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An Illusory Right to Appeal: Substantial Constitutional Questions at the New York Court of Appeals

Meredith R. Miller*

Introduction

The jurisdiction of the New York Court of Appeals has long been shrouded in mystery. When the court dismisses an appeal, it provides a boilerplate, one-sentence decretal entry, which gives the litigants little, if any, meaningful indication of the court's reasons for dismissal. In February 2010, however, the world received a rare glimpse into the court's jurisdiction when, in *Kachalsky v. Cacace*,[1] Judge Robert Smith dissented from the court's sua sponte dismissal of the appeal.

Kachalsky involved an appeal questioning whether a state law prohibiting the carrying of concealed weapons is consistent with the Second Amendment to the United States Constitution. The court dismissed the appeal for failure to raise a "substantial constitutional question."[2] Judge Smith dissented from the dismissal and voted to retain the appeal, arguing that the court was using the requirement of "substantiality" to invoke discretion it did not have on an appeal as of right.[3]

The court's civil jurisdiction generally covers two types of cases: (1) those it hears "as of right" pursuant to Civil Practice Law Rules (CPLR) 5601; and (2) those for which it has granted permission to appeal pursuant to CPLR 5602. In *Kachalsky,* Judge Smith opined that the definition of "substantiality" had

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1. 925 N.E.2d 80 (N.Y. 2010).
2. *Id.* at 80.
3. *Id.*

become "so flexible" that it, in effect, conferred on the court "discretion comparable to that we have in deciding whether to grant permission to appeal under CPLR 5602."[4]

In *Kachalsky*, Judge Smith pointed to a problematic policy. Through the requirement of "substantiality," the New York Court of Appeals is granting itself discretion to determine whether to hear certain appeals that ought to be "as of right." The justification for the requirement of "substantiality" is to prevent the creativity of counsel in contriving constitutional questions to gain the right to appeal. This Article argues that this concern is overstated and, in any event, existing limitations on appealability and reviewability serve to hinder counsel from inventing frivolous constitutional questions for the sake of an appeal. Moreover, an expansion of existing limits on reviewability could further militate against such abuses.

As the court's policy presently stands, an appeal as of right does not lie if the constitutional question is not directly involved in the decision from which the appeal is taken. In addition, issues that have not been preserved in the courts below are not reviewable by the New York Court of Appeals. Finally, in some instances, the court will only review the constitutional question and none of the other issues in the case. This Article argues that, in all appeals "as of right" based on a constitutional question, the court's review should be limited to the constitutional question raised.

Thus, this Article proposes elimination of the "substantiality" requirement. The existing limits on appealability and reviewability, as well as proposed, expanded limits, serve to prevent counsel from manufacturing frivolous constitutional issues for an appeal. The court's exercise of discretion is not warranted and the current requirement of "substantiality" effectively renders the right to appeal on constitutional grounds an illusory one.

I. An Overview of the Court's Civil Jurisdiction

The civil jurisdiction of the New York Court of Appeals generally includes two types of appeals: (1) those that it hears

4. *Id.*

"as of right";[5] and (2) those where it has granted leave.[6] The most common appeals as of right are either premised upon a double dissent at the New York Supreme Court, Appellate Division,[7] or a substantial constitutional question.[8] Appeals as of right on constitutional grounds are discussed in depth in Section II.

Where an aggrieved litigant does not have an appeal as of right, the appeal may be heard by permission of the appellate division or the Court of Appeals.[9] When a motion for leave is made to the Court of Appeals, it requires the vote of two judges to be granted.[10] The judges assess typical certiorari factors, such as whether the question of law is "novel or of public importance, [or] present[s] a conflict with prior decisions of [the] court, or involve[s] a conflict among the departments of the Appellate Division."[11] The court, therefore, has wide latitude to determine its civil docket. Indeed, in 2009, it granted permission to appeal in only 7.2 percent of the 1,070 civil motions for leave.[12]

II. Appeals as of Right on Constitutional Grounds

The New York State Constitution[13] and CPLR 5601(b)[14]

