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National Gay Task Force v. Board of Education of Oklahoma City

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NATIONAL GAY TASK FORCE V. BOARD OF EDUCATION OF OKLAHOMA CITY

INTRODUCTION

Homosexual teachers have looked to the American court system for two types of relief: (1) protection against employment discrimination based upon their status as homosexuals; and (2) protection against reprimands for voicing an opinion on the topic of homosexuality.[1] Until the last quarter century, it has been as if teachers gave up their first amendment rights[2] when they received their teaching certificates.[3]

The National Gay Task Force (NGTF) looked to the courts for relief in challenging an Oklahoma statute which attempted to regulate teachers' speech. *National Gay Task Force v. Board of Education of Oklahoma City*[4] marks the first time since the beginning of the gay rights movement that the United States Supreme Court has granted *certiorari* to a case which had homosexuality as its central issue.[5] The result in *National Gay Task Force*[6] has left

[1]Lavine, *Free Speech, Rights of Homosexual Teachers*, 80 COLUM. L. REV. 1513, 1514 (1980) (hereinafter cited as Lavine). This note discusses balancing teachers' right to free speech against the state's interest in regulating teachers' speech.

[2]U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."; Keyshian v. Board of Regents, 385 U.S. 589 (1967) (Faculty members of a New York State University were reinstated after having been dismissed for refusing to certify that they were not communists); Pickering v. Board of Educ., 391 U.S. 563 (1968) (A teacher was fired after publicly commenting upon the Board of Education's method of fund raising. The Supreme Court recognized the right of teachers to formulate and publicly announce opinions regarding public issues without fear of dismissal. The proper balance is a "balance between the interests of a teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.") *Id.* at 568: Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969) (Three students protested the Viet Nam War by wearing black armbands, even though this violated school rules. The students were suspended. The Court recognized that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.") *Id.* at 506.

[3]*See generally*, Lavine, *supra* note 1; Stevens, *Balancing Speech and Efficiency: The Educator's Freedom of Expression after Pickering*, 8 J.L. & EDUC. 223 (1979). This note discusses the harmonization of teachers' interest of free speech and the state's interest of regulating teachers' speech since *Pickering;* Kusma, *First Amendment Rights and Teacher Dismissal: A Survey*, 4 OHIO N.U.L. REV. 392 (1977). This note discusses the limitations of teachers' first amendment rights.

[4]729 F.2d 1270 (10th Cir. 1984), *aff'd*, 105 S.Ct. 1858 (1985).

[5]The case of Rowland v. Mad River Local School Dist., 730 F.2d 444 (1984), *cert. denied*, 105 S.Ct. 1373 (1985), was denied a writ of *certiorari* to the United States Supreme Court February 25, 1985, only one month before hearing the *National Gay Task Force* case. Homosexuality was the central issue of this case also, dealing specifically with the issue of the "rights of public employees to maintain and express their private sexual preferences." *Rowland*, 105 S.Ct. 1373. A non-tenured teacher was suspended from her high school guidance counseling position in December of 1974 and did not have her contract renewed in April of 1975 solely because she was bisexual. The Sixth Circuit Court of Appeals ruled that the school district's decision to not renew the teacher's contract could not be objected to on a first amendment basis because the teacher's speech was not about "a matter of public concern." *Rowland*, 730 F.2d at 451. The court also held that the teacher did not have an equal protection claim because the teacher did not present evidence of "how other employees with different sexual preferences were treated." *Id.* When the writ of *certiorari* was denied, Justice Brennan with whom Justice Marshall joined, wrote a dissenting opinion stating reasons why *certiorari* should have been granted. Justice Powell took no part in the consideration or decision of this petition. *Id.* at 1379.

