INTRODUCTION

When the Supreme Court dismisses an appeal from a state's highest court for want of a substantial federal question, the dismissal stands as binding precedent on all lower courts. Nevertheless, the Supreme Court itself is not astringently bound by the decision under the rule of stare decisis. This article will consider this ambivalent practice, concentrating on its undesirable repercussions and the questions it raises about meaningful appellate review.

In suggesting some corrective measures for problems raised by this practice, the discussion raises questions about what should be the res judicata/collateral estoppel effect of dismissals for want of a substantial federal question. The emphasis throughout the article is on the need for a principled and consistent Supreme Court practice.

Congress provided for Supreme Court review of state court decisions in 28 U.S.C. section 1257. The statute permits review by either appeal or certiorari, depending on the nature of the issues presented. A basic difference between appeal and certiorari, at

3. 28 U.S.C. § 1257 (1976) provides:
   State Courts; appeal; certiorari
   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. June 25, 1948, c. 646, 62 Stat. 929.
4. 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 4011 (1977) [hereinafter cited as WRIGHT & MILLER]. There is no requirement for diversity of citizenship between the parties. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 3.1 (5th ed. 1978) [hereinafter cited as SUPREME COURT PRACTICE]. The statute requires the decree to be final and "rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257 (1976).
least in theory, is that the Court's jurisdiction by appeal is obligatory, and thus, a matter of right for the litigants. However, this right only arises when the state court either (1) invalidates a federal statute or treaty, or (2) validates a state statute in the face of a federal constitutional challenge. Although appeal may be available to a particular litigant, an appellant may choose to invoke the Court's jurisdiction by certiorari. The certiorari provision of section 1257 covers the entire range of federal questions that can arise in a state court, even though the granting of certiorari is discretionary. This allows the Court to consider "prudence and politics" in deciding whether to hear a case.

THE SUBSTANTIAL FEDERAL QUESTION REQUIREMENT

Not every case that satisfies the jurisdictional requirements for mandatory appeal receives plenary consideration. Plenary consideration—a full briefing on the merits, oral argument and a full opinion—follows a demonstration that the issues raised on appeal are "substantial" from the standpoint of federal constitutional protections. Some commentators have suggested that in practice the grant of plenary consideration parallels the discretionary element in the grant of certiorari.

Once the Supreme Court has considered the jurisdictional

See generally WRIGHT & MILLER, supra at § 4007 for a discussion of these limitations.

5. WRIGHT & MILLER, supra note 4, at § 4003. The Court has relied on the distinction between mandatory and discretionary review in determining that summary disposition on appeal is an adjudication on the merits. Since review is prescribed by 28 U.S.C. § 1257, the Court reasons that a denial of review is tantamount to a ruling on the merits. 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, 125-27 (1978) [hereinafter cited as PRECEDENTIAL EFFECT].


7. Id. at § 1257(3).

8. SUPREME COURT PRACTICE, supra note 4, at § 3.5. As the discussion below will indicate, a choice to invoke jurisdiction by certiorari, rather than to take an appeal, may have less effect on the litigants themselves than on those who will later consider the case as precedent. See notes 19-56 and accompanying text infra.

9. SUPREME COURT PRACTICE, supra note 4, at § 4.1.


11. Note, Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent, 52 B.U.L. REV. 373, 375 (1972) [hereinafter cited as Summary Disposition]. See also note 54 infra.

12. SUPREME COURT PRACTICE, supra note 4, at § 4.28. The substantial federal question requirement has developed in Court decisions over the years, initially in response to frivolous appeals. WRIGHT & MILLER, supra note 4, at § 4014. The doctrine is now contained in the Rules of the Supreme Court. Sup. Ct. R. 15.