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5. N.Y. C.P.L.R. 5601 (McKinney 2010).
6. N.Y. C.P.L.R. 5602.
7. N.Y. C.P.L.R. 5601(a).
8. N.Y. C.P.L.R. 5601(b).
9. *See generally* N.Y. C.P.L.R. 5602.
10. N.Y. C.P.L.R. 5602(a).
11. N.Y. COMP. CODES R. & REGS. tit. 22, § 500.22(b)(4) (2008); *see also* 8 MARK DAVIES ET AL., NEW YORK CIVIL APPELLATE PRACTICE § 15:5 (2010); *id.* § 15:3.
12. STUART M. COHEN, ANNUAL REPORT OF CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK 6 (2009), *available at* http://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2009.PDF. The Court denied 74.2% of civil motions for leave and dismissed 18.6% for jurisdictional defects.
13. N.Y. CONST. art. VI, § 3(b)(1) and (2) provides:

> b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;
>
> . . . .
>
> In civil cases and proceedings as follows:

authorize an appeal as of right to the Court of Appeals on constitutional grounds.[15] This type of appeal is either: (1) from a final determination of the appellate division where a constitutional question is directly involved; or (2) directly from a final determination of a court of original instance where the only question involved is the constitutionality of a state or federal statute (a "direct appeal").[16]

When the appeal is from an appellate division judgment, it is not required that the constitutional question challenge the validity of a statute.[17] On such an appeal from the appellate

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> (1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.
>
> (2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

14. Tracking the language of the state constitution, N.Y. C.P.L.R. 5601 provides in pertinent part:

> (b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:
>
> 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and
>
> 2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

15. ARTHUR KARGER, POWERS OF THE NEW YORK COURT OF APPEALS § 7:1, at 219-20 (3d ed. 2005).

16. *Id.*

17. *Id.* § 7:2, at 222; N.Y. C.P.L.R. 5601(b)(1).

division, the Court of Appeals will consider all questions properly within its jurisdiction, even those that do not raise constitutional challenges.[18] On a direct appeal from a court of original instance, however, the constitutional question must challenge the validity of a statute, and the court will consider only that question on the appeal.[19]

In neither of these instances does the New York State Constitution or the CPLR expressly require that the constitutional question involved be "substantial." Nevertheless, whether the appeal is taken from the appellate division or is a direct appeal, the Court of Appeals requires that the constitutional question be a "substantial" one; otherwise, it will not be heard on the merits. The origin of the substantiality requirement is a judicial gloss, and while it has not been traced back to an exact public pronouncement, dismissals for failure to raise a "substantial constitutional question" appear in decretal entries as early as the 1930s.[20] Arthur Karger's authoritative treatise on the court's jurisdiction notes that the limitation is "firmly established."[21]

Explaining the justification for the requirement of substantiality, Karger provides:

> It is an obviously necessary safeguard against abuse of the right to appeal on constitutional questions, for otherwise the right to appeal would turn on the ingenuity of counsel in advancing arguments on constitutional issues, howsoever fanciful they might be.[22]

The standard of "substantiality," however, is nowhere defined in New York law and "can mean different things to different people."[23] Consistent with its justification, substantiality has been described as requiring the

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18. KARGER, *supra* note 15, § 7:2, at 223.

19. *Id.* at 222 (citing N.Y. CONST. art. VI, § 3(b)(2)).

20. *See, e.g.*, Wynkoop Hallenback Crawford Co. v. W. Union Tel. Co., 268 N.Y. 108 (1935); Karsten Dairies v. Baldwin, 269 N.Y. 566 (1935).

21. KARGER, *supra* note 15, § 7:5, at 226.

22. *Id.*

23. DAVIES ET AL., NEW YORK CIVIL APPELLATE PRACTICE § 15:4.

constitutional question to "appear to have colorable merit and not to be advanced solely or primarily as the predicate for appeal as of right."[24] In addressing what constitutes a "substantial" constitutional question, Karger writes:

> The standard of substantiality cannot, of course, be defined with mechanical precision. Whether a particular constitutional issue is sufficiently substantial to warrant an appeal as of right is, generally speaking, rather a matter of judgment, to be determined on the facts of the individual case.[25]

In defining substantiality, Karger references the United States Supreme Court's standard for certiorari petitions.[26]

Another, significant limitation on the appealability of the constitutional question is that it must be "directly involved" in the order from which the appeal is taken. This requirement is explicitly stated in New York Constitution, article VI, section 3(b), and CPLR 5601(b). Direct involvement is a strict requirement, and it has been understood to require that the constitutional question is "necessarily involved" in deciding the case.[27] That is, there cannot be another, non-constitutional ground that independently supports the determination from which the appeal is taken.[28]

If one of the jurisdictional predicates for an appeal as of right pursuant to CPLR 5601 is not present, the appeal is subject to dismissal upon motion or by the court sua sponte.[29] When, on its own motion, the court dismisses an appeal as of right which is purportedly on constitutional grounds, the

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24. 9 JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, NEW YORK CIVIL PRACTICE: CPLR ¶ 5601.09 (2d ed. 2005).

