a necessary compromise: In certain types of cases Congress has decided to bypass the single-judge level and, as if in exchange, has guaranteed Supreme Court review. The three-judge court has come under increasing criticism and may no longer be justified. Yet if one is willing to accept this procedure in principle, mandatory Supreme

As a result of this legislative activity, the current principal categories of mandatory appeals include a fairly narrow range of cases: (i) cases in which a state court declares a federal statute unconstitutional or sustains a state law against a federal challenge;[199] (ii) cases in which a federal court of appeals invalidates a state law;[200] (iii) cases in which a federal court invalidates a federal statute where the United States is a party to the litigation;[201] (iv) orders by three-judge panels granting or denying injunctive relief;[202] and (v) certified questions from the federal courts of appeals and the Court of Claims.[203]

In view of the above discussion, it is doubtful that discretionary Supreme Court review of state cases would present genuine constitutional objections. The current statute apparently reflects, and its defenders operate under, assumptions about the degree of trust which should be vested in state courts and the Supreme Court which are probably no longer valid.[204] Indeed, these assumptions may not have been completely sound even in 1925. Whatever constraining influence mandatory review may have on a state judge would be difficult to test empirically. It is a rare occurrence for a state court to invalidate a federal statute or treaty.[205] Cases in which a state judge upholds a state law against a federal attack are more frequent, but the vast majority of state cases reaching the Supreme Court today arrive there by way of certiorari.[206] This evidence is at best ambiguous on the issue of how far state courts may be trusted, but it does suggest that certiorari would be adequate to the task of preserving the supremacy of federal law in cases in which federal and state provisions clash.

Even if misgivings as to the degree of trust that should be vested in state courts are serious enough to warrant the maintenance of obligatory jurisdiction, they do not justify preserving the existing statutory scheme. If these considerations require mandatory review, it makes little sense to differentiate between federal challenges to state legislative

Court review may well be irresistible. The absence of obligatory review of three-judge decisions would create a class of cases in which the losing party has no review as of right at all. With state cases raising federal issues, the unsuccessful party usually has access to at least one compulsory appeal in the state system.

199. 28 U.S.C. § 1257(1)-(2) (1976).

200. 28 U.S.C. § 1254(2) (1976).

201. 28 U.S.C. § 1252 (1976).

202. 28 U.S.C. § 1253 (1976).

203. 28 U.S.C. §§ 1254(3), 1255(2) (1976). For other extremely narrow and rarely invoked classifications of appeals, see note 14 *supra*.

204. *See* notes 162-88 and accompanying text *supra*.

205. STERN & GRESSMAN, *supra* note 103, at §§ 3.3-.4.

206. *Id.* at § 3.4.

action, where under section 1257(2) review is by appeal,[207] and those to state judicial or executive action, where certiorari is prescribed by section 1257(3).[208] This distinction assumes that a state supreme court is more receptive to local interests in cases dealing with a state statute than in cases involving state judicial or executive action. It might be argued that a statute tends to have broader reach than judicial or executive decisions and therefore presents a greater potential encroachment upon federal interests. Yet, if hostility to federal values is to be the touchstone of obligatory review in this field, this dichotomy is difficult to defend.[209]

This inconsistency is compounded by *Dahnke-Walker Milling Co. v. Bondurant*,[210] wherein the Court held that in terms of general importance, a federal challenge to the application of a state statute presented an issue as serious as an attack on the statute on its face. Accordingly, a case sustaining a state law as applied can be reviewed by appeal. Justice Brandeis' dissent warned that "the right to a review will depend, in large classes of cases, . . . upon the skill of counsel,"[211] and experience has borne this out.[212] If the difference between paragraphs (2) and (3) of section 1257 is not responsive to the issue of trust, the gloss contributed by *Dahnke-Walker* makes the distinction even more tenuous. *Dahnke-Walker* has been criticized as a "needless complexity,"[213] and if obligatory review of state decisions were to remain, this excrescence should be removed.[214]

Congress could undoubtedly revamp section 1257 to rid it of its internal inconsistencies and to remove the *Dahnke-Walker* complexity, but the question remains whether the existing scheme, if so modified, would really perpetuate important policies. Arguments based upon distrust of state judges and the Supreme Court do not seem valid, but perhaps mandatory jurisdiction fosters a desirable political objective. As was noted at the outset of this subsection,[215] obligatory jurisdiction has been pared down to a narrow range of situations which, save the certified question provisions and litigations to which the United States