13. See WRIGHT & MILLER, supra note 4, at § 4014; Frankfurter & Landis, The Business of the Supreme Court at October Term, 1929, 44 HARV. L. REV. 1, 12-14
statement outlining the substantial federal question claim, the Court will entertain the motion to dismiss based on the lack of a substantial federal question.\textsuperscript{14} It is at this point that an arguably discretionary element intervenes in the mandatory appeal provision.\textsuperscript{15} If the Court grants a motion to dismiss on this basis, not only is plenary consideration denied, but the dismissal stands as a ruling on the merits to be afforded full precedential weight.\textsuperscript{16} This is a curious and somewhat paradoxical situation. The reason that a dismissal is a ruling on the merits follows directly from the mandatory nature of the appeal;\textsuperscript{17} yet the summary nature of the disposition seems to directly infringe on the obligations imposed by section 1257.\textsuperscript{18} In spite of this, the practice of summary dismissals does serve what some believe is an essential function—conserving the resources of an overextended Supreme Court.\textsuperscript{19} The inconsistencies in the practice, however, are basic to the problem presented and discussed in this article.

THE DILEMMA: A BINDING DETERMINATION BUT NOT NECESSARILY AUTHORITATIVE

Cases dismissed from the Supreme Court for want of a substantial federal question, while binding precedent as to lower court decisions, are not binding on the Court itself under the rule of stare decisis.\textsuperscript{20} While this inconsistency may not seem harmful, it does raise questions regarding the quality of appellate review when summary dispositions are granted. For example, in \textit{Edelman v. Jordan},\textsuperscript{21} the Court declared that although the Court's summary dispositions have precedential value which fully binds lower courts, they do not have the same value to the Court itself that a case receiving plenary consideration does.\textsuperscript{22} The Court has reinforced this opinion in subsequent cases.\textsuperscript{23}

\textsuperscript{14} Sup. Ct. R. 16. There are two methods of summary disposition of cases on appeal from state courts: (1) summary affirmation or reversal, and (2) dismissal for want of a substantial federal question. \textit{Wright \& Miller, supra} note 4, at § 4014.
\textsuperscript{15} \textit{Business of the Supreme Court, supra} note 13, at 12-14.
\textsuperscript{16} \textit{Supreme Court Practice, supra} note 4, at § 4.29.
\textsuperscript{17} See text at note 72 \textit{infra}.
\textsuperscript{18} Comment, \textit{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, 519-20 (1976).
\textsuperscript{19} \textit{See Supreme Court Practice, supra} note 4, at § 4.28.
\textsuperscript{20} \textit{Wright \& Miller, supra} note 4, at § 4014.
\textsuperscript{21} 415 U.S. 651 (1974).
\textsuperscript{22} Id. at 671. \textit{See Rehnquist, Whither the Courts}, 60 A.B.A.J. 787, 790 (1974).
\textsuperscript{23} Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180-81
At the time of the Edelman decision, the question of how much deference lower courts owe summary dispositions was unclear, and confusion and conflict developed among the lower courts.\(^{24}\) The Court's decision in Hicks v. Miranda\(^ {25}\) ended the conflict by declaring that summary disposition of an appeal, unlike the denial of a writ of certiorari, is an adjudication on the merits, and must therefore be treated as binding precedent by lower courts.\(^ {26}\) The current situation is that lower courts are bound under Hicks to regard summary dispositions as precedent while the Supreme Court is free under Edelman to give these dispositions less of an effect from a stare decisis standpoint.\(^ {27}\)

This practice is particularly troublesome for two reasons. First, lower courts frequently have difficulty interpreting the summary dispositions.\(^ {28}\) Since the Court does not indicate the ground for the ruling, lower courts are often confused as to what the decision means.\(^ {29}\) Second, the quality of review in these cases may fall far short of those given plenary consideration.\(^ {30}\) Justice Brennan has voiced concern that the Court's summary dispositions fail to provide any guidance to lower courts about the true meaning of the precedent set by a particular case.\(^ {31}\) This article will demonstrate that this practice undermines an intended function of the Court: assuring uniformity among the lower courts.\(^ {32}\)

Questions about the quality of review in summary dispositions are most acute when the practice is used in a case which will necessarily result in a ruling on the merits.\(^ {33}\) Asserting that the Court is obligated to "follow procedures which provide both fairness to litigants and conditions conducive to informed and considered de-