[6]*Id.*

both the challengers and the defenders of the Oklahoma statute claiming victory.[7]

The NGTF claims that although the portion of the statute which prohibits teachers from advocating or promoting homosexuality in the classroom has been upheld, four members of the Supreme Court have demonstrated that laws which silence all speech about homosexuality will not be upheld.[8] The Board of Education of Oklahoma City will probably lobby to have the Oklahoma legislature pass a new law which will not infringe upon the constitutional rights of homosexual teachers.[9]

FACTS

In 1978, the Oklahoma legislature enacted a statute[10] which provided for the dismissal or suspension of teachers engaging in homosexual activity or conduct. This statute attempted to regulate not only teachers, but any teaching-related employee, that is, one who comes in continual contact with school children.[11] Also, the statute prohibited all speech relating to the issue of homosexuality. However, this law was never actually invoked because the NGTF immediately filed an action in federal court challenging the facial constitutionality of the statute.[12] The NGTF believed that the Oklahoma statute was "too broad and would inhibit teachers from expressing their views on

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[7]The Washington Post, March 27, 1985, at A2.

[8]*Id.*

[9]*Id.*

[10]OKLA. STAT. ANN. tit. 70, § 6-103.15 (West Supp. 1984).

A. As used in this section:
   1. Public homosexual activity means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:
      a. committed with a person of the same sex, and
      b. indiscreet and not practiced in private;
   2. "Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and
   3. "Teacher" means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teacher, student teacher, or a teachers' aide may be refused employment or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:
   1. Engaged in public homosexual conduct or activity; and
   2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or a teachers' aide.

C. The following factors shall be considered in making the determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:
   1. The likelihood that the activity or conduct may adversely affect students or school employees;
   2. The proximity in time and place of the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties;
   3. Any extenuating or aggravating circumstances; and
   4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

[11]For the purpose of this note, all employees affected by this statute will be referred to as teachers.

[12]NGTF membership includes teachers in the Oklahoma Public School System. *See, National Gay Task Force*, 729 F.2d at 1272.

homosexuality."[13] The district court applied the "material and substantial disruption test," and held that the statute was constitutional despite the fact that it reaches protected speech.[14]

The NGTF appealed to the Tenth Circuit Court of Appeals, contending that the statute violated the first and fourteenth amendments. The Tenth Circuit Court reversed[15] holding that "the statute, in so far as it punishes homosexual conduct as that phrase is defined in the statute to include advocating . . . encouraging or promoting public or private homosexual activity is unconstitutional."[16] The court added that the unconstitutional portion of the statute was severable from the portion which proscribes "homosexual activity," thereby enabling that portion to withstand constitutional attack.[17]

An appeal to the United States Supreme Court resulted in a split decision,[18] and an affirmance of the judgment of the Tenth Circuit Court of Appeals.[19] Furthermore, the Court did not order reargument of this case.[20]

This note will focus on the opinion of the Tenth Circuit Court of Appeals and will discuss the Oklahoma statute as it relates to: (1) teachers' right of privacy; (2) the doctrine of overbreadth; (3) the doctrine of statutory vagueness; (4) teachers' right to equal protection; and (5) the establishment clause.

RIGHT OF PRIVACY

The right of privacy was first recognized as a fundamental right in *Griswold v. Connecticut.*[21] One of the most controversial types of right of privacy is the right of privacy of sexual intimacy between homosexuals.[22] The right of privacy is defined as a right to be free from unwarranted governmental intrusion into matters which fundamentally affect a person.[23] The United

[13] *See supra* note 7.

[14] *National Gay Task Force,* 729 F.2d at 1272-73.

[15] A three judge panel reversed this decision by a 2-1 vote.

[16] *National Gay Task Force,* 729 F.2d at 1275.

[17] *Id.*

[18] *National Gay Task Force,* 105 S.Ct. 1858 (1985). Justice Powell took no part in the decision of this case because of illness.

[19] The tie vote, 4-4, caused the Supreme Court to affirm the Tenth Circuit Court's decision. Because of this affirmance, the Supreme Court ruling does not serve as a precedent for other cases. Neil v. Biggers, 409 U.S. 188 (1972). No Supreme Court opinion was written.

