University of Miami Law Review

Volume 39 | Number 5 Article 8

9-1-1985

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Elisa L. Fuller

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Elisa L. Fuller, *Hardwick v. Bowers: An Attempt to Pull the Meaning of Doe v. Commonwealth's Attorney Out of the Closet*, 39 U. Miami L. Rev. 973 (1985)
Available at: https://repository.law.miami.edu/umlr/vol39/iss5/8

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Hardwick v. Bowers: An Attempt to Pull the Meaning of *Doe v. Commonwealth's Attorney* Out of the Closet

I. INTRODUCTION

Two years after a succession of cases addressing the constitutional right to privacy culminated in the Supreme Court's decision in *Roe v. Wade*,[1] a group of male homosexuals challenged the constitutionality of a Virginia statute criminalizing sodomy.[2] A three judge district court declared the statute constitutional and denied the plaintiffs' prayer for an injunction against the enforcement of the statute.[3] On appeal to the Supreme Court,[4] the Court affirmed the lower court's decision with a one line statement, "Affirmed on appeal from D.C.E.D. Va."[5] Legal scholars harshly criticized the Court's action because the decision came in the midst of great speculation as to the extent to which the Constitution barred state

1. 410 U.S. 113 (1973) (criminal abortion statutes violated the constitutional right to privacy). Prior right to privacy cases included Eisenstadt v. Baird, 405 U.S. 438 (1972) (state may not bar access of unmarried persons to contraceptives); Stanley v. Georgia, 394 U.S. 557 (1969) (right to privacy in conjunction with the first amendment prevents state regulation of pornography when viewed in private at home); Griswold v. Connecticut, 381 U.S. 479 (1965) (statute that forbade the use of contraceptives by married couples unconstitutional).

2. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975). *See infra* note 54 for text of the statute.

3. The court initially declared the statute, which prohibited all sodomy, whether between married or unmarried persons, constitutional on its face. The majority went on, however, to distinguish earlier privacy cases as premised on the sanctity of marriage. 403 F. Supp. at 1200. It is unclear, therefore, whether the court really held the statute unconstitutional on its face, or just as applied to homosexuals.

4. *See* 28 U.S.C. § 1253 (1982) (provides for direct appeal to the Supreme Court from a three judge district court order denying a permanent injunction).

5. 425 U.S. 901 (1976).

regulation of private sexual behavior between consenting adults.[6] Nine years later, both state and federal courts are still struggling to interpret the meaning of the Court's ruling in that case.[7]

Appellant, Michael Hardwick, was a homosexual who regularly engaged in acts proscribed by the Georgia sodomy statute[8] and alleged that he would continue to do so in the future. On August 3, 1982, Atlanta police arrested and charged Hardwick with committing sodomy in his home with another consenting male adult. After a hearing, Hardwick was bound over to the Superior Court. The District Attorney, however, decided not to present the case to the grand jury unless further evidence developed.

Subsequently, Hardwick filed a complaint in the United States District Court for the Northern District of Georgia requesting the

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6. *See, e.g.*, P. BATOR, D. SHAPIRO, P. MISHKIN, & H. WESCHLER, HART & WESCHLER'S THE FEDERAL COURT & THE FEDERAL SYSTEM 159 n.1 (Supp. 1981); Comment, *The Constitutionality of Sodomy Statutes*, 45 FORDHAM L. REV. 553 n.4 (1976); *Recent Decisions*, 15 DUQ. L. REV. 123 (1976). *But see* Comment, Doe v. Commonwealth's Attorney: *Closing the Door to a Fundamental Right of Sexual Privacy*, 53 DEN. L.J. 553, 555 (1976).

7. The following cases cited *Doe* as precedent for the constitutionality of statutes regulating sodomy: Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289, 292 (5th Cir. 1985) (declared a sodomy statute as applied to homosexuals constitutional); Dronenburg v. Zech, 741 F.2d 1388, 1391-92 (D.C. Cir.), *reh'g en banc denied*, 746 F.2d 1579 (D.C. Cir. 1984) (relying on *Doe* to uphold the discharge of a Navy officer for engaging in homosexual conduct); State v. Pilcher, 242 N.W.2d 348, 360, 366 (Iowa 1976) (dissenting opinion) (citing *Doe* as precedent to uphold a sodomy statute as applied to unmarried heterosexuals).

For a series of cases that distinguished *Doe* and addressed the right to privacy issue, see *Dronenburg*, 746 F.2d at 1580-81 (dissenting opinion) (would grant rehearing to determine if the constitutional right to privacy encompasses homosexuality); *Baker*, 553 F. Supp. at 1136-38 (declared sodomy statute unconstitutional on right to privacy and equal protection grounds); People v. Onofre, 51 N.Y.2d 476, 493, 415 N.E.2d 936, 943, 434 N.Y.S.2d 947, 953 (1980), *cert. denied*, 451 U.S. 987 (1981) (distinguished *Doe* as based on plaintiffs' lack of standing).

The following cases cited *Doe* as evidence of the Court's intent to restrict the right of privacy to heterosexual conduct: Lovisi v. Slayton, 539 F.2d 349, 352 (4th Cir. 1976) (*Doe* necessarily confined the constitutionally protected right to privacy to heterosexual conduct, probably only within the marital relationship); Johnson v. San Jacinto Junior College, 498 F. Supp. 555, 575 (S.D. Tex. 1980) (*Doe* is evidence of the Supreme Court's intent to restrict protection of sexual intimacy to marital relationships).

For a discussion, in dicta, of the unsettled question of whether the Constitution protects private consensual homosexual activity, see Rich v. Secretary of the Army, where the government's interest in regulating the armed forces outweighed homosexuals' privacy interests, 735 F.2d 1220, 1228 n.8 (10th Cir. 1984) and, under the same circumstances, Beller v. Middendorf, 632 F.2d 788, 809-10 (9th Cir. 1980).

See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW 941-43 (1978) ("Although the force of *Doe v. Commonwealth's Attorney* is to a degree augmented by previous dicta, it is difficult to belief [sic] that it can survive indefinitely.").

8. GA. CODE ANN. § 16-6-2 (1984). See *infra* note 54 for text of the statute.

court to declare the Georgia sodomy statute unconstitutional.[9] John and Mary Doe, a married couple, joined in the suit claiming that they desired to engage in sexual activity which was prohibited by the statute, but felt "chilled and deterred" due to the existence of the statute and Hardwick's recent arrest.[10] The Does had never been arrested nor threatened with arrest for violating the statute. Upon motion by the defendants,[11] the district court dismissed the complaint for failure to state a claim upon which relief could be granted.[12] The court ruled that only Hardwick had standing to bring suit,[13] but that the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*[14] foreclosed his constitutional challenge to the statute.

The plaintiffs appealed to the United States Court of Appeals for the Eleventh Circuit, which first agreed that only Hardwick had standing to bring suit.[15] As to his privacy claim, however, the court reversed and remanded,[16] holding that *Doe* was not dispositive of the constitutional issues in this case because the Supreme Court could have based its summary affirmance on Doe's lack of standing.[17] Alternatively, the court held that subsequent doctrinal developments after the decision in *Doe* had robbed it of any precedential value.[18] The court determined that the statute criminalizing sodomy contravened a fundamental right to engage in private, consensual sexual activity which both the ninth amendment and the due process clause of the fourteenth amendment to the United States Constitution protected.[19] In order to prevail, the state, on remand, must prove both a compelling interest to regulate such behavior and that the statute was narrowly drawn to serve that interest.[20] *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir.), *reh'g de-*

9. Hardwick v. Bowers, 760 F.2d 1202, 1204 (11th Cir.), *reh'g denied*, 765 F.2d 1123 (11th Cir. 1985).

10. *Id.*

11. The complaint named as defendants the Attorney General of Georgia, the District Attorney for Fulton County, and the Public Safety Commissioner of Atlanta. *Id.* at 1204.