\(^{24}\) Precedential Effect, supra note 5, at 117-18.
\(^{25}\) 422 U.S. 332 (1975).
\(^{26}\) See id. at 343-45.
\(^{27}\) Supreme Court Practice, supra note 4, at §§ 4.30 & 4.31.
\(^{28}\) Precedential Effect, supra note 5, at 117.
\(^{29}\) However, the Court had explained in Hicks that decisions should be considered binding only if the issues presented were "sufficiently the same." 422 U.S. at 345 n.14.
\(^{30}\) Precedential Effect, supra note 5, at 127.
\(^{32}\) See notes 58-74 and accompanying text infra.
\(^{33}\) See generally Precedential Effect, supra note 5.
cision," one commentator concludes that the Court may not be making informed judgments in its summary disposition practice.34 This serious assertion finds support when one considers the Court's continuing emphasis on the importance of oral arguments in appellate advocacy.35

There are two approaches for substantiating a claim of less-than-quality review in a case receiving summary treatment. One approach is to determine the number of cases treated summarily and conclude that the higher the number of summary dispositions, the lower the quality of those dispositions.36 While this argument is persuasive, it is questionable because these same statistics are used to support the efficacy of the summary disposition practice in enabling the Court to control its workload.37

The other approach considers only distinct classes of cases, yet appears to be the stronger of the two. This method compares cases receiving summary disposition with those subsequent cases which have made the same federal claim, and yet have been given plenary consideration.38 This seems to be a pure reasoning process based entirely on analogy—the more similarity in the facts of the cases, the stronger the inference that the summary disposition of the first case was improvident. When the time lapse between the cases is short, an inference of less-than-meaningful review in the first case is heightened. This approach is well illustrated by the Court's dismissal of an appeal for want of a substantial federal question in Orsini v. Blasi.39 In Orsini, the father of an illegitimate child appealed from an adverse judgment in the Court of Appeals of New York.40 Orsini had challenged a New York adoption statute on equal protection grounds.41 The statute required consent of the mother before a child born out of wedlock could be adopted, but

36. Comments, The Evolution of Equal Protection—Education, Municipal Services, and Wealth, 7 Harv. C.R.-C.L. L. Rev. 103, 170 (1972); see also Supreme Court Practice, supra note 4, at § 4.28.
40. 36 N.Y.2d at 568, 331 N.E.2d at 486, 370 N.Y.S.2d at 511.
41. 36 N.Y.2d at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513.
did not require the consent of the child's natural father.\textsuperscript{42} This, Orsini asserted, unjustly discriminated between fathers of illegitimate children and all other parents.\textsuperscript{43}

The New York Court of Appeals upheld the constitutionality of the New York statute\textsuperscript{44} and Orsini's appeal to the United States Supreme Court was dismissed for want of a substantial federal question.\textsuperscript{45} The dismissal in \textit{Orsini} is not in itself significant. However, its significance becomes apparent when it is compared with a later case, \textit{Caban v. Mohammed}.\textsuperscript{46} In \textit{Caban} the Court invalidated the same section of the New York domestic relations law upheld in \textit{Orsini}.\textsuperscript{47} The facts of the two cases are remarkably similar,\textsuperscript{48} and in both cases the challenge was on equal protection grounds.\textsuperscript{49} The \textit{Orsini} and \textit{Caban} decisions are important because of the manner in which the Court in \textit{Caban} disposed of \textit{Orsini} as precedent, and because of the cases decided in New York after \textit{Orsini} and before \textit{Caban}.

The Court dispensed with \textit{Orsini} as having little precedential value in a footnote to the opinion.\textsuperscript{50} After indicating that the dismissal in \textit{Orsini} had indeed been a ruling on the merits entitled to precedential weight, the Court continued: "At the same time, however, our decision not to review fully the questions presented in \textit{Orsini v. Blasi} is not entitled to the same deference given a ruling after briefing, argument, and a written opinion."\textsuperscript{51} The Court made no effort to distinguish \textit{Orsini}—possibly because the cases are virtually indistinguishable—or to offer any principled reason for the \textit{Orsini} precedent.