25. KARGER, *supra* note 15, § 7:5, at 226.

26. *Id.*

27. *Id.* § 7:8, at 230.

28. *Id.* For direct appeals, remember, the only question involved can be the constitutional challenge of a statute. Further, the clear implication is "that [the question] shall have been 'not only directly and necessarily involved in the decision of the case.'" *Id.*

29. N.Y. COMP. CODES R. & REGS. tit. 22, § 500.10 (2008).

Court's decretal entry routinely, simply states: "Appeal dismissed, without costs, by the Court of Appeals, *sua sponte*, upon the ground that no substantial constitutional question is directly involved."[30] Ordinarily, no further information is provided concerning the dismissal of the appeal.

III. *Kachalsky v. Cacace*: The Illusory Appeal as of Right on Constitutional Grounds

This standardized decretal entry usually fails to provide any meaningful suggestion of the court's reasons for dismissal. However, in February 2010, in *Kachalsky*,[31] insight was gained into the mystifying inner workings of the court. In that case, the court dismissed the appeal sua sponte for failure to raise a substantial constitutional question. Judge Robert Smith dissented from the dismissal and voted to retain the appeal. In so doing, Judge Smith challenged the other judges to consider the proper contours of the substantiality requirement.

Petitioner Alan Kachalsky, a solo practitioner, wanted to carry a concealed pistol for self-protection but knew it would be a "long shot to get authorization."[32] When Judge Susan Cacace denied Kachalsky's application, he commenced an article 78 proceeding to review the determination.[33] The New York Appellate Division, Second Department, confirmed the determination and denied the petition, holding petitioner "failed to demonstrate 'proper cause' for the issuance of a 'full carry' permit" as required by the New York Penal Law.[34] Further, it held that "respondent's determination was not arbitrary or capricious."[35] The terse opinion did not address any of petitioner's constitutional claims.

Apparently, however, on appeal to the New York Court of

30. *See, e.g.*, Disimone v. Adler, 14 N.Y.3d 764 (2010); Sieger v. Sieger, 14 N.Y.3d 750 (2010); W. N.Y. Land Conservancy, Inc. v. Cullen, 13 N.Y.3d 904 (2009).

31. Kachalsky v. Cacace, 925 N.E.2d 80 (N.Y. 2010).

32. Joel Stashenko, *Smith Takes Judges to Task for Failure to Find Substantial Constitutional Issue in Gun Case*, N.Y. L.J., Mar. 4, 2010.

33. Kachalsky v. Cacace, 884 N.Y.S.2d 877 (App. Div. 2009).

34. *Id.*

35. *Id.*

Appeals, petitioner argued that the Penal Law violates the Second Amendment to the United States Constitution.[36] Namely, petitioner raised the following two issues: "(1) whether the Second Amendment limits the powers of the states, as well as of the federal government; and (2) whether a prohibition on carrying concealed weapons without a showing of proper cause is consistent with the Second Amendment."[37]

In a rare written dissent[38] from the court's dismissal of the appeal, Judge Smith stated that the issues raised were substantial.[39] Judge Smith reasoned:

> The first [issue] is of such great substance, and current importance, that the Supreme Court has granted certiorari to consider it [McDonald v. City of Chicago, 130 S.Ct. 48 (2009)]. The second issue, in light of [District of Columbia v. Heller, 128 S.Ct. 2783 (2008)], unquestionably presents fair ground for litigation. On neither issue could petitioner's case, by any remote stretch, be called frivolous or fanciful.[40]

Judge Smith opined that the definition of "substantial" had become "so flexible that it confers on us, in effect, discretion comparable to that we have in deciding whether to grant permission to appeal under CPLR 5602."[41]

In so arguing, Judge Smith questioned whether the court has such wide latitude in determining whether to retain an appeal on constitutional grounds. He recognized that, if it had discretion concerning whether to retain the appeal, there was "a perfectly reasonable argument" for the Court to wait until the United States Supreme Court decided *McDonald*.[42] However, given that the appeal was as of right, Judge Smith questioned whether the Court of Appeals had such discretion.