12. Hardwick v. Bowers, No. C83-273A, slip op. (N.D. Ga. Apr. 18, 1983) (included in Petition for Ceritorari at Appendix A).

13. *Id.*

14. 425 U.S. 901 (1976).

15. *Hardwick*, 760 F.2d at 1204-07.

16. *Id.* at 1213.

17. *Id.* at 1207-08.

18. *Id.* at 1208-10.

19. *Id.* at 1212-13.

20. *Roe*, 410 U.S. at 152-56 (state regulations of fundamental rights, such as marriage and family relationships, must be narrowly drawn to only reach a compelling state interest).

nied, 765 F.2d 1123 (11th Cir. 1985).

This note will discuss the precedential value of the Supreme Court's summary affirmance in *Doe*. This question is particularly significant in light of the Court's decisions regulating the precedential effect of summary affirmances, and the uncertainty surrounding the constitutional right to privacy at the time the Court decided *Doe*. This note takes the position that *Doe* is not binding on lower courts because the basis of the summary affirmance is unclear. At least some of the Justices may have voted to summarily affirm *Doe* based on plaintiffs' lack of standing because plaintiffs had never been arrested nor threatened with arrest for violating the sodomy statute. In addition, subsequent decisions have hinted that the question of the constitutionality of sodomy statutes is still open. Those decisions support the premise that the Court may have decided *Doe* on the standing issue. Finally, this note will suggest that the Supreme Court promulgate a rule governing summary affirmances that will eliminate the precedential value of such decisions. Such a rule will eliminate the difficult task lower courts now face when trying to interpret the meaning of summary affirmances. Since the right to privacy is amply addressed elsewhere, this note will not address that issue except where it relates to the Court's summary affirmance of *Doe*.[21] In addition, this note will not discuss either the Does' or Hardwick's standing to bring suit.[22]

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21. Upon first hearing the facts of *Hardwick*, the constitutional right to privacy would seem to be the paramount issue in the case. In fact, the Supreme Court of the United States will soon address the issue of whether the constitutional right to privacy protects private sexual acts between consenting adults because the Court granted certiorari in *Hardwick*. N.Y. Times, Nov. 5, 1985, at 11, col. 1-3 (nat'l ed.). An analysis of the Eleventh Circuit's decision, however, must first be directed at the precedential value of *Doe*, however, because several courts have treated the Supreme Court's summary affirmance of that case as a bar to any further discussion of the constitutionality of sodomy statutes. *See supra* note 7. It was only after the court determined that *Doe* was not controlling, that it was able to reach the right to privacy issue. For a discussion of the constitutional right to privacy arguments regarding homosexuality, see Note, Hardwick v. Bowers *Revisited: Is AIDS a Compelling State Interest?*, 40 U. MIAMI L. REV. ___ (1985). *See also* Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy-Balancing the Individual & Social Interests*, 81 MICH. L. REV. 463 (1983); Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311 (1980-81); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670 (1973). Even though the Supreme Court apparently plans to clarify the uncertainty of *Doe*, a discussion of the Court's summary practice is appropriate because the Court continues to use summary disposals to manage its docket. *See infra* note 26.

22. For relevant discussions of standing, see City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Warth v. Seldin, 422 U.S. 490 (1975); Poe v. Ullman, 367 U.S. 497 (1961); C. WRIGHT,

II. THE PRECEDENTIAL VALUE OF SUMMARY AFFIRMANCES

Congress regulates the Supreme Court's appellate jurisdiction through guidelines established by Article III of the Constitution.[23] The statutes regulating the Court's appellate jurisdiction differentiate between discretionary jurisdiction by writ of certiorari and obligatory jurisdiction by appeal.[24] While the Court has full discretion to decide whether to grant a petition for certiorari, Congress has mandated that the Court must decide cases arising on appeal on the merits.[25] Although the Justices must decide the merits, they may summarily dispose of the case without considering briefs, hearing oral argument or writing a full opinion.[26]

THE LAW OF FEDERAL COURTS 70-74 (4th ed. 1983).

23. *See* U.S. CONST. art. III, § 2, cl. 2; Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1868). *See also* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 34-36 (5th ed. 1978) [hereinafter cited as STERN & GRESSMAN].

24. Congress has provided for appeal to the Supreme Court from (1) an interlocutory or final judgment of a federal court holding a congressional act unconstitutional in any civil action where the United States is a party, 28 U.S.C. § 1252 (1982); (2) an order granting or denying an interlocutory or permanent injunction in any civil action required to be heard by a three judge district court, 28 U.S.C. § 1253 (1982); (3) a decision of any circuit court of appeals holding a state statute repugnant to the Constitution, treaties or laws of the United States, 28 U.S.C. § 1254(2) (1982); (4) a final judgment rendered by the highest court of a state or Puerto Rico declaring a federal law invalid, 28 U.S.C. §§ 1257(1) & 1258(1) (1982); and (5) a final judgment rendered by the highest court of a state or Puerto Rico upholding the validity of a state statute against a challenge on the ground of its repugnancy to the Constitution or federal law, 28 U.S.C. § 1257(2) & 1258(2) (1982). *See also* STERN & GRESSMAN, *supra* note 23, at 52-247 (detailed discussion of the Court's appellate jurisdiction).

25. *See* Ex Parte Peru, 318 U.S. 578, 585 n.4 (1943) (purpose of the Judiciary Act of 1925 was to limit, in certain types of cases, the Court's obligatory jurisdiction by replacing appeals as of right with discretionary review by certiorari). *See also* 12 J. MOORE, H. BENDIX & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 400.05-1 (2d ed. 1982) [hereinafter cited as MOORE'S]; 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 Note, *Summary Disposition*] (in-depth analysis of the Court's summary practice, but note subsequent decisions, *infra* notes 29, 31, 35 & accompanying text).

26. In order to manage its large case load, the Court has summarily disposed of some appeals. Rosenberg, *Notes from the Underground: A Substantive Analysis of Summary Adjudication by the Burger Court: Part I*, 19 HOUS. L. REV. 607, 619-20, 631 n.107 (1982) (quoting letter from the Justices to Sen. DeConcini) [hereinafter cited as Rosenberg, *Part I*]. Unfortunately, it is not possible to determine the percentage of cases arising on appeal of which the Court has summarily disposed. This is the case because the Office of the Clerk of the Supreme Court does not maintain separate statistics regarding cases arising on appeal, as compared to cases arising upon a writ of certiorari. Telephone interview with Office of the Clerk, Supreme Court of the United States, Public Information Desk. *See also* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S.: 1985 178 (105th ed. 1984) (disposition of cases filed for the Terms 1970-1983). A study prepared in 1972, however, determined that the Court summarily disposed of 209 of 253 appeals in the 1971 Term. *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 622 (1972).