Even a proponent of the Court's summary disposition practice would wonder about the quality of appellate review in \textit{Orsini}. Yet, the \textit{Orsini} dismissal was on the merits, standing as precedent to all lower courts. Although the Supreme Court could cavalierly dis-

\begin{itemize}
\item \textsuperscript{42} \textit{Id.} The text of the statute can be found at N.Y. \textit{[DOMESTIC RELATIONS] LAW} § 111 (McKinney 1977).
\item \textsuperscript{43} 36 N.Y.2d at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513.
\item \textsuperscript{44} See 36 N.Y.2d at 577-78, 331 N.E.2d at 492-93, 370 N.Y.S.2d at 520-21.
\item \textsuperscript{45} \textit{Orsini v. Blasi}, 423 U.S. 1042 (1976). Justices White and Brennan would have noted probable jurisdiction and set the case for oral argument. \textit{Id.}
\item \textsuperscript{46} 441 U.S. 380 (1979).
\item \textsuperscript{47} \textit{Id.} at 391 n.9.
\item \textsuperscript{48} \textit{Compare} 441 U.S. at 382-85 with 36 N.Y.2d at 589-91, 331 N.E.2d at 501-02, 370 N.Y.S.2d at 589-91. In both cases, the child's natural parents had been living together prior to the child's birth. Both Orsini and Caban established their paternity in court, and both paid child support after the relationship dissolved. \textit{Id.}
\item \textsuperscript{49} \textit{Compare} 441 U.S. at 385 with 36 N.Y.2d at 569-70, 331 N.E.2d at 487, 370 N.Y.S.2d at 513.
\item \textsuperscript{50} 441 U.S. 390 n.9.
\item \textsuperscript{51} \textit{Id.}
\end{itemize}
pose of Orsini in a footnote, the case stood as controlling precedent in five other adoption cases brought in New York before the Court's decision in Caban. These five cases demonstrate the repercussions of this incorrect practice: the adoptions proceeded on the belief that Orsini represented the controlling law. Eighteen months later, the Supreme Court demonstrated the improvidence of that dismissal by noting jurisdiction in Caban.

What explains the Orsini dismissal? It was not a change in the composition of the Court. The Court's opinion demonstrates no doctrinal change, or any other change in the legal atmosphere which would explain the complete reversal between Orsini and Caban. While it is possible that the Court turned its limited resources toward more pressing causes than Orsini's in that year, the binding effect that the decision had on lower courts filtered the harm down to five other adoption cases. Aside from the apparent unfairness to Orsini, this practice affronts the Court's duty to justify its decisions intellectually.

The Implied Promise of Supreme Court Review of Federal Questions

No guarantee of Supreme Court review of federal questions is found within the black letter of the Constitution. However, there remains much to be said for meaningful Supreme Court review for persons who advance claims of a federal constitutional right. Any argument for federal appellate review seems embedded


54. The Court's process for determining whether to grant plenary consideration in a case is the "rule of four." Four justices must agree that the issues presented warrant full consideration. Ohio ex rel. Eaton v. Price, 360 U.S. 246, 246 (1959); Summary Disposition, supra note 11, at 375-76.

55. The author believes that this is true because only three of the cases cited by the Court in support of the holding in Caban were decided after the Orsini dismissal: Quilloan v. Wolcott, 434 U.S. 246 (1978); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976).

56. See note 52 supra.

57. See note 90 and accompanying text infra.

58. This discussion concerns the availability of Supreme Court review of federal questions since it is clear that Congress could abolish the lower federal courts. L. Tribe, AMERICAN CONSTITUTIONAL LAW 33 (1978).

in the sense of fundamental justice of its advocates.60

Several arguments have been advanced to substantiate the claim that the Constitution provides for Supreme Court review of federal questions. Some assert that it was the framers' intent that Article III provide review in "all cases . . . arising under this Constitution."61 Others would argue that this review is necessary if the Supreme Court is going to carry out its essential role in the constitutional plan: "vindicating the supremacy of federal over state law (and of the Constitution over other sources of federal law)."62 Still others claim that the federal judiciary should hear all challenges to federal law.63 This seems to complement the argument that, while Congress can relegate the adjudication of Article III business to the state courts, a state court's disposition must be subject to review in the Court expressly provided for by article III, the Supreme Court.64 Finally, some urge that article III, when read in the context of the entire Constitution, clearly prescribes Supreme Court review of federal claims. Article III implements the supremacy clause.65 Its express provisions for judicial tenure and fixed compensation66 protect a function—judicial review.67 To deny the existence of that function would deprive those express provisions of any meaning.68