[20] It could be that Justice Powell did not want to take part in this decision. The Court ordered reargument on three other cases which resulted in a tie during Justice Powell's absence.

[21] 381 U.S. 479 (1965). The director and a doctor of the Planned Parenthood League of Connecticut were convicted as assessories in violation of a Connecticut statute prohibiting the use of contraceptives. Appellants distributed contraceptives to married couples. The Court held the statute unconstitutional as it invaded the right to marital privacy. *Id.* at 486.

[22] *See* People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S. 2d 947 (1980), *cert. denied,* 451 U.S. 987 (1981); *National Gay Task Force,* 729 F.2d 1270; *See generally,* Blackburn, *Human Rights in an International Context: Recognizing the Right of Intimate Association,* 43 OHIO ST. L.J. 143 (1982). This note discusses the right of privacy in all types of human relationships.

[23] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

States Supreme Court in *Roe v. Wade*[24] stated that governmental intrusion into a person's life is permissible only when the state proves that the governmental intrusion is warranted.[25] In *Whalen v. Roe,*[26] the Supreme Court set out the interests protected by the constitutional right of privacy.[27] The Tenth Circuit Court[28] applied the standards set out in *Baker v. Wade,*[29] *People v. Onofre,*[30] and *Lovisi v. Slayton*[31] when determining whether a teacher's right of privacy is violated by the Oklahoma statute.

In *Baker v. Wade,*[32] Donald Baker, a homosexual, brought suit attacking the constitutionality of a Texas statute[33] which proscribed deviate sexual intercourse between persons of the same sex. Donald Baker contended that according to the Texas statute, his behavior was criminal, but that the same kind of sexual behavior which the Texas statute defines as "deviate" is protected by the constitutional right of privacy, when practiced by married couples. Recognizing that "the right of privacy protects individuals' decisions concerning marriage, procreation, contraception, abortion, and family relationships — and that any government regulation upon such fundamental rights may be justified only by a compelling state interest and must be narrowly drawn to express only the legitimate state interest at stake,"[34] the court held that there is a right of privacy to private sexual conduct between consenting adults.[35]

In *People v. Onofre,*[36] Ronald Onofre was convicted of violating a New York statute[37] which made consensual sodomy a crime. The court recognized

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[24]410 U.S. 113, *reh'g denied,* 410 U.S. 959 (1973).

[25]*Id.* at 154.

[26]429 U.S. 589 (1977).

[27]*Id.* at 599 n. 24.
(1) the right to be free from governmental intrusions into a person's private affairs;
(2) protection from involuntary exposure of a person's private affairs; and
(3) freedom from governmental compulsion into a person's actions, thoughts, experiences and beliefs.

[28]*National Gay Task Force,* 729 F.2d at 1273.

[29]553 F. Supp. 1121 (N.D. Tex. 1982).

[30]51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied,* 451 U.S. 987 (1981). *See generally,* Schwartz, *Consensual Sodomy and the Choice of a Moral Doctrine: New York's Permissive Position,* 5 W. NEW ENG. L. REV. 75 (1983); Katz, *Sexual Morality and the Constitution: People v. Onofre,* 46 ALB. L. REV. 311 (1982); Note, *Constitutional Law,* 20 J. FAM. L. 174 (1981-82); Wolff, *Expanding the Right of Sexual Privacy,* 27 LOY. L. REV. 1279 (1981). All articles discuss *Onofre,* 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980).

[31]539 F.2d 349 (4th Cir.), *cert. denied,* 429 U.S. 977 (1976).

[32]553 F. Supp. 1121 (N.D. Tex. 1982).

[33]*Id.* at 1124. "A person commits an offense if he [or she] engages in deviate sexual intercourse with another individual of the same sex. Deviate sexual intercourse means any contact between any part of the genitals of one person and the mouth or anus of another person. A violation of this statute is a class C misdemeanor, punishable only by a fine not to exceed $200." *Id.*

[34]*Id.* at 1135.