Because not all cases arising on appeal are of great import, Supreme Court Rule 15

Because the Court has obligatory jurisdiction over appeals, orders summarily affirming or dismissing for want of a substantial federal question are decisions on the merits and binding on lower courts.[27] Once the Court issues a summary affirmance or dismissal, the lower courts are faced with the task of determining exactly what the Supreme Court decided, without the aid of a written opinion.[28] In several opinions handed down in the 1970's, the Court sought to provide lower courts with guidelines to interpret the meaning of summary affirmances and dismissals. In *Fusari v. Steinberg*,[29] the Court admonished judges against making broad interpretations of summary affirmances if it served to nullify a previous full opinion.[30] In a later case, *Hicks v. Miranda*,[31] the majority stated that summary affirmances or dismissals are only binding

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requires the appellant to file a jurisdictional statement setting forth reasons why the issues are so substantial as to require plenary consideration. SUP. CT. R. 15.1(h). The appellee may file a motion to dismiss or affirm in response. SUP. CT. R. 16.1. Similar to the Court's certiorari practice, the Court will receive briefs and hear oral argument if four or more justices believe the issues warrant such review. Ohio *ex rel.* Eaton v. Price, 360 U.S. 246, 247 (1959) (memorandum of Brennan, J.). Otherwise, the Court will summarily affirm or dismiss the case for want of a substantial federal question without an opinion. *Id. See also* Note, *Summary Disposition, supra* note 25, at 394-400 (discussion of Court's appellate practices and procedures).

27. Hicks v. Miranda, 422 U.S. 332 (1975). Traditionally, the Court summarily disposes of appeals from federal courts by affirmance and appeals from state courts by dismissal for want of a substantial federal question. For classes of cases arising on appeal, see *supra* note 24. Although literally the two actions would seem to be different, the impact is the same. Either action is binding on lower courts and the Court discusses their precedential value interchangeably. *Hicks*, 422 U.S. at 344; MOORE'S, *supra* note 25, at 4-21; 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, 117 n.7 (1978) [hereinafter cited as Note, *Precedential Effect*].

The distinction in terminology apparently arose because the Court wished to avoid addressing the issue of federal jurisdiction when summarily disposing of appeals from state courts. Note, *Summary Disposition, supra* note 25, at 414. In other words, the Court will dismiss an appeal from a state court if it lacks jurisdiction because the federal question presented was insubstantial, *or* if the federal question met the jurisdictional threshold, but does not warrant plenary consideration. *See also* Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913 (1976) (Brennan, J., dissenting from denial of certiorari). A summary affirmance necessarily assumes that the lower court had jurisdiction. *Id.* at 921-22. A dismissal for want of a substantial federal question, however, may mean that the federal question was insubstantial or that the state court correctly decided a substantial federal question. *Id.*

28. *See also* P. BATOR, D. SHAPIRO, P. MISHKIN, & H. WESCHLER, HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 11 (Supp. 1981). Even full opinions are often very difficult to interpret due to the frequency of concurring and dissenting opinions that join only portions of the majority opinion. *Id.* at 11 n.2.

29. 419 U.S. 379 (1974).

30. *Id.* at 388 n.15.

31. 422 U.S. 332 (1975).

precedent in cases presenting sufficiently similar issues.[32] In addition, the Court commented that subsequent doctrinal developments may undermine the precedential value of a summary affirmance or dismissal.[33] *Hicks*, however, did not elaborate on the *procedure* courts should use to determine exactly what issues the Supreme Court in fact decided.[34]

Two years later, the Court sought to clarify *Hicks* in *Mandel v. Bradley*[35] when it declared that a previous summary affirmance was not dispositive of the issue presented in *Mandel*.[36] The per curiam opinion quoted Chief Justice Burger's concurrence in *Fusari*,[37] stating that a summary affirmance affirms only the judgment, not the rationale of the lower court.[38] In addition, the Court stated:

> 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. . . . The precedential significance of the summary action . . . is to be assessed in the light of *all* of the facts in that case . . . .[39]

Mandel essentially created a two-step test for lower courts to apply in determining the precedential weight of summary disposals. First, the lower court must establish exactly what issues were

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32. *Id.* at 345. The Court recognized the difficulty in determining the issues and stated: "Ascertaining the reach and content of summary actions may itself present issues of real substance . . . ." *Id.*

33. *Id.* at 344.

34. Both individual Justices and legal scholars criticized *Hicks*. *Colorado Springs Amusements, Ltd.*, 428 U.S. at 917 ("*Hicks* will impair the Court's ability to . . . adjudicate important constitutional issues."); Tushnet, *The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments*, 46 U. CIN. L. REV. 347, 365 (1977) (Court's declarations have only created "troublesome anomalies").

35. 432 U.S. 173 (1977) (per curiam).

36. *Id.* at 176.

37. 419 U.S. at 391-92.

38. 432 U.S. at 176.

39. *Id.* (emphasis added). *Cf.* Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173 (1979). The Court considered a summary affirmance to be of less precedential value than a full opinion for purposes of stare decisis. *Id.* at 180-81. The opinion may be taken for the proposition that the Court is more likely to reconsider issues disposed of summarily rather than by plenary review.

presented in light of all the facts in the prior case. Second, the lower court must determine if the Supreme Court necessarily decided those issues when it summarily disposed of the case.[40]

Justice Brennan elaborated on this test in his concurring opinion where he commented that courts should make a detailed analysis of summary dispositions before relying on them as precedent.[41] He stated that state and federal judges must first examine the jurisdictional statement in the earlier case to determine if the constitutional issues are the same.[42] If the issues are the same, the judge must then determine if the Court's decision actually rested upon those issues 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."[43]

Despite the Court's attempts to clarify the precedential value of summary affirmances and dismissals, lower courts still struggle to interpret and apply them.[44] The Court has aggravated the prob-

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40. *Mandel*, 432 U.S. at 176. There is a tension between the Court's initial statement that summary disposals "without doubt reject the specific challenges presented in the statement of jurisdiction . . ." and its later statements that summary actions prevent lower courts from reaching "opposite conclusions on the precise issues presented *and* necessarily decided. . . ." and that summary disposals should "be assessed in the light of *all* of the facts in that case; . . . ." *Id.* (emphasis added). The two-step test set out above is a logical resolution of the conflict because confining the precedential value of a summary action to the issues raised in the jurisdictional statement may preclude consideration of different issues which the respondent may raise. For example, a plaintiff who lost on the merits in a lower court would not raise the issue of standing on appeal. *See Illinois Elections Bd.*, 440 U.S. at 182-83 ("A summary disposition affirms only the judgment of the court below, . . . and no more may be read into our action than was essential to sustain that judgment."). This interpretation is further supported by the concept that the whole case comes up on appeal and the Court may consider all issues raised in the case below. *See infra* note 73 and accompanying text.

41. *Mandel*, 432 U.S. at 179-80.

42. *Id.* at 180.

43. *Id.* at 180 (Brennan, J., concurring) (none of the other Justices dissented from this view). Justice Brennan's concurrence supports the analysis in *supra* note 40 and accompanying text.