36. *Kachalsky*, 925 N.E.2d at 81-82.
37. *Id.* at 81.
38. Stashenko, *supra* note 32.
39. *Kachalsky*, 925 N.E.2d at 81.
40. *Id.*
41. *Id.* at 80.
42. *Id.* at 81.

He wrote, "I would not quarrel with that exercise of discretion, if I thought the discretion existed. I think, however, that petitioner has a constitutional right to have us hear this appeal, and that's all there is to it."[43]

IV. Elimination of the Requirement of "Substantiality"

In his *Kachalsky* dissent, Judge Smith raises a serious concern. The court is using the requirement of "substantiality" to invoke discretion that it should not, by definition, have on appeals as of right. This practice is reinforced by Karger's authoritative treatise, which explains the requirement of substantiality as akin to the standard for certiorari at the United States Supreme Court.[44] Through the requirement of substantiality, the Court of Appeals has some measure of discretion whether to retain an appeal on constitutional grounds and, therefore, this type of appeal "as of right" is not really "as of right."

Neither the CPLR nor the New York State Constitution requires that the constitutional question be "substantial."[45] If the New York Legislature intended for the Court of Appeals to have discretion on these appeals: (1) it would not have described them as appeals "as of right" and, further, (2) there would be no distinction between appeals as of right pursuant to CPLR 5601 and motions for leave to appeal pursuant to CPLR 5602.

This invocation of discretion is problematic because it may serve to deprive an aggrieved litigant of a proper appeal. In addition, it is a way for the court to avoid addressing the merits of difficult, politically charged issues. Indeed, the issue in *Kachalsky* involved the highly politicized debate about the scope of the federal constitutional right to bear arms. Further, for example, other recent dismissals of appeals as of right included constitutional issues affecting sex offender

43. *Id.*

44. KARGER, *supra* note 15, § 7:5, at 226.

45. *See* N.Y. CONST. art. VI, § 3(b)(1)-(2); *see also* N.Y. C.P.L.R. 5601(b)(1)-(2) (McKinney 2010).

commitment,[46] state executive power,[47] public school standards and enrollment policies,[48] marriage and domestic partnership laws,[49] public university funding,[50] the state budget,[51] and judicial pay.[52]

The stated justification for invoking a requirement of "substantiality" is to prevent counsel from crafting frivolous constitutional claims to manufacture an appeal to the Court of Appeals.[53] This concern, however, is exaggerated. Likewise, other existing and proposed safeguards could prevent frivolous constitutional arguments without the court invoking discretion that it should not have on these appeals.

From January 1990 to May 2010, New York's highest court dismissed sua sponte 197 civil appeals "upon the ground that

46. Martin v. Goord, 845 N.Y.S.2d 524 (App. Div. 2007) (whether Department of Correctional Services' standardization of sex offender programs and resulting policy changes violated the ex post facto clause of State or Federal Constitution), *appeal dismissed*, 883 N.E.2d 365 (N.Y. 2008).

47. McKinney v. Comm'r of N.Y. State Dep't of Health, 840 N.Y.S.2d 6 (App. Div. 2007) (whether law authorizing State Department of Health to reorganize hospitals and nursing homes unconstitutionally delegated legislative authority to the executive branch), *appeal dismissed*, 874 N.E.2d 735 (N.Y. 2007).

48. Paynter v. State, 735 N.Y.S.2d 337 (App. Div. 2001) (whether reliance on standardized test scores violates constitutional right to a sound education), *appeal dismissed*, 771 N.E.2d 832 (N.Y. 2002) (Judge George Bundy Smith and Judge Ciparick dissenting and voting to retain jurisdiction).

49. Slattery v. City of New York, 697 N.Y.S.2d 603 (App. Div. 1999) (whether New York City exceeded its authority in enacting domestic partnership law), *appeal dismissed*, 727 N.E.2d 1253 (N.Y. 2000).

50. Weinbaum v. Cuomo, 631 N.Y.S.2d 825 (App. Div. 1995) (whether disparate funding of CUNY and SUNY violated equal protection clause), *appeal dismissed*, 664 N.E.2d 506 (N.Y. 1996) (Judge George Bundy Smith dissented and voted to retain jurisdiction "on the ground that the allegations of racial discrimination in the funding of City University of New York [CUNY] and State University of New York [SUNY] present substantial constitutional questions and support an appeal as of right . . . .").