[35]*Id.* at 1148.

[36]51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied,* 451 U.S. 987 (1981).

[37]*Id.* at 484, 415 N.E.2d at 938, 434 N.Y.S.2d at 948-49, *cert. denied,* 451 U.S. 987 (1981). "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person. Deviate sexual

that when acts such as those defined by the New York consensual sodomy statute are done in private, there is no rational basis for prohibiting such acts if they are done voluntarily by consenting adults.

In *Lovisi v. Slayton,*[38] a married couple was convicted of violating a Virginia sodomy statute.[39] Mr. and Mrs. Lovisi placed an advertisement in a magazine to solicit a third sexual partner. Pictures were taken of the three persons engaging in sexual activity in the Lovisi's home. Some of the photographs showed Mrs. Lovisi performing fellatio upon her husband and another male. Later, Mrs. Lovisi's two minor daughters saw the photographs. Mr. and Mrs. Lovisi challenged the constitutionality of the Virginia sodomy statute claiming that the statute violated their right to sexual privacy in a marital relationship.[40] The court denied this challenge, stating that once a married couple admits strangers into their bedroom to share in their sexual intimacy, then the constitutional protection of privacy is dissolved. The court recognized that couples have the freedom to choose their own degree of privacy, but when couples begin to allow "onlookers, whether they are close friends, chance acquaintances, observed 'peeping Toms' or paying customers, they may not exclude the state as a constitutionally forbidden intruder."[41]

The Constitution protects the private sexual behavior of consenting adults provided the sexual behavior takes place in private. Since the Oklahoma statute does not punish acts performed in private, the court reasoned that there was not even an implication of a violation of the right of privacy.[42]

After failing to prove that the first amendment right of privacy was violated by the statute, the NGTF attempted to prove that the statute violated another first amendment protection, the right to advocate a particular ideal, by proving that the Oklahoma statute was overbroad.

OVERBREADTH

A statute may be challenged as overbroad when it overreaches into constitutionally protected activities while lawfully restraining unprotected activities. When considering a facial challenge of a statute based upon over-

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intercourse means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva." *Id.* at 485, 415 N.E.2d at 938, 434 N.Y.S.2d at 948.

[38]539 F.2d 349 (4th Cir.), *cert. denied,* 429 U.S. 977 (1976).

[39]*Id.* at 350. "If any person shall carnally know in any manner any brute animal, or carnally know 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."

[40]*Id.* at 351.

[41]*Id.*

[42]*National Gay Task Force,* 729 F.2d at 1273. The constitution protects consensual, non-commercial sexual acts in private between adults. The dissenting opinion does not address the right of privacy issue. This portion of the Tenth Circuit Court's ruling was not appealed and was not before the Supreme Court. The New York Times, March 27, 1985, at 23.

breadth, the courts proceed cautiously for fear that the invalidation of a statute may interfere unnecessarily with a state regulatory program.[43] Therefore, a court will not totally invalidate a statute unless it is not "readily subject to a narrowing construction by the state courts and its deterrent effect on legitimate expression is both real and substantial."[44]

Because of the courts' reluctance to invalidate a statute or a part of a statute unless it unconstitutionally limits expression, the Tenth Circuit Court invalidated only the part of the Oklahoma statute that it found was overbroad.

The Oklahoma statute provided punishment for "public homosexual conduct."[45] Public homosexual conduct is defined as "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees."[46] Advocacy is protected by the first amendment unless the advocacy of a particular ideal results in an imminent lawless action.[47]

The Tenth Circuit Court recognized that "encouraging" and "promoting," like "advocating," do not imply a threat of imminent action.[48] Thus, the court struck down Section B of the statute, claiming that it was severable from the remaining portion of the statute.[49] A teacher who advocates the repeal of an antisodomy statute via the local media would be violating Section B of the statute, because there would be a substantial risk of the statement coming to the attention of school children. Such statements are protected by the first amendment of the Constitution.[50] It would be unfair and unconstitutional to require all teachers to restrict their expression.[51]

The dissenting judge, Judge Barrett, did not agree on this point. He stated that

> [a]ny teacher who advocates, solicits, encourages or promotes the practice of sodomy in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees is in fact and in truth inciting school children to participate in the abominable and detestable crime against nature.[52]

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[43] Erznozik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

[44] *Id.*

[45] *See supra* note 9.