44. For an example of complete confusion, see Rosenberg, *Part I*, *supra* note 26, at 632 n.112 (analyzing Jones v. T.H., 425 U.S. 986 (1976), *aff'g* 425 F. Supp. 873 (D. Utah 1975)). Stern & Gressman suggest using anything in the earlier record, appeal papers, and even the parties' briefs to interpret summary affirmances. STERN & GRESSMAN, *supra* note 23, at 333-34. *See also* Cantor v. Detroit Edison Co., 428 U.S. 579, 617 n.5 (1975) (Stewart, J., dissenting) (implies that use of the parties' briefs is appropriate when interpreting summary affirmances); Comment, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of* Hicks v. Miranda, 76 COLUM. L. REV. 508, 532 n.154 (1976) (suggests using the jurisdictional statement, the appellee's reply, and the lower court's opinion). *But see supra* text at note 38.

It is understandable that lower courts have difficulty interpreting summary affirmances,

lem by summarily disposing of complex and novel constitutional issues despite its instruction to lower courts that summary actions should not be viewed "as breaking new ground but as applying principles established by prior decisions."[45] Rather than restricting the use of summary affirmances and dismissals to "frivolous" appeals,[46] it appears that the Court has occasionally used summary actions as another means of avoiding controversial questions.[47] A summary affirmance or dismissal for want of a substantial federal question may, therefore, create a binding ruling on an important constitutional question without providing any explanation of the Court's rationale.

Although the Court's summary calendar provides an efficient method of controlling the appellate docket, the benefits of the practice break down when the Court summarily disposes of cases which present novel constitutional questions.[48] Summary affirmances or dismissals in such cases limit and may even foreclose further discussions of important constitutional issues by lower courts because the Supreme Court has declared that its summary

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because the Supreme Court Justices themselves still disagree as to the proper interpretation of certain summary dispositions. *Compare* Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 433 n.18 (1983) (prior summary affirmance is not binding because it may have rested on alternative grounds) *with id.* at 455 n.3 (O'Connor, J., dissenting) (Justice O'Connor refers to the district court's opinion in order to interpret a prior summary affirmance).

45. *Mandel*, 432 U.S. at 176. *See also* Levin & Hellman, *The Many Roles of the Supreme Court and the Constraints of Time and Caseload*, 7 U. TOL. L. REV. 399, 410 (1976) (the Court has summarily disposed of appeals "involving issues that were novel, difficult, and highly controversial").

46. Note, *Impact of the Supreme Court's Summary Disposition Practice on Its Appeals Jurisdiction*, 27 RUTGERS L. REV. 952, 962 (1974). A five year study of summary actions showed that most were disposals of frivolous appeals or obvious extensions of prior decisions. Rosenberg, *Part I*, *supra* note 26, at 621.

47. Comment, *Per Curiam Decisions of the Supreme Court: 1957 Term*, 26 U. CHI. L. REV. 279, 282 (1959); Marshall, *Supreme Court Summary Dispositions: Either Change the Rules or Stop Giving Short Shrift to Important Issues*, 19 WILLIAMETTE L. REV. 313 (1983) (speech delivered by Justice Thurgood Marshall to the Second Circuit Judicial Conference on September 9, 1982). *See also* Rosenberg, *Note from the Underground: A Substantive Analysis of Summary Adjudication by the Burger Court: Part II*, 19 HOUS. L. REV. 831, 833-69 (1982) (survey of summary disposals of cases presenting novel or controversial issues including civil commitment of the mentally ill and the rights of parents). Of course, the Court often avoids deciding cases by simply denying ceriorari. A denial of certiorari, however, has no precedential effect whereas a summary affirmance or dismissal for want of a substantial federal question is a binding decision on the merits. MOORE'S, *supra* note 25, at 4-18. *See also* Rosenberg, *Part I*, *supra* note 26, at 639 (comparing summary actions to doctrines such as standing, justiciability and non-intervention which the Court also uses to avoid deciding cases).

48. Note, *Precedential Effect*, *supra* note 27, at 141.

rulings are binding precedent. Rather than analyzing the important constitutional rights at stake, lower courts must spend their time deciphering a jurisdictional statement and trying to guess the meaning behind the Supreme Court's one line "opinion."[49] In addition, a summary disposal of a case presenting several issues compounds the difficulty of this task because the lower court must determine if the Supreme Court necessarily decided all of the issues presented. Arguably, a summary decision should have little precedential value if alternative theories will support the holding.[50] In such a case, the Court did not necessarily decide any particular one of the alternative theories.[51] Thus, the Court's misuse of a device designed to quickly dispose of straightforward appeals has also served to increase the burden on state and federal courts.[52]

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49. Rosenberg, *Part I, supra* note 26, at 632-33 (summary actions may increase the lower courts' dockets because parties will relitigate issues hoping that the Supreme Court will grant plenary review). It is interesting to note that even though summary affirmances and dismissals are decisions on the merits, such orders cannot be Shepardized independently of their lower court opinions nor are they accessible through the Dicennial Digests. Thus, a court may never be aware that the Supreme Court summarily disposed of a similar case in a different jurisdiction. Note, *Summary Disposition, supra* note 25, at 421.

In addition, since 1971, the Office of the Clerk of the Supreme Court has included dismissals of appeals for want of a substantial federal question with denials of certiorari for the purpose of statistical reporting even though dismissals of appeals are decisions on the merits. *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 303 n.c (1970) (including dismissals with decisions on the merits is appropriate because dismissals are of "limited precedential value").

50. *See Akron*, 462 U.S. at 433 n.18.

51. Note, *Summary Disposition, supra* note 25, at 407, 413 (a summary appeal is valueless as precedent if the rule of the case is indeterminable); Note, *Precedential Effect, supra* note 27, at 141 (*Hicks* rule is most effective where only one issue is raised).

52. *See* Note, *Precedential Effect, supra* note 27, at 133 (quoting Clark, J., in Hogge v. Johnson, 526 F.2d 833, 836 (4th Cir. 1975), *cert. denied*, 428 U.S. 913 (1976)) ("[a]n unquestioning application of the *Hicks* rule can lead to nothing but mischief and place an unnecessary restraining hand on the progress of federal constitutional adjudication") (brackets in original).

The United States Circuit Courts of Appeals also use summary disposals to manage their dockets. For example, Eleventh Circuit Court Rule 25 provides:

> When the court determines that any of the following circumstances exist:
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
> (b) the evidence in support of a jury verdict is not insufficient;
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
> (d) summary judgment, directed verdict or judgment on the pleadings is supported by the record;
> and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

11TH CIR. R. 25.

III. ANALYSIS OF *Hardwick v. Bowers*

A. *Applicability of* Doe v. Commonwealth's Attorney

In *Hardwick*, the Eleventh Circuit appropriately applied the two-step test of *Mandel* in determining whether the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney* was controlling.[53] First, the court determined that the issues presented by *Hardwick* were the same as those presented in *Doe*.[54] Hardwick alleged that the Georgia statute violated his constitutional right to privacy, due process, and freedom of expression and association.[55] The jurisdictional statement in *Doe* presented the same right to privacy and due process challenges, as well as an equal protection argument under the first, fourth, fifth, ninth, and fourteenth amendments.[56] If the Supreme Court actually reached the constitutional issues in *Doe*, it must have found that the Virginia statute did not violate any of the constitutional challenges presented because the Court affirmed the district court's decision which had declared the statute constitutional. The summary affirmance, however, would have no precedential effect on the issue of freedom of association because this issue was not raised in *Doe*.