51. Schulz v. Silver, 629 N.Y.S.2d 316 (App. Div. 1995) (whether, absent the passage of a budget and an emergency situation, any appropriations or expenditures by the State Legislature are unconstitutional), *appeal dismissed*, 658 N.E.2d 216 (N.Y. 1995).

52. Davis v. Rosenblatt, 559 N.Y.S.2d 401 (App. Div. 1990) (whether disparity in wages among judges of various counties violates equal protection clause of State and Federal Constitutions), *appeal dismissed*, Higgins v. Rosenblatt, 567 N.E.2d 976 (N.Y. 1991).

53. KARGER, *supra* note 15, § 7:5, at 226.

no substantial constitutional question is directly involved."[54] This is an average of less than ten such dismissals per year—with some years seeing as few as one or two such dismissals and other years having more than twenty. Of those appeals, it is difficult to discern from the decretal entry which were dismissed for lack of substantiality and which were dismissed because the constitutional question was not directly involved. Nevertheless, a survey was undertaken of all 197 decisions on the orders appealed from and dismissed during this twenty-year time frame. Of these decisions, a very insignificant number (roughly forty-three)[55] addressed a constitutional issue.

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54. The quoted language is the wording of the boilerplate decretal entry the Court uses to dismiss constitutional appeals sua sponte. Using these key words, in May 2010, the following search query was performed in the Westlaw database "NY-CS": "COURT (HIGH) & DISMISSED /S APPEAL /S "SUA SPONTE" /S "SUBSTANTIAL CONSTITUTIONAL QUESTION" /S INVOLVED & DATE (AFT 1989)." This search was, therefore, limited to sua sponte dismissals.

During that same time, based upon the official reporter's summaries, the Court appears to have retained roughly seventy-eight appeals on constitutional grounds. In May 2010, the following search query was performed in the Westlaw database "NY-ORCS": "CO (HIGH) AND (APPEAL /2 "CONSTITIONAL GROUNDS") AND DATE (AFT 1989) % DISMISSED." This search includes constitutional question appeals that were not the subject of a sua sponte dismissal inquiry and were, thus, decided on the merits. There are, however, some limits to this search. First, it does not include constitutional question appeals that were placed on sua sponte dismissal track but were retained by the Court. Second, the search does not include appeals on constitutional grounds that were not put on sua sponte dismissal track but still did not proceed to disposition on the merits (e.g., dismissals for failure to timely perfect). It is believed that the number of such cases, if there are any, is very small. Also, the search is based on decision dates and not filing dates; therefore, the results may include cases filed before 1990 but decided after. Again, however, this would be a very small number of decisions.

My gratitude extends to Stuart Cohen, Frances Murray and James Costello for helping craft the search and informing me of its limitations.

55. *See* Madireddy v. Madireddy, 886 N.Y.S.2d 495 (App. Div. 2009), *appeal dismissed*, 925 N.E.2d 96 (N.Y. 2010); W. N.Y. Land Conservancy, Inc. v. Cullen, 886 N.Y.S.2d 303 (App. Div.), *appeal dismissed*, 922 N.E.2d 880 (N.Y. 2009); Attea v. Tax Appeals Tribunal, 883 N.Y.S.2d 610 (App. Div.), *appeal dismissed*, 918 N.E.2d 955 (N.Y. 2009); Potter v. Town Bd. of Aurora, 875 N.Y.S.2d 414 (App. Div.), *appeal dismissed*, 910 N.E.2d 1006 (N.Y. 2009); Mill River Club, Inc. v. N.Y. State Div. of Human Rights, 873 N.Y.S.2d 167 (App. Div.), *appeal dismissed*, 910 N.E.2d 428 (N.Y. 2009); *In re* Bishop, 863 N.Y.S.2d 1 (App. Div. 2008), *appeal dismissed*, 906 N.E.2d 1079 (N.Y. 2009); Friendly Car Wash Main Street, Inc. v. Comm'r of Labor, No. 504440, 2009