Any one of these answers standing alone is probably insufficient to find a guarantee of Supreme Court review. It is possible that all of them read together are at best only persuasive. But persuasive may be enough, when considered along with the congressional grant of review in section 1257.69

As discussed above, that statute provides for appellate review in two classes of cases.70 This is an appeal of right, that is, appel-

60. See generally Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 YALE L.J. 498 (1974).
64. Id. at 66.
68. Id.
70. Id. See notes 3-10 and accompanying text supra. Congress has always pro-
late review is a statutory obligation of the Court. The Court has explained that the reason summary dispositions of appeals must stand on the merits is that they arise in the Court's obligatory jurisdiction. Even if any discretionary element in the appellate jurisdiction must be prescribed by Congress, it does not necessarily follow that a ruling on the merits is also mandated when Congress makes the Court's jurisdiction mandatory.

Persuasive commentaries on the Constitution, plus the Congressional provision for appellate review, give substance to the argument that any discussion of state court competence in adjudicating federal matters is predicated on the background of Supreme Court review. It further appears that this implicit promise of Supreme Court review has been narrowed, not by statute or the Constitution, but by Supreme Court practice. The substantial federal question doctrine, and other discretionary dismissals of appeals, and notions of justiciability rooted in the "case or controversy" requirement all illustrate the abridgement of the

vided for Supreme Court review when there is a question of the repugnance of a state statute to the Constitution and the state's highest court upholds the statute. Merry, Scope of Supreme Court's Appellate Jurisdiction: Historical Basis, 47 MINN. L. REV. 53 n.1 (1963).


72. U.S. CONST. art. III. Justiciability is a term of art used to express limits placed on the federal courts by article III. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 53 (1978). Examples of the justiciability doctrine are the Court's ripeness, mootness, and standing criteria. Id. at 50-115. The Court failed to find standing in a recent taxpayer's suit challenging a conveyance of federal property to a religious college. Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 50 U.S.L.W. 4103 (U.S. Jan. 12, 1982). In his dissenting opinion, Justice Brennan classified the Court's holding as "a stark example of this un-
statute.

In addition, the substantial federal question practice parallels the problems created by the Court in another area: federal court interference with state-court proceedings under the doctrine of Younger v. Harris.\(^8\) In Younger the Court began to outline limitations on the power of federal courts to enjoin or grant declaratory relief in cases in which constitutional claims can adequately be heard in parallel state proceedings.\(^8\) While the rules of this doctrine can be described in detail,\(^8\) the Court has failed to precisely articulate the norms and policies which shape them.\(^8\) Younger, in effect, imposes an exhaustion requirement not prescribed by the Constitution\(^8\) or the Congress.\(^8\) One commentator believes that the arbitrary way the Court currently uses Younger creates the "worst of all possible worlds" by discouraging congressional amendment, and by allowing all federal courts a freedom of interpretation which is inappropriate in a constitutional context.\(^8\) The parallel between these criticisms of Younger and the substantial federal question practice is apparent.

When appeals are summarily dismissed, the Court offers no explanations, while arbitrarily binding lower courts to an elusive precedent which has no stare decisis effect on the Court itself.\(^8\) The Congressional grant of federal question jurisdiction to the Supreme Court carries with it the obligation to develop rational, functional standards to govern in matters of discretion.\(^8\) The Court has failed to meet this obligation in its practice of summarily dismissing appeals and must now re-evaluate that practice.

RESOLUTION

The Supreme Court has developed the substantial federal question doctrine and effectively created the troublesome situation that now exists: the confusion and inequity that arise from fortunate trend of resolving cases at the 'threshold' while obscuring the nature of the underlying rights and interests at stake." \(\text{Id. at 4110.}\)\(^8\)

82. 401 U.S. 37 (1971).
84. \(\text{Id. at 152-54.}\)
85. \(\text{Id. at 154.}\)
86. \(\text{Id. at 155.}\)
89. See notes 20-35 and accompanying text supra.
the Court's ambivalent practices following the dismissal of an appeal for want of a substantial federal question. The Court should now develop principled doctrines to relieve the problems caused by this incorrect practice.

THE COLLATERAL ESTOPPEL/RES JUDICATA EFFECT OF A DISMISSAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

One remedial doctrine that the Court could implement is to decide that the costs to the system and to the parties are not too great, and allow parties in narrow circumstances, such as were found in the Orsini case, either to raise a second claim, or to relitigate an issue normally barred by the preclusion doctrine.