This court rule recognizes that a summary affirmance is a decision on the merits. But, since the case presents no novel issues of law, an opinion would provide little aid to lower courts. Because the decision follows easily from prior written opinions, district courts need not be concerned with interpreting the particular case that the court of appeals summarily affirmed. *See also* 5TH CIR. R. 47.6; National Labor Relations Bd. v. Amalgamated Clothing Workers of Am., 430 F.2d 966, 972 (5th Cir. 1970) (Chief Judge Brown emphasized that the Fifth Circuit would use summary dispositions sparingly and only when an opinion would have no precedential value.).

53. *See supra* text accompanying note 40.

54. The Georgia statute at issue in *Hardwick* and the Virginia statute upheld in *Doe* are almost identical. The Georgia sodomy statute provided:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . . (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.

GA. CODE ANN. § 16-6-2 (1981).

The Virginia sodomy statute provided:

> If any person shall carnally know in any manner any . . . male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

VA. CODE § 18.1-212 (1950) (repealed 1975, current version at VA. CODE § 18.2-10, 361 (1950)).

55. Hardwick v. Bowers, No. C83-273A, slip op. (N.D. Ga. Apr. 18, 1983) (included in Petition for Certiorari at Appendix A).

56. Doe v. Commonwealth's Attorney, 44 U.S.L.W. 3448 (U.S. Feb. 10, 1976) (No. 75-896).

Despite this, the Eleventh Circuit merely devoted a short footnote to freedom of association[57] choosing instead to rest its decision on the right to privacy.[58]

Second, the Eleventh Circuit found that the Supreme Court did not necessarily decide the constitutional questions because the plaintiffs in *Doe* may have lacked standing to sue.[59] Plaintiffs in *Doe* were male homosexuals who regularly practiced sodomy in private with other consenting adult males. They alleged that the sodomy statute had a chilling effect on their relationships with other homosexuals.[60] One of the plaintiffs testified in a deposition introduced at trial that police had harassed him on two occasions for frequenting an area which homosexuals used as a meeting place. He had never been arrested, however, nor even threatened with arrest.[61] Their situation was very similar to that in *Poe v. Ullman*,[62] where a doctor and three of his married patients challenged a state statute that criminalized the use of contraceptives.[63] Plaintiffs had never been arrested for violating the statute nor did they face an immediate threat of arrest.[64] In addition, the Court commented that the "prosecution of spouses for use of contraceptives [was] inherently bizarre."[65] The Court admitted that the case did fall within its Article III jurisdiction, but declined to address the constitutional issues presented because the plaintiffs did not face an immediate and real threat of prosecution for violating the statute.[66]

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57. 760 F.2d at 1208 n.6. Hardwick's brief also did not address freedom of association. Brief of Appellants on Appeal from the United States District Court for the Northern District of Georgia at 1, Hardwick v. Bowers, 760 F.2d 1202 (11th Cir.), *reh'g denied*, 765 F.2d 1123 (11th. Cir. 1985). Because both the court and the parties emphasized the right to privacy, this note will be limited to *Doe's* effect on that issue.

58. *Hardwick*, 760 F.2d at 1212.

59. For a similar analysis, see Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir.), *reh'g en banc denied*, 746 F.2d 1579, 1580 (D.C. Cir. 1984) (Robinson, C.J. & Wald, Mikva & Edward, JJ., dissenting); Miller v. Rumsfield, 647 F.2d 80, 84 (9th Cir. 1981) (Norris, J., dissenting from denial of rehearing en banc); People v. Onofre, 51 N.Y.2d 476, 493, 415 N.E.2d 936, 943, 434 N.Y.S.2d 947, 953 (1980), *cert. denied*, 451 U.S. 987 (1981); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 943 (1978).

60. Jurisdictional Statement at 4, Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *summ. aff'd*, 425 U.S. 901 (1976).

61. *Id.*

62. 367 U.S. 497 (1961).

63. *Id.* at 499-500.

64. *Id.* at 501.

65. *Id.* at 502 n.3.

66. *Id.* at 502, 508-09. *Cf.* City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (past arrest will not confer Article III standing to challenge constitutionality of police procedures where repetition of arrest is purely speculative). *See generally* Warth v. Seldin, 422 U.S. 490, 498-

Similarly the plaintiffs in *Doe* may have presented a case or controversy within the meaning of Article III because they had a personal stake in the outcome of the case.[67] They did not, however, present any evidence to prove that the alleged threat of prosecution was real.[68] Furthermore, prosecution of the plaintiffs would seem just as improbable as prosecution of spouses in *Poe* because plaintiffs' acts of sodomy allegedly took place in private with consenting adults. Thus, plaintiffs may have lacked standing to sue because they had not been injured by a real and immediate threat of prosecution. The Supreme Court could have premised the summary affirmance of *Doe* on standing, and therefore did not *necessarily* consider the privacy issue as determinative in the case. *Doe*, consequently, would not be controlling in *Hardwick* because the basis of the summary affirmance was inherently unclear.[69]

There are three problems, however, with concluding that the Supreme Court may have based its summary affirmance of *Doe* on plaintiffs' lack of standing. First, the parties did not raise the issue of standing in the jurisdictional statement or motion to dismiss.[70] Several statements by the Court, however, suggest that lower courts are not bound by the jurisdictional statement if the summary affirmance can be interpreted on a narrower ground. For instance, the Court stated that summary affirmances are binding precedent on the issues presented *and* necessarily decided.[71] In ad-

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99 (1975) (presenting a comparative analysis of constitutional versus prudential standing).

Often it is difficult to differentiate between constitutional and prudential rules of standing. E. BARRETT & W. COHEN, CONSTITUTIONAL LAW 117 (6th ed. 1981) [hereinafter cited as BARRETT & COHEN]. In Rescue Army v. Municipal Court, the Court described prudential standing as a "corollary offshoot of the case and controversy rule." 331 U.S. 549, 570 (1946).

> [C]onstitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided.

Id. at 569 (quoting Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

67. *Warth*, 422 U.S. at 498.

68. Jurisdictional Statement at 4, *Doe*. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 943 (1978) (arguably, *Doe* was not ripe for adjudication).

69. Note, *Summary Disposition*, *supra* note 25, at 407, 413.

70. Jurisdictional Statement at 3; Motion to Dismiss at 1, *Doe*.

71. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 499 (1981); Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 182 (1979); Mandel v. Bradley, 432 U.S. 173, 176 (1977). *See also supra* text accompanying note 43 (Justice Brennan instructed lower court judges to determine whether a summary affirmance was actually based on the issues

dition, the Court in *Mandel* stated that summary actions should be interpreted in light of *all* the facts in the case.[72] It seems appropriate, therefore, to consider the fact that the plaintiffs in *Doe* had never been arrested, nor were they prosecuted. Finally, the entire case comes to the Court on a direct appeal from a district court. The Supreme Court is free to consider all issues raised below, not solely those contained in the jurisdictional statement.[73]

The second problem with the court's characterization of *Doe* is that neither the parties nor the district court raised the issue of standing below. Of course, if the plaintiffs lacked constitutional standing, the Court could raise the issue sua sponte because Article III's requirement of a case or controversy goes to subject matter jurisdiction, a challenge which can be raised at any time.[74] The Court will also occasionally address other issues related to jurisdiction even if not raised by the parties in the lower court.[75] The Court has stated that the issues of constitutional and prudential standing are closely intertwined.[76] The former is an external limit on the Court's power to decide a case, whereas the latter is an internal limit.[77] It seems appropriate, therefore, for the Court to raise either constitutional or prudential standing sua sponte because both issues go to the power of the Court to act.[78] Thus, the Court may have addressed the issue of standing in *Doe* even though the parties did not raise it.