[46] *Id.*

[47] Brandenberg v. Ohio, 395 U.S. 444 (1969). "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of . . . law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

[48] *National Gay Task Force*, 729 F.2d at 1274.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *National Gay Task Force*, 729 F.2d at 1276; *see Baker*, 553 F. Supp. 1121. "At least 5% of American

Judge Barrett further stated that advocacy of homosexuality is considered inciting because it has the possibility of coming to the attention of school children.[53]

The NGTF claimed victory on the first amendment overbreadth issue, but made another first amendment challenge charging that the Oklahoma statute violated the establishment clause.

ESTABLISHMENT CLAUSE

The establishment clause[54] of the first amendment requires the government to not aid or establish a religion. When a law is challenged by the establishment clause, it must pass a three prong test:

(1) it must have a secular purpose;
(2) it must have a primary secular effect; and
(3) it must not involve the government in excessive entanglement with religion.[55]

A statute does not violate the establishment clause if it has a secular purpose, if its primary effect does not advance or inhibit religion, and if it does not promote an excessive entanglement with religion.[56] The Supreme Court had held that a statute does not violate the establishment clause because it "happens to coincide or harmonize with the tenets of some or all religions."[57]

The Tenth Circuit Court affirmed the ruling of the district court, stating that the Oklahoma statute does not violate the establishment clause.[58] Since the statute did not espouse one particular form of religion it was irrelevant that it happened to harmonize with the beliefs of some or all religions. The Oklahoma statute thus did not violate the establishment clause.

After exhausting all issues challenging that the statute violates the first amendment, the NGTF challenged the statute on fourteenth amendment grounds.

VOID FOR VAGUENESS

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.[59] detailed

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males are exclusive or obligatory homosexuals — those who have no heterosexual experiences and no desire to change. Obligatory homosexuality is not a matter of choice: it is fixed at an early age. The overwhelming majority of experts agree that individuals become homosexuals because of biological or genetic factors, or environmental conditioning, or a combination of these causes." *Id.* at 1129; "There is no basis to assume that criminal laws . . . reduce the number of homosexuals." *Id.* at 1130.

[53] *National Gay Task Force*, 729 F.2d at 1277.

[54] U.S. CONST. amend. I, *supra* note 2.

[55] NOWAK, ROTUNDA, YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 851 (1978).

[56] Harris v. McRae, 448 U.S. 297, 319, *reh'g denied*, 448 U.S. 917 (1980).

[57] McGowan v. Maryland, 366 U.S. 420, 442 (1961).

[58] *National Gay Task Force*, 729 F.2d at 1273.

[59] 455 U.S. 489, *reh'g denied*, 456 U.S. 950 (1980).

the standards for the unconstitutionality of a statute based upon vagueness.

> A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications.[60]

The NGTF challenged that the statute violated the fourteenth amendment[61] by infringing upon the plaintiff's right to due process. In an inquiry into this issue, the court must first determine whether the statute reaches a "substantial amount of constitutionally protected conduct."[62] Only if the statute is not overbroad may the court examine the statute for vagueness.[63] To succeed on a vagueness claim, the plaintiff must prove that the statute is "impermissibly vague in all of its applications."[64] A person who takes part in conduct which is clearly proscribed cannot complain of the vagueness of the law as it is applied to the conduct of others.[65]

The NGTF attempted to prove that the Oklahoma statute was impermissibly vague as it is applied to public homosexual activity.[66] The Tenth Circuit Court rejected the void for vagueness argument because the NGTF made "no showing"[67] that the statute was impermissibly vague. Cases[68] in Oklahoma have clearly defined what acts the Oklahoma Crime Against Nature[69] proscribes.[70]

Although the NGTF did not succeed with its void for vagueness claim, it challenged the Oklahoma statute on another fourteenth amendment claim, the right to equal protection.