The Restatement (Second) of Judgments uses the terms "claim preclusion" and "issue preclusion" to distinguish between res judicata and collateral estoppel. Both doctrines consider the effect of a valid and final judgment on a subsequent action involving the same parties or their privies. Collateral estoppel forecloses the relitigation of issues of fact or law actually litigated; res judicata bars the relitigation of whole causes of action, even those that could have been, but were not, litigated in the first action. The application of collateral estoppel is not restricted to later suits between the same parties or their privies; only the party against whom estoppel is invoked must have been present or represented in the prior action.

The narrow situation presented in Orsini v. Blasi suggests an exception to the usual operation of the preclusion doctrine. Orsini was limited to Supreme Court review of his federal questions on appeal, as it was not possible for him to procure a federal forum.

91. See notes 36-57 and accompanying text supra.
92. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.2 (2d ed. 1977) for a discussion of the societal interests served and efficiency promoted by the preclusion doctrine.
96. 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.442[1] (2d ed. 1980).
97. Id. at ¶ 0.405[1].
98. Id. at ¶ 0.441[3]. See generally Comments, The Collateral-Estoppel Effect to be Given State-Court Judgments in Federal Section 1983 Damage Suits, 128 U. PA. L. REV. 1471 (1980).
initially. On appeal, the Court's dismissal of Orsini's case foreclosed the availability of plenary consideration to him and was arguably not a meaningful appellate review. If Orsini had subsequently filed an action for damages against a state officer based on an unconstitutional deprivation of his right to raise his child, the action would normally be barred by collateral estoppel. Estoppel would apply, rather than res judicata, because one of the parties is different, and because the issue of constitutionality was determined in the prior action.

After the decision in Caban v. Mohammed, Orsini's action might arguably fall under an exception to collateral estoppel in the Second Restatement. In order to qualify for this exception, the issue must be one of law, and a new determination must be warranted by a change in the applicable legal context. The Reporter's Note cites Christian v. Jemison as a case exemplifying the logic of the exception. Jemison was a class action suit to enjoin a Baton Rouge, Louisiana ordinance mandating segregation on city buses. The defendant city officials contended that res judicata barred the suit, since Jemison and others had filed essentially the same action in Louisiana state court nine

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100. There was no diversity of citizenship between the parties as prescribed by 28 U.S.C. § 1332 (1976). Even if there had been diversity of citizenship between the parties, the federal courts will not act in domestic relations cases. C. Wright, LAW OF FEDERAL COURTS § 25, at 97 (3d ed. 1976).

101. See notes 38-56 and accompanying text supra.


107. Id.

108. Restatement (Second) of Judgments § 68.1, Reporter's Note at 44 (Tent. Draft No. 4, 1977).

109. 303 F.2d 52 (5th Cir. 1962).

110. Restatement (Second) of Judgments § 68.1, Reporter's Note at 44 (Tent. Draft No. 4, 1977).

111. 303 F.2d at 53.
years earlier. The Fifth Circuit found res judicata to be inapplicable because of the Supreme Court's intervening decision in Brown v. Board of Education. Under this rationale, the Supreme Court’s decision in Caban should provide the same opportunity for relitigation in Orsini as Brown provides for relitigation in Jemison.

If Caban had not intervened, the case for Orsini bringing his action against New York would be more difficult, as this situation does not seem to be precisely addressed in the Restatement. The Restatement, however, does allow an exception when the party against whom preclusion is sought could not, as a matter of law, have obtained review by an appellate court in the initial action. The Reporter's Notes indicate that this exception relates to cases involving mootness or cases in a jurisdiction limiting appeals to cases involving more than a specified amount or value. If one analogizes mootness to the substantial federal question requirement, it makes some sense to abrogate estoppel in a case like Orsini. As a matter of law, Orsini could not have secured any other federal forum for his federal question. The problems surrounding the quality of his review in the Supreme Court remain, and perhaps one way to resolve them would be to allow another opportunity for him to pursue the adjudication of his federal claim in a lower federal court as a substitute for Supreme Court review.