WL 105107 (N.Y. App. Div. Jan. 5, 2009), *appeal dismissed*, 906 N.E.2d 1065 (N.Y. 2009); *In re* Land Master Montg I, LLC 863 N.Y.S.2d 692 (App. Div.), *appeal dismissed*, 900 N.E.2d 551 (N.Y. 2008); Syndicated Commc'n Venture Partners IV, LP v. BayStar Capital, L.P., 859 N.Y.S.2d 125 (App. Div.), *appeal dismissed*, 896 N.E.2d 85 (N.Y. 2008); Junk'n Doughnuts Inc. v. Dep't of Consumer Affairs of New York, 855 N.Y.S.2d 59 (App. Div.), *appeal dismissed*, 892 N.E.2d 856 (N.Y. 2008); Kosich v. State Dept. of Health, 854 N.Y.S.2d 551 (App. Div.), *appeal dismissed*, 892 N.E.2d 856 (N.Y. 2008); Leyse v. Domino's Pizza LLC, 853 N.Y.S.2d 38 (App. Div.), *appeal dismissed*, 892 N.E.2d 395 (N.Y. 2008); Marino v. Kahn, 855 N.Y.S.2d 560 (App. Div.), *appeal dismissed,* 892 N.E.2d 395 (N.Y. 2008); Kessler v. Hevesi, 846 N.Y.S.2d 56 (App. Div. 2007), *appeal dismissed*, 889 N.E.2d 489 (N.Y. 2008); Graham v. Dunkley, 852 N.Y.S.2d 169 (App. Div.), *appeal dismissed*, 889 N.E.2d 484 (N.Y. 2008); Davenport v. Stein, 845 N.Y.S.2d 253(App. Div. 2007), *appeal dismissed*, 886 N.E.2d 789 (N.Y. 2008); Martin v. Goord, 845 N.Y.S.2d 524 (App. Div. 2007), *appeal dismissed*, 883 N.E.2d 365 (N.Y. 2008); Love'M Sheltering, Inc. v. County of Suffolk, 824 N.Y.S.2d 98 (App. Div. 2006), *appeal dismissed*, 881 N.E.2d 1198 (N.Y. 2008); Street Vendor Project v. City of New York, 841 N.Y.S.2d 79 (App. Div.), *appeal dismissed*, 879 N.E.2d 168 (N.Y. 2007); St. Joseph Hosp. of Cheetowaga. v. Novello, 840 N.Y.S.2d 263 (App. Div.), *appeal dismissed*, 878 N.E.2d 606 (N.Y. 2007); DiFrancesco v. County of Rockland, 839 N.Y.S.2d 105 (App. Div.), *appeal dismissed*, 877 N.E.2d 296 (N.Y. 2007); McKinney v. Comm'r of N.Y. State Dep't of Health, 840 N.Y.S.2d 6 (App. Div.), *appeal dismissed*, 874 N.E.2d 735 (N.Y. 2007); Festa v. N.Y.C. Dep't of Consumer Affairs, 37 A.D.3d 343 (1st Dep't), *appeal dismissed*, 9 N.Y.3d 858 (2007); *In re* Estate of Rose BB, 35 A.D.3d 1044 (3d Dep't 2006), *appeal dismissed*, 8 N.Y.3d 936 (2007); Kaplan v. Julian, 35 A.D.3d 1291 (4th Dep't 2006), *appeal dismissed*, 8 N.Y.3d 395 (2007); Cobos v. Dennison, 34 A.D.3d 1325 (4th Dep't 2006), *appeal dismissed*, 8 N.Y.3d 851 (2007); *In re* Guardianship of Chantel Nicole R., 34 A.D.3d 99 (1st Dep't 2006), *appeal dismissed*, 8 N.Y.3d 840 (2007); Landsman v. Village of Hancock, 296 A.D.2d 728 (3d Dep't), *appeal dismissed*, 99 N.Y.2d 529 (2002); Paynter v. Stone, 290 A.D.2d 95 (4th Dep't 2001), *appeal dismissed*, 98 N.Y.2d 644 (Smith, J. and Ciparick, J. dissent and vote to retain jurisdiction); DiRose v. N.Y. State Dep't of Corr. Servs., 276 A.D. 842 (3d Dep't 2000), *appeal dismissed*, 96 N.Y.2d 850 (2001); MacFarlane v. Village of Scotia, 241 A.D.2d 574 (3d Dep't 1997), *appeal dismissed*, 95 N.Y.2d 930 (2000); Santiago v. Bristol, 273 A.D.2d 813 (4th Dep't), *appeal dismissed*, 95 N.Y.2d 827 (2000); Slattery v. City of New York, 266 A.D.2d 24 (1st Dep't 1999), *appeal dismissed*, 94 N.Y.2d 897 (2000); Children's Vill. v. Greenburgh Eleven Teachers' Union Fed'n of Teachers, Local 1532, 685 N.Y.S.2d 754 (App. Div.), *appeal dismissed*, 716 N.E.2d 178 (N.Y. 1999); Helgans v. Plurad, 680 N.Y.S.2d 648 (App. Div. 1998), *appeal dismissed*, 711 N.E.2d 639 (N.Y. 1999); Gulotta v. State, 645 N.Y.S.2d 41 (App. Div.), *appeal dismissed*, 674 N.E.2d 332 (N.Y. 1996); Weinbaum v. Cuomo, 631 N.Y.S.2d 825 (App. Div. 1995), *appeal dismissed*, 664 N.E.2d 506 (N.Y. 1996); Kraebel v. N.Y.C. Dep't of Fin., 629 N.Y.S.2d 42 (App. Div.), *appeal dismissed*, 658 N.E.2d 216 (N.Y. 1995); Schulz v. Silver, 629 N.Y.S.2d 316 (App. Div.), *appeal dismissed*, 658 N.E.2d 216 (N.Y. 1995); Penfield Tax Protest Grp. v. Yancey, 621 N.Y.S.2d 256 (App. Div. 1994), *appeal dismissed*, 650 N.E.2d 1318 (N.Y. 1995); *In re* Rowe, 595 N.Y.S.2d 499 (App. Div.), *appeal dismissed*, 625