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presented.).

72. *See supra* text accompanying note 39.

73. C. WRIGHT, THE LAW OF FEDERAL COURTS 758 (4th ed. 1983). For an example of a case in which the Court even considered questions not included in the petition for certiorari, see Piper Aircraft Co. v. Reyno, 454 U.S. 235, 246 n.12 (1980).

74. FED. R. CIV. P. 12(h)(3). *See, e.g.*, Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 398 (1979).

75. For example, the Court dismissed an appeal in Poe v. Ullman because the plaintiffs lacked prudential standing. 367 U.S. 497, 501 (1961). The Court stated that it was not bound by allegations of the complaint nor the stipulations between the parties. *Id.* In St. Paul Fire & Marine Ins. Co. v. Barry, the Court addressed the issue of mootness although the parties themselves had not raised the issue. 438 U.S. 531, 537 (1978).

76. *Rescue Army*, 331 U.S. at 570-71. (The Court viewed the concept of justiciability as founded in the role of judicial review within the federal system.).

77. BARRETT & COHEN, *supra* note 66, at 117. Some rules of standing stem from the Constitution whereas others are judicially developed restraints. *Id.*

78. *Cf.* Vance v. Terrazas, 444 U.S. 252, 257 n.5 (1980) (intent issue not raised in the court of appeals nor in the jurisdictional statement); Edelman v. Jordan, 415 U.S. 651, 677-78 (1974) (eleventh amendment defense may first be raised on appeal because it so closely relates to jurisdiction); Vachon v. New Hampshire, 414 U.S. 478, 479 n.3 (1974) (The Court recognized "plain error" not raised in jurisdictional statement and independently reviewed the trial record.). If the Court will consider substantive issues sua sponte, it seems it would be even more likely to consider issues of justiciability on its own as well.

The third problem in regarding the Supreme Court's summary affirmance of the district court's decision in *Doe* as based on standing is that the Court affirmed the judgment rather than remanding for dismissal. Dismissal seems appropriate where the plaintiffs lacked standing because the Court would be without jurisdiction over the case.[79] The Court, however, has not always adhered to that practice. The Eleventh Circuit cited *Shea v. Littleton*[80] and *Rizzo v.Goode*[81] as examples of cases where the Court *reversed* the lower court's decision, rather than remanding for dismissal, because the plaintiffs failed to allege a case or controversy pursuant to Article III.[82] The real question, however, as Judge Kravitch noted in dissent,[83] is whether the Court may *affirm* a lower court's decision on the merits if it determines that the plaintiffs lacked standing.

In *Pressler v. Simon*,[84] the District Court for the District of Columbia held that Rep. Pressler had standing to challenge the constitutionality of two statutes regulating congressional salaries, but still found the statutes to be constitutional.[85] Rep. Pressler appealed and the Supreme Court summarily affirmed.[86] Justice Rehnquist filed a concurring opinion stating: "Our 'unexplicated affirmance' without opinion could rest as readily on our conclusion that appellant lacked standing to litigate the merits of the question as it could on agreement with the District Court's resolution of the merits of the question."[87] Similarly, in *Doe*, the district court presumably found that the plaintiffs had standing and then

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79. *Hardwick*, 760 F.2d at 1214 (Kravitch, J., dissenting). *See also* FED. R. CIV. P. 12(h)(3).

80. 414 U.S. 488 (1974). Despite the Court's lack of jurisdiction, it alternatively declared that plaintiffs did not state an adequate basis for equitable relief. *Id.* at 499.

81. 423 U.S. 362 (1976).

82. *Hardwick*, 760 F.2d at 1207 n.5.

83. *Id.* at 1214 n.4.

84. 428 F. Supp. 302 (D.D.C. 1976).

85. *Id.* at 306.

86. 434 U.S. 1028 (1978).

87. *Id.* U.S. at 1029. No other justices filed opinions. *See* Rosenberg, *Part I, supra* note 26, at 635 & n.118 (Justices may have based their decision on plaintiff's lack of standing, or they may have disagreed as to the rationale for affirmance.). *See also* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 342 (1936) (Brandeis, J., concurring) (because the plaintiffs lacked standing the Court should affirm the lower court's decision "without passing upon it"); Goldwater v. Carter, 617 F.2d 697, 711 n.4 (D.C. Cir.) (Wright & Tamm, JJ., concurring) (majority reversed the lower court on the merits; Judges Tamm and Wright concurred in the *result* because they believed plaintiff lacked prudential standing to sue), *vacated & remanded for dismissal*, 444 U.S. 996 (1979) (plurality held that the case presented a political question).

went on to declare the statute constitutional.[88] The only distinction between the two cases is that in *Pressler*, the appellees twice raised the issue of standing; once in the lower court and again in the motions to dismiss.[89] In *Doe*, the issue was never raised. Still, it should be remembered that the Supreme Court may raise the issue of justiciability sua sponte.[90] The Eleventh Circuit's conclusion that the Court may have summarily affirmed the district court's decision in *Doe* without reaching the right to privacy issue is plausible. *Doe*, therefore, would not be binding on the court in *Hardwick* because the Supreme Court did not "necessarily" decide the right to privacy issue.

B. *Doctrinal Developments Since* Doe

After concluding that the Supreme Court may have predicated its affirmance of *Doe* on standing, the Eleventh Circuit proposed that even if that conclusion were wrong, doctrinal developments since *Doe* have robbed it of any precedential value.[91] Lower courts need not blindly follow a prior decision of the Supreme Court until such time as the Court expressly overrules that decision.[92] Subsequent decisions may so erode an earlier opinion as to impliedly overrule it and thereby relieve lower courts from following the original decision.[93] Such erosion is even more likely with summary affirmances because they carry less precedential weight than full opinions for the purpose of stare decisis. The Court, therefore, might be more likely to reconsider an issue resolved summarily than one resolved by a full opinion.[94] The Eleventh Circuit cited the following two cases as undercutting the decision in *Doe*, and

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88. *Doe*, 403 F. Supp. at 1203.

89. *Pressler*, 428 F. Supp. at 304; Motion of the Secretary of the Treasury to Affirm at 9-10; Motion of Appellee J.S. Kimmitt, Secretary of the United States Senate to Dismiss, or in the Alternative, to Affirm at 11-15; Motion of Appellee Kenneth R. Harding to Dismiss or Affirm at 4-5, *Pressler*.

90. *See supra* text accompanying notes 75-78.

91. "[I]f the Court has branded a question as insubstantial it remains so except when doctrinal developments indicate otherwise." Hicks v. Miranda, 422 U.S. 332, 344 (1975) (quoting Port Auth. Bondholders Protective Comm. v. Port of New York Auth., 387 F.2d 259, 263 n.3 (2d Cir. 1967)).

92. *See, e.g.*, Browder v. Gayle, 142 F. Supp. 707, 716 & n.14, 717 (M.D. Ala.), *aff'd per curiam*, 352 U.S. 903 (1956) (a three judge district court held that Plessy v. Ferguson, 163 U.S. 537 (1896) was not good law even though the Supreme Court had not expressly overruled it).

93. *Id.*

94. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500 (1981); Edelman v. Jordan, 415 U.S. 651, 671 (1974). *See also supra* note 39.

leaving the right to privacy issue open as it applies to homosexuals.