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[60] *Id.* at 497.

[61] U.S. CONST. amend. XIV, § 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[62] *Village of Hoffman Estates*, 455 U.S. at 494.

[63] *Id.* at 495.

[64] *Id.* at 497. This is accomplished by first examining the plaintiff's conduct and then analyzing other hypothetical applications of the law.

[65] *Id.* at 495. Vagueness must be determined according to the circumstances of each case.

[66] *National Gay Task Force*, 729 F.2d at 1273.

[67] *Id.*

[68] Berryman v. State, 283 P.2d 558 (Okl. Crim. App.), *appeal dismissed*, 350 U.S. 878 (1955). Abominable and detestable crimes against nature "include not only sodomy as defined at common law but all unnatural sexual copulation, including oral genital contact, or fellatio." *Id.* at 563.

[69] OKLA. STAT. tit. 21, § 886 (1910). "Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years."

[70] Wainwright v. Stone, 414 U.S. 21 (1973), held that a similar Florida statute was not void for vagueness because Florida courts had specified that the statute applied to both oral and anal copulation.

EQUAL PROTECTION

The equal protection clause of the United States Constitution[71] concerns the legality of statutory classifications of persons. This requires that individuals be treated in a manner similar to others. The requirement of the equal protection guarantee is met if the statutory classification is rationally related to valid statutory purposes.[72]

The Tenth Circuit Court held that the NTGF's guarantee to equal protection was not violated by the Oklahoma statute.[73] The United States Supreme Court has not recognized that homosexuals, or a classification based upon choice of sexual partners, as a suspect class.[74] The court was reluctant to recognize homosexuals as a suspect class because in *Frontiero v. Richardson*[75] only four members of the Supreme Court accepted gender as a suspect classification.[76] A law which creates an inherently suspect class is subject to the strict scrutiny test[77] when it limits fundamental[78] constitutional rights. The rational relationship to legitimate state purposes test[79] is applied when a fundamental right or suspect class is not involved.[80]

Therefore, the court applied "something less than a strict scrutiny test."[81] Relying upon *Ambach v. Norwick,*[82] the court found that the state government has a compelling interest in not allowing public homosexuals or public advocacy of homosexuality to influence school children.[83] "Surely a school may fire a teacher for engaging in an indiscreet public act of oral or anal inter-

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[71] *See supra* note 61.

[72] Sustein, *Public Values Private Interests, and the Equal Protection Clause,* 5 SUP. CT. REV. 127, 130 (1982). This note discusses the history of equal protection cases and the various tests which are applied to equal protection cases.

[73] *National Gay Task Force,* 729 F.2d at 1273.

[74] "Suspect" classifications are those based upon: gender, Frontiero v. Richardson, 411 U.S. 677 (1973); alienage, Graham v. Richardson, 403 U.S. 365 (1971); race, Loving v. Virginia, 388 U.S. 1 (1967); national origin, Oyama v. California, 332 U.S. 633 (1948); .

[75] *Frontiero,* 411 U.S. 677 (1973).

[76] *National Gay Task Force,* 729 F.2d at 1273.

[77] The strict scrutiny test requires the government to show that it is pursuing a compelling end, the value of which is so great that it justifies the limitation of fundamental values.

[78] Recognized fundamental rights are sex, child rearing, child bearing and marriage.

[79] The rational relationship test questions whether the classification bears a rational relationship to an end of the government which is not prohibited by the Constitution. City of New Orleans v. Dukes, 427 U.S. 297 (1976).