DOCTRINAL CHANGES ALTERING THE DIMENSIONS OF PRECEDENT

Either one of two suggested changes in Supreme Court practice could provide a solution to the dilemma: the court could either begin to give summary dismissals of appeals full stare decisis ef-

112. Id. at 54. The state court had dismissed the action on other grounds without reaching the merits of the constitutional issue. Id. at 54 n.2.
114. 423 U.S. 1042 (1976). There was arguably a continuing wrong in both Jemison and Orsini. The language of a “continuing or recurrent wrong,” while not found in the Restatement’s treatment of issue preclusion, is discussed as an exception to claim preclusion. Restatement (Second) of Judgments § 61.2(1)(e) (Tent. Draft No. 5, 1978).
115. Restatement (Second) of Judgments § 68.1(a) (Tent. Draft No. 4, 1977).
116. Restatement (Second) of Judgments § 68.1(a), Reporter's Note at 42 (Tent. Draft No. 4, 1977).
117. See notes 12-19 and note 80 and accompanying text supra.
119. See note 100 supra. Orsini was effectively locked into a state court adjudication of his constitutional claim.
fect in subsequent Court opinions, or begin to treat these dismissals of appeals the same as denials of petitions for certiorari.

Treating summary dismissals as equally authoritative would end the current ambivalence, but would not solve the problem of confusion among the lower courts.120 Nevertheless, such a doctrinal change would follow the spirit of the appeals statute, since the Court would arguably consider more carefully the merits of a case which would bind the Court as precedent.121 The Court's enhanced consideration would more closely approach meaningful review for a litigant whose case is given summary treatment.

If, on the other hand, the court chose to treat these dismissals of appeals just as denials of petitions for certiorari, they would have no binding effect whatsoever on lower courts.122 This would address the problems lower courts encounter in deciphering the meaning of a dismissal. Such a change would also prevent the repercussions observed in a situation like Orsini, where New York courts settled a number of adoption disputes based on a summary dismissal shown to be improvident eighteen months later.

The Court has explained that the practice of treating these dismissals as decisions on the merits necessarily follows from the mandatory nature of the appeals jurisdiction.123 However, the Court itself does not adhere to the logic of that argument when it gives less precedential weight to these dismissals. It is doubtful that the Court is bound in any real sense to rule on the merits in dismissals of appeals for want of a substantial federal question.124 The Court is bound to exercise principled adjudication.125 One principled approach is to remove this practice which offers no guidance to the lower courts, while it binds them on the merits.

CONCLUSION

This article has examined the possibility that a Supreme Court

120. See notes 28-32 and accompanying text supra.
121. See generally Tushnet, The Constitutional Right to One’s Good Name: An Examination of the Scholarship of Mr. Justice Rehnquist, 64 Ky. L.J. 753 (1976), for a discussion of the Court’s institutional conservatism as it is manifested in its reluctance to overturn recent decisions.
122. Denials of petitions for certiorari are not rulings on the merits. WRIGHT & MILLER, supra note 4, at § 4004.
123. Some commentators have suggested that the distinction between the Court’s mandatory and discretionary jurisdiction has eroded. See, e.g., C. WRIGHT, LAW OF FEDERAL COURTS § 107 at 548 (3d ed. 1976); Precedential Effect, supra note 5, at 123-30. The justices themselves have disagreed over the current vitality of the distinction. Id. at 126.
124. See id. at 123-30.
125. See note 90 and accompanying text supra.
dismissal of an appeal for want of a substantial federal question is not, in all cases, a meaningful appellate review. Even if a lapse in quality review does occur, lower courts must nevertheless respect the dismissal as binding precedent, while the Supreme Court is free to disregard the case without the normal constraints imposed by the rule of stare decisis. This ambivalent practice poses problems for lower courts who are firmly bound by a tenuous precedent.

Some resolution to the problem would be afforded by relaxing the collateral estoppel/res judicata consequences of these dismissals in certain narrow circumstances. A better solution would be to change Supreme Court doctrine in such a way that the Supreme Court would begin treating these dismissals in the same manner as denials of petitions for certiorari. Ending the current disparate situation through this doctrinal change would elevate the dismissal practice toward a more principled adjudication.

Michaela M. Nicolarsen—'83