A year after *Doe*, in *Carey v. Population Services International*,[95] the Court held, inter alia, that a state could not prohibit the sale of nonprescription contraceptives to adults except by licensed pharmacists, nor could the state blanketly prohibit the sale of nonprescription contraceptives to minors.[96] Justice Powell concurred in the result stating that the majority unnecessarily "would subject all state regulation affecting adult sexual relations to the strictest standard of judicial review."[97] In response, Justice Brennan, writing for the majority, noted that the holding was limited to the individual's right to decide whether to prevent conception or terminate a pregnancy and went on to state: "As we observe below, 'the Court has not definitively answered the difficult question *whether* and *to what extent* the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults,' . . . and we do not purport to answer that question now."[98] In a later section, joined by a plurality, Justice Brennan stressed that the Court, in order to decide the case at bar, need not address the appellees' argument that any state regulation of private consensual sexual behavior was unconstitutional, and reiterated that the Court had not definitively answered that question.[99]

The Court's comment suggested that the constitutionality of state sodomy statutes was still an open question, particularly in light of the majority's failure to cite *Doe*.[100] Justice Rehnquist underscored this point in his dissent where he criticized the majority's comment that "the Court has not definitively answered the difficult question whether and to what extent the Constitution pro-

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95. 431 U.S. 678 (1977).

96. *Id.* at 689-91, 694-96.

97. *Id.* at 703. Justice Powell would apply the rationally related test rather than the compelling state interest test. *Id.* at 703-07.

98. *Id.* at 688 n.5 (brackets in original) (emphasis added).

99. *Id.* at 694 n.17. This view is consistent with the Court's traditional stance of not deciding constitutional issues until absolutely necessary. Poe v. Ullman, 367 U.S. 497, 503 (1961). *See supra* note 66. The plurality also cited, without further comment, a law review article written before the decision in *Doe* that analyzed statutes criminalizing consensual sexual behavior in light of the right to privacy doctrine. Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 719-38 (1973).

100. Perhaps the majority was signalling that its summary affirmance did not completely answer the questions raised in Doe. Three of the Justices comprising the *Carey* majority, Justices Brennan, Marshall, and Stevens, had also dissented from the summary affirmance in *Doe*. *Doe*, 425 U.S. at 901. Justice Marshall had been particularly upset with the Court's failure to address openly the right to privacy issue, especially because Justices Blackmun, Stewart, and Powell had previously voted to extend the concept to abortion. B. WOODWARD & S. ARMSTRONG, THE BRETHREN 505 (1979).

hibits statutes regulating [private consensual sexual] behavior among adults, ..." He cited *Doe* as an example of a case in which the Court had definitively acted in the area of sexual privacy.[101] No other Justice, however, joined in his opinion although both Justices White and Powell expressed concern that the Court's decision would invalidate all state regulation of adult sexual behavior.[102]

The *Carey* decision generated three concurring opinions and one dissent in addition to the majority opinion. As noted above, the Justices themselves disagreed as to exactly what the decision in *Carey* meant, let alone prior decisions addressing the right to privacy.[103] If the Court actually rested its affirmance in *Doe* on the right to privacy issue, it does not seem likely that it would have reconsidered that issue only fourteen months later. *Carey*, however, strengthens the argument that at least some of the Justices may have based their affirmance on Doe's lack of standing rather than on the right to privacy issue. Possibly the six Justices in the majority voted to affirm *Doe* for different reasons.[104] If nothing else, *Carey* illustrated the confused status of the right to privacy issue at the time of *Doe*. This confusion only compounded the difficulty lower courts naturally faced in interpreting the summary affirmance of *Doe*.[105]

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101. *Carey*, 431 U.S. at 718 n.2 (brackets in original). *See also* Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1297 (1979).

102. *Carey*, 431 U.S. at 702-03.

103. A detailed diagram is necessary to determine what the Court held in *Carey*. Justice Brennan delivered the opinion of the Court in five parts.

Part	Topic Addressed	Justices Joining
I.	Standing	Brennan, Marshall, Blackmun, Stevens, White, Powell, Stewart
II.	Defined right to privacy	Brennan, Marshall, Blackmun, Stevens, Stewart
III.	Prohibition of distribution of nonmedical contraceptives except through licensed pharmacists (*See supra* text accompanying note 98)	Brennan, Marshall, Blackmun, Stevens, White, Stewart
IV.	Prohibition of distribution of nonmedical contraceptives to minors (*See supra* text accompanying note 99)	Brennan, Marshall, Blackmun, Stewart
V.	Prohibition of advertising or display of contraceptives	Brennan, Marshall, Blackmun, Stevens, White, Stewart

Note that Justices Stevens and White declined to join Part IV because they believed Brennan's opinion swept too broadly in condemning state regulation of *minors'* sexual activity.

104. Note, *Summary Disposition*, *supra* note 25, at 408.

105. For further discussion of *Carey*, see Baker v. Wade, 553 F. Supp. 1121, 1138 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985); People v. Onofre, 51 N.Y.2d 476, 493-94, 415

The Eleventh Circuit cited *New York v. Uplinger*[106] as a second case that undercut the *Doe* decision. In *Uplinger*, the New York Court of Appeals held a state statute that prohibited loitering for the purpose of procurring another person to engage in deviate sexual behavior unconstitutional. The court based its holding on an earlier decision in *People v. Onofre*[107] which declared a statute criminalizing consensual sodomy unconstitutional.[108] The state appealed in *Uplinger* and the Supreme Court granted certiorari.[109] After full briefing and oral argument, the Court dismissed the writ as improvidently granted because (1) the opinion of the New York Court of Appeals did not clearly state the constitutional issue decided,[110] (2) the positions of state officials conflicted,[111] and (3) a thorough evaluation of *Uplinger* would require consideration of the issues raised in the prior opionion because the lower court based its opinion on *Onofre*.[112] Furthermore, the state had not challenged the decision in *Onofre*. The Court considered the case to be "an inappropriate vehicle for resolving the important constitutional issues raised by the parties."[113]

Uplinger does not provide very strong support for the Eleventh Circuit's position because a dismissal of certiorari has no precedential value.[114] In addition, the Court admitted its uncertainty as to which constitutional issues the lower court actually decided.[115] The Court's per curiam opinion, however, bolsters the comment in *Carey* that the Court had not fully addressed the constitutionality of statutes regulating adult consensual sexual behavior.

N.E.2d 936, 943, 434 N.Y.S.2d 947, 954 (1980); Linzer, *supra* note 101, at 1297.

106. 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1980), *cert. dismissed as improvidently granted*, 104 S. Ct. 2332 (1984).

107. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981) (affirmed lower court's dismissal of defendent's indictment).

108. *Id.* at 494, 415 N.E.2d at 943, 434 N.Y.S.2d at 954.

109. New York v. Uplinger, 464 U.S. 812 (1983).

110. The court of appeals may have rested its decision on the fact that the loitering statute was not severable from the sodomy statute. 104 S. Ct. at 2333 n.2.

111. 104 S. Ct. at 2333 n.1. (The District Attorney for Erie County represented the state, but the Attorney General filed a brief as amicus curiae in support of plaintiffs.).

112. *Id.* at 2334.