[80] *Baker,* 533 F. Supp. at 1273.

[81] *National Gay Task Force,* 729 F.2d at 1273.

[82] 441 U.S. 68 (1979). This case held that a law forbidding certification of a public school teacher because the applicant is not a United States citizen does not violate the equal protection clause because public school teachers come within governmental function principle such that the law bears a rational relationship to a legitimate state interest.

[83] "Public education, like the police function, fulfills a most fundamental obligation of government to its constituency. The importance of public schools in the preparation of individuals for participation as citizens and in the preservation of the values on which our society rests, long has been recognized by our decisions." *Id.*

course."[84]

When considering whether a violation of the equal protection clause has been made, the court must consider whether the state has an interest in upholding the statute which is more compelling than the group or class of persons whose rights are being infringed. In *National Gay Task Force,*[85] the interests that the court balanced were the state's interest in protecting school children against the teachers' interest in their first and fourteenth amendment rights.

STATE'S INTEREST IN REGULATING TEACHERS' SPEECH

The majority and the minority of the court differed in opinion over the issue of the state's interest in regulating teachers' speech. The majority contended that the "state's interest outweigh a teacher's interest only when the expression results in a material or substantial interference or disruption in the normal activities of the school."[86] Teachers nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[87] In *Tinker v. Des Moines Independent Community School District,*[88] the Supreme Court noted that fear or apprehension of disturbance is not great enough to overcome the constitutional right to freedom of speech.[89] To justify the prohibition of speech, the state must show "something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint."[90] The Supreme Court has held that a teacher's first amendment rights may be limited only if the state proves that "some restriction is necessary to prevent the disruption of official functions or to ensure effective performance"[91] by the teacher.

The minority opinion, however, vehemently disagrees.[92] Oklahoma enacted this statute to protect its school children and teachers from any teacher who engages in public homosexual conduct or activity.[93] "To equate such 'restraint' on first amendment (sic) speech with the *Tinker* armband display and to require proof that advocacy of the act of sodomy will substantially interfere or disrupt normal school activities is a bow to permissiveness."[94]

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[84] *National Gay Task Force,* 729 F.2d at 1273.

[85] *Id.* at 1270.

[86] *Id.* at 1274.

[87] Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969).

[88] *Id.*

[89] *Id.* at 508.

[90] *Id.* at 509.

[91] *National Gay Task Force,* 729 F.2d 1270. "It is fundamental that the state legislative bodies, in the exercise of state police power, may enact reasonable regulations in the interest of public health, safety, morals and welfare over persons within state limits." *Id.* at 1275.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 1277.

JUSTICE POWELL'S ABSENCE

Supreme Court Justice Lewis F. Powell, Jr. took no part in the decision of this case because he was unable to hear oral argument[95] due to illness.[96] A tie resulted with the Court sharply divided four to four.[97] Justice Powell's absence and the tie vote caused the Court to affirm the Tenth Circuit Court's opinion.[98] Because no Supreme Court opinion was written, the views of the remaining members of the Court are also unavailable.

If Justice Powell had voted, *National Gay Task Force*[99] would have had precedential value and would have provided a cornerstone for subsequent litigation which has homosexuality as its central issue.[100] It is impossible to definitely determine what the outcome of the case would have been if Justice Powell was able to participate in the decision, but a prediction can be made by reviewing Justice Powell's personal background and by reading his opinions.[101]

Justice Powell's experience makes him attentive to school related issues and issues affecting education. As an advocate of education, Justice Powell served on the Richmond Public School Board for nine years and on the Virginia State Board of Education for one year.[102]

In *Plyler v. Doe*,[103] a Texas law enabled the state to withhold from local school districts any state funds for the education of children who were illegal aliens and allowed local school districts to deny enrollment in public school to children who were illegal aliens. The children of illegal aliens challenged the Texas statute on the basis that it violated their right to equal protection of the law. The Court recognized that these children were entitled to equal protection of the law even though they are illegal aliens and are not members of a recognized suspect class.[104]

Justice Powell wrote a concurring opinion recognizing that although illegal alien children are not a suspect class, "[t]hey are excluded only because of a status resulting from the violation by parents or guardians of our immigra-

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[95] *See supra* note 7.