Further, of those roughly forty-three decisions that did address a constitutional issue, most also raised non-constitutional issues, suggesting that some of the appeals were dismissed on the ground that the constitutional question was not directly involved. Because the court publicly issues only the one-sentence decretal, it is difficult to know just how many of these appeals were dismissed for lack of substantiality—but even if all of them were dismissed on this basis, it only amounts to about forty-three appeals in the course of twenty years. This is hardly a floodgate of work for the court.

Further, the roughly 154 remaining decisions from which an appeal was taken did not address or did not involve a discernible constitutional issue. This would appear to suggest that the constitutional questions raised on these appeals were either not raised below or not directly involved (after all, if the decision below does not mention any constitutional issues, the decision very likely rests on other, independent, non-constitutional grounds).

Given the elusive nature of the court's one-sentence decretal, it is admittedly a very limited gauge to review the decisions from which appeals were taken to assess whether the appellants raised a substantial constitutional issue in the courts below. Indeed, the decision on the appellate division order appealed from in *Kachalsky* did not address any constitutional issues.[56] Nevertheless, the decisions are a window into what types of issues are being raised and addressed in the courts before the appeal is taken to the Court of Appeals.

That said, it simply does not appear that the Court of Appeals would be overburdened if the "substantiality" requirement were eliminated. Certainly, one might argue that the reason that there are only 197 such dismissals in the past twenty years is because of the substantiality requirement; in other words, it could be argued that there is an insignificant number of these appeals because the hurdle of substantiality

N.E.2d 587 (N.Y. 1993); Duffy v. Wetzler, 579 N.Y.S.2d 684 (App. Div.), *appeal dismissed*, 592 N.E.2d 798 (1992); Davis v. Rosenblatt, 599 N.Y.S.2d 401 (App. Div. 1990), *appeal dismissed*, Higgens v. Rosenblatt, 567 N.E.2d 976 (N.Y. 1991).

56. Kachalsky v. Cacace, 884 N.Y.S.2d 877 (App. Div. 2009).

dissuades litigants from attempting an appeal as of right. However, the requirement of substantiality could actually have the opposite effect of incentivizing more frivolous appeals. To the extent that "substantiality" imbues the court with discretion, and most attorneys lack a solid understanding of the intricacies of the court's jurisdiction, they are arguably *more likely* to file an appeal as of right—after all, they might perceive that there is a slight chance the court will exercise its discretion and retain the appeal. "Substantiality" is a standard, which Karger observes is "not defined with mechanical precision."[57] The uncertainty of such a vast grey area, combined with a general ignorance of the technicalities of the court's jurisdiction, is likely to lead to more appeals, not less.[58]

There are intellectually honest ways for the court to prevent frivolous appeals on invented constitutional grounds without invoking discretion that it is not technically granted by statute or New York State Constitution. First and foremost, the requirement that the constitutional question is "directly involved" is expressly stated in both the CPLR and the State Constitution.[59] As discussed, this strict requirement appears to dispose of many, if not most, of the purported appeals as of right on constitutional grounds. Of course, given that the court's decretal entry does not decode whether the dismissal is for lack of substantiality or because the question is not directly involved, it is admittedly difficult to make any hard and fast pronouncements, other than the law and the public would benefit from less cryptic entries from the New York Court of Appeals.