113. *Id.*

114. Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 365 n.1 (1973) (a prior dismissal of certiorari as improvidently granted does not establish the law of the case); Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review & Writ Dismissals*, 26 VAND. L. REV. 895, 921 (1973).

115. *Uplinger*, 104 S. Ct. at 2333.

IV. COMMENTS

A. *Further Uncertainty Regarding* Doe

The significance of *Carey* and *Uplinger* is not in showing that the Court has moved away from its decision in *Doe*, as the Court of Appeals for the Eleventh Circuit contended, but rather in demonstrating that the Court in *Doe* may not have originally intended to answer the question of whether the constitutional right to privacy extended to private consensual sexual behavior. In other words, the Court's comments in *Carey* and *Uplinger* support the premise that at least some Justices may have based the summary affirmance of *Doe* on the plaintiffs' lack of standing.

It is interesting to note that the Court decided *Doe* at a time when it was also narrowing the reach and scope of the doctrine of standing. For example, the Court handed down a 5-4 decision in *Warth v. Seldin*,[116] a seminal case restricting the scope of standing, just nine months before *Doe*. The previous year, the Court denied standing to certain plaintiffs suing both as citizens and taxpayers.[117] The fact that the same Justices who voted to deny standing in these two cases also voted to summarily affirm *Doe* supports the contention that some of the Justices may have based their decision in *Doe* on the plaintiffs' lack of standing.[118] At the least, it increases the uncertainty as to what *Doe* necessarily decided.

Not only was the Court divided on the issue of standing, but the concept of a constitutional right to privacy was in an even greater state of flux.[119] After the Court decided *Eisenstadt v. Baird*[120] and *Roe v. Wade*,[121] scholars speculated as to the full reach of the constitutional right to privacy.[122] *Eisenstadt* declared that a state may not prevent the distribution of contraceptives to

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116. 422 U.S. 490 (1975) (The five justices in the majority also voted to summarily affirm *Doe*.).

117. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (The six justices in the majority also voted to summarily affirm *Doe*.).

118. The Court handed down several other important opinions addressing standing between 1974 and 1976. Rizzo v. Goode, 423 U.S. 362 (1976); United States v. Richardson, 418 U.S. 166 (1974); Steffel v. Thompson, 415 U.S. 452 (1974).

119. Rosenberg, *Notes from the Underground: A Substantive Analysis of Summary Adjudication by the Burger Court: Part II*, 19 HOUS. L. REV. 831, 848-56 (1982) (analysis of the right to privacy cases prior to *Doe*) [hereinafter cited as Rosenberg, *Part II*]. *But see* Hafen, *supra* note 21, at 517-21; Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670 (1973) (the Court has consistently refused to extend the right to privacy to encompass lifestyle arguments).

120. 405 U.S. 438 (1972). *See supra* note 1.

121. 410 U.S. 113 (1973). *See supra* note 1.

122. *See supra* note 6.

unmarried persons.[123] *Roe* declared that criminal abortion statutes violated the constitutional right to privacy whether applied to married or unmarried women.[124] After these decisions, it seemed that the right to privacy might extend to all forms of adult consensual sexual behavior because *Eisenstadt* and *Roe* had expanded the concept beyond the marital relationship.[125]

The Court further confused matters when, only three months after *Doe*, it decided *Planned Parenthood v. Danforth*.[126] In *Danforth*, the Court held that the state may not require minors seeking abortions to have parental consent[127] nor require married women seeking abortions to obtain their husbands' consent.[128] Four Justices dissented from the first holding[129] while three Justices dissented from the latter holding.[130] Apparently the Justices disagreed as to whether the right to privacy should be strictly limited to "traditional family" concepts or expanded to embrace other forms of adult behavior.[131] Even after *Danforth* it was not clear how far the right to privacy could extend. Indeed, permitting minors to obtain abortions without parental consent does not fit within any definition of "traditional family" concepts.[132]

It is uncertain whether the Court based its summary affirmance of *Doe* on the issue of standing or on the right to privacy. Perhaps all six Justices voted to affirm for different reasons.[133] When the meaning of a summary affirmance is so vague, lower courts would be better advised to disregard the case as precedent, rather than to erroneously and prematurely foreclose an important constitutional debate.[134]

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123. 405 U.S. at 438.

124. 410 U.S. at 113.

125. *See supra* note 119.

126. 428 U.S. 52 (1976).

127. *Id.* at 72-75.

128. *Id.* at 67-72.

129. *Id.* at 54.

130. *Id.*

131. *Compare id.* at 71 & 75 (majority rejected the state's interest in promoting marriage and family as a justification for the statute) *with id.* at 93 (White, J., dissenting) (husbands have an interest in child bearing) & 95 (parental consultation is traditional method of protecting children).

132. *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 134-37 (1977) (criticism of the Court's use of tradition to define constitutional rights).

133. *See* Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 920 (1976) (Brennan, J., dissenting from denial of certiorari).

134. Rosenberg, *Part II*, *supra* note 119, at 631 (discussion of the high risk of erroneous decisions by the Court in summary actions).

B. *The Supreme Court's Resolution?*

The State of Georgia has filed a petition for writ of certiorari in *Hardwick v. Bowers*,[135] which the Supreme Court of the United States has granted.[136] In the past, lower courts have cited *Doe* as precedent when dismissing cases raising the question of whether the Constitution protects the right of consenting adults to engage in "unorthodox" private sexual behavior.[137] The Supreme Court, however, should not rely on *Doe* because the Court does not consider summary affirmances binding on itself.[138]

When the Court does hear *Hardwick*, the time will finally arrive for a possible resolution of the issue of a homosexual's right to privacy.[139] Indeed, this question has been hopelessly muddled because of the Court's summary affirmance in *Doe*. The Court, therefore, should take this opportunity to further clarify the precedential value of summary disposals. The Justices should consider patterning a rule governing their summary calendar after the rules promulgated by the Courts of Appeals for the Fifth and Eleventh Circuits.[140] The Court would still be able to manage its appellate docket if it limited summary disposals to frivolous appeals and cases controlled by binding precedent because such cases compose the majority of appeals.[141] These summary disposals, however, would have little or no precedential value.[142] In fact, the Court should specifically declare that lower courts are not to treat summary actions as precedent. Thus, the Court, as required by statute,[143] would decide appeals which it summarily disposed of on the merits, but the decisions would not add to the body of precedent. If the Court should summarily dispose of a case that presents an important constitutional issue after declaring that such a disposal will have no precedential value, at least the mischief will be confined to that particular case. If the Court removes the unnecessary stamp of precedent from its summary disposals, lower courts will

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135. Hardwick v. Bowers, 54 U.S.L.W. 3086 (U.S. July 25, 1985) (No. 85-140).

136. N.Y. Times, Nov. 5, 1985, at 11, col. 1-3 (nat'l ed.).

137. *See supra* note 7.

138. *See supra* note 39 and text accompanying note 94.

139. *See supra* note 21.

140. *See supra* note 52 for text of Eleventh Circuit Court Rule 25.

141. *See supra* note 46.

142. *See* Rosenberg, *Part II*, *supra* note 119, at 896 (Summary dispositions should be given persuasive rather than binding authority.).

143. *See supra* text accompanying note 25.

then be freed from the task of wrestling the Court's hidden meaning from within the words "affirmed on appeal."

ELISA L. FULLER*

*The author would like to thank Professor Tony Powers, Thane Rosenbaum, Andrew Peretz, and Jon Fuller.