207. 28 U.S.C. § 1257(2) (1976).
208. 28 U.S.C. § 1257(3) (1976).
209. Tushnet, *supra* note 167, at 353.
210. 257 U.S. 282 (1921).
211. *Id.* at 298 (Brandeis, J., dissenting).
212. *See* HART & WECHSLER, *supra* note 15, at 637.
213. *Judicial Improvement Hearings, supra* note 90, at 275-76 (statement of Paul A. Freund). *See also* FRANKFURTER & LANDIS, *supra* note 7, at 215.
214. The Supreme Court has reaffirmed *Dahnke-Walker* on similar facts. Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974).
215. *See* notes 194-203 and accompanying text *supra*.

is a party, involve cases in which the legislation of one sovereignty is invalidated by the courts of another. When a federal judge overturns a state statute, he is confounding the will of the people as voiced by their representatives in the legislature. When a state judge upholds a state statute against a federal challenge or sets aside a federal law, he is placing the judgment of the local representative body above the collective wisdom of the nation as reflected in Congress. By now, it is beyond peradventure that judicial review, even though it may lead to examination of the acts of the political branches, is an integral component of the constitutional framework. Certiorari seems sufficient for policing excessive activism by state and lower federal judges. Yet, perhaps there is some symbolic value in Congress expressing, through mandatory jurisdiction, that this class of cases should not be left to Supreme Court review by chance, even though the likelihood of an actual denial of review in a truly important case would otherwise be remote. It may be worthwhile, from the standpoint of a rationally designed democratic system, that in situations in which the undemocratic branches are likely to have acted most undemocratically, the invocation of the highest tribunal's refereeing powers is guaranteed by law and is not a matter of discretion.

The costs of preserving this form of symbolism may be prohibitive, for it necessarily comes at the expense of perpetuating the current system of summary dispositions which operate as binding adjudications on the merits. The dilemma posed by *Hicks*[216] may have been mitigated by the qualifications in *Mandel*,[217] but the burden of administering such an uncertain rule would probably outweigh any symbolic value which the current system of obligatory review may embody. From this perspective, the proponents of Senate bill 3100 have the stronger argument.

2. Obligatory jurisdiction generally

In the final analysis, Senate bill 3100 is justifiable as a legitimate, temporary response to the problems created by mandatory review. This does not necessarily mean, however, that obligatory jurisdiction can serve no valid function in the appellate process. Congress might reflect upon whether compulsory jurisdiction can be reformulated to encompass a class of cases which are agreed to raise issues of a fundamental nature. Because the Bill of Rights, as written, interpreted and applied to the states under the Fourteenth Amendment, is meant to

216. *See* notes 126-38 and accompanying text *supra*.
217. *See* notes 141-55 and accompanying text *supra*.

restrain government as it affects individuals, perhaps cases which implicate these safeguards should form the core of a new obligatory jurisdiction. Considering the ease with which conventional common law actions are converted into constitutional claims, however, the task of drafting a sufficiently precise mandatory classification might prove nearly impossible. Indeed, even a narrow categorization would probably worsen the Court's workload, putting it on a footing similar to that in the 1925 Term when obligatory cases occupied eighty percent of the docket.[218]

Even if an acceptable compulsory classification were devised, the constitutional obligations of the Supreme Court and the availability of certiorari suggest that compulsory review of any sort may have no place in our federal system. Even with cases based upon the Bill of Rights, obligatory review would ultimately rest upon the same assumptions about the degree of trust which should be lodged in the Court—assumptions which this article has explored and discounted.[219] Nonetheless, Congress might well consider all the possibilities before definitively concluding that it can conceive of no class of cases significant enough to warrant Supreme Court review with only a minimal exercise of discretion.

Conclusion

The concept of obligatory review was imported into American practice through the writ of error for reasons entirely distinct from the question of whether or not the Supreme Court should have discretion in exercising its appellate jurisdiction over state courts.[220] In its early twentieth century efforts to curtail the Court's mandatory jurisdiction and to make its caseload more manageable, Congress utilized the right of appeal to designate classes of cases significant enough to warrant compulsory review.[221] In recent years, the Court's calendar has swollen, forcing that tribunal to infuse more discretion into the handling of appeals.[222] In addition, the rule in *Hicks v. Miranda*[223] has made summary dispositions binding,[224] and lower courts have encountered difficulty in determining the exact effect of such dispositions.[225] A repeal of

218. *See* note 62 and accompanying text *supra*.
219. *See* notes 181-88 and accompanying text *supra*.
220. *See* notes 20-24 and accompanying text *supra*.
221. *See* notes 53-54 and accompanying text *supra*.
222. *See* notes 1-2 & 88-109 and accompanying text *supra*.
223. 422 U.S. 322 (1975).
224. *See* notes 119-22 and accompanying text *supra*.
225. *See* notes 126-38 and accompanying text *supra*.

mandatory review does not raise serious constitutional questions and is defensible as a temporary solution to the problems flowing from *Hicks*.