Second, to the extent there is concern that litigants will manufacture constitutional issues to get the appeal heard "as of right," limitations on reviewability serve to stem this abuse. Significantly, the court's power of review is limited to those

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57. KARGER, *supra* note 15, § 7:5, at 226.

58. Further, one might argue that, if very few of the decisions appeal from actually addressed a constitutional issue, perhaps this is evidence that a constitutional issue is being manufactured for the purpose of bringing an appeal. This argument is irrelevant because, if the issue is only first raised on appeal, it is not preserved and, therefore, not reviewable by the Court. *See infra* notes 59-60 and accompanying text.

59. *See* N.Y. CONST. art. VI, § 3(b)(1); N.Y. C.P.L.R. 5601(b)(1).

issues that have been preserved in the courts below.[60] That is, the question must have been raised before appeal to the court. Therefore, a litigant could not devise a frivolous constitutional argument and raise it for the first time on appeal solely for the purpose of obtaining an appeal as of right. Preservation rules apply to appeals as of right.[61] "[U]nless the constitutional question was initially properly raised in the court of first instance, it will not be reviewable by the [New York] Court of Appeals."[62] To be sure, the court has stated that "it is better . . . not to resolve constitutional questions unaddressed by the lower courts."[63]

In addition, on a direct appeal from a court of original jurisdiction, the Court of Appeals will consider only the constitutional question.[64] Therefore, it would not make sense to manufacture a frivolous constitutional claim to create an appeal, because the court will not address the other, non-constitutional issues raised on the appeal.

To further safeguard against the stated concerns that purport to justify the "substantiality requirement," this limitation on the court's review should also be extended to appeals from appellate division judgments. Currently, on appeals as of right from the appellate division, the court will consider all questions properly within its jurisdiction, even those that do not raise constitutional challenges.[65] However, if the court only reviewed the constitutional question, it would negate any incentive for a litigant to invent a flimsy constitutional argument just to gain an appeal. This would address the concerns that purport to justify the substantiality requirement without furnishing the court with discretion that makes an appeal "as of right" illusory.

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60. KARGER, *supra* note 15, § 14:1, at 495.

61. DAVIES ET AL., *supra* note 11, § 15:5; *id.* § 15:3.

62. KARGER, *supra* note 15, § 17:5, at 599.

63. Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 825 (2003) (stating that is was better for the Court not to review a constitutional question not discussed at trial court and only mentioned in passing by the Appellate Division); *see also* KARGER, *supra* note 15, § 14:1, at 498.

64. KARGER, *supra* note 15, § 7:2, at 222 (citing N.Y. CONST. art. VI, § 3(b)(2)).

65. *Id.* § 7:2, at 223.

Conclusion

The Court of Appeals' practice requiring that an appeal as of right pursuant to CPLR 5601(b) raise a "substantial" constitutional question is not loyal to the explicit text of the CPLR or the New York State Constitution. Indeed, to the extent that the requirement invokes discretion for the court to determine which appeals on constitutional grounds to retain, it subverts the basic structure of both the CPLR and the State Constitution, which contemplate appeals as of right as distinct from appeals that necessitate permission from the court.

The stated justification for the requirement of "substantiality" is unsound and redundant of other existing limitations on appealability and reviewability—namely, the requirement that the constitutional question be directly involved in deciding the case and the requirement that the question be preserved for the court's review. Moreover, the court will only review the constitutional challenges on a direct appeal. If the court expanded this reviewability limitation to appeals from the appellate division, it would significantly eliminate the incentive for an aggrieved litigant to manufacture a frivolous constitutional question in order to gain the right to appeal—because the constitutional question is the only issue the court would address on the appeal.

In sum, the judicially created policy of requiring "substantiality" should be eliminated. There are existing and sensible safeguards that do not require the court to furnish itself with discretion that is not conferred by statute or constitution.