[96] Justice Powell missed oral argument in 56 cases due to recovery from surgery for prostrate cancer in January of 1985.

[97] 105 S.Ct. 1858 (1985).

[98] *See supra*, note 19.

[99] 729 F.2d 1270.

[100] *See supra*, note 19.

[101] Because the right of privacy was not in issue before the Supreme Court, the following discussion is based upon Justice Powell's previous opinions about the equal protection clause.

[102] Oaks, *Tribute to Lewis F. Powell, Jr.*, 68 VA. L. REV. 161 (1982).
"Colleagues who worked with Lewis Powell on the school boards of Richmond and the State of Virginia during the stressful desegregation battles of the sixties have described how all of his personal relations were permeated with his sense of fairness and consideration for others, his compassion, and his respect for the dignity of the human personality." *Id.* at 162.

[103] 457 U.S. 202 (1982), *reh'g denied*, 458 U.S. 1131 (1982).

[104] *Id.* at 230.

tion laws and the fact that they remain in our country unlawfully."[105] He further states that a legislative classification that has the potential to create an underclass of citizens cannot be reconciled with the equal protection clause.[106] Because Texas' denial of education to the illegal alien children had no substantial relationship to any substantial state interest, Justice Powell concurred in striking down the statute.[107]

In *Frontiero v. Richardson,*[108] a married female Air Force officer challenged a statute which solely for administrative convenience made spouses of male members of uniformed services dependents for the purposes of obtaining larger living space and larger medical allowances. Spouses of female members were not considered dependents under this statute unless the officer's husband was dependent upon his wife for more than half of his support. The Court concluded that a classification based upon sex is inherently suspect[109] and held that the due process clause of the fifth amendment was violated.[110] Justice Powell concurred in this judgment, but did not agree that all classifications based upon sex are inherently suspect.[111] Since the passage of the equal rights amendment was pending at the time, he believed that the legislature should create a new suspect class.[112]

Justice Powell's reluctance to create an inherently suspect classification in *Plyler*[113] and *Frontiero*[114] probably would have been demonstrated in *National Gay Task Force.*[115] He would probably have applied something less than a strict scrutiny test to NGTF. Justice Powell's fundamental belief in education and its importance in American society probably would have caused him to side with the view demonstrated in *Ambach*[116] and affirm the view of the Tenth Circuit Court.

CONCLUSION

National Gay Task Force[117] poses a perplexing problem. The difficulty lies in evaluating at what point the teachers' expression becomes so disruptive as to

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[105] *Id.* at 238.
[106] *Id.* at 239.
[107] *Id.*
[108] 411 U.S. 677 (1973).
[109] *Id.* at 688.
[110] *Id.* at 690-91.
[111] *Id.* at 691.
[112] *Id.* at 692.
[113] *Plyler,* 457 U.S. 202.
[114] *Frontiero,* 411 U.S. 677.
[115] *National Gay Task Force,* 729 F.2d 1270.
[116] *Ambach,* 441 U.S. at 76.
[117] *National Gay Task Force,* 729 F.2d 1270.

warrant the state's interference with the teachers' right to free speech. Although *National Gay Task Force*[118] upheld the portion of the statute allowing teacher dismissal for public homosexuality, it did show that some Justices of the Supreme Court are willing to affirm laws that inhibit the freedoms of homosexual teachers. Harvard Law Professor, Laurence Tribe, the attorney who argued the case on behalf of the NGTF before the United States Supreme Court said, "[i]t is a signal that there will be no green light from this Court for laws silencing speech about homosexuality."[119]

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[118] *Id.*

[119] *See supra* note 7.