The Legality of Homosexual Marriage

Two men recently petitioned the Minnesota Supreme Court to compel the state to grant them a marriage license.[1] The court rejected their application for mandamus, and their appeal was subsequently dismissed by the United States Supreme Court.[2] But the claim was far from frivilous. A credible case can be made for the contention that the denial of marriage licenses to all homosexual couples violates the Equal Protection Clause of the Fourteenth Amendment.[3] There are serious difficul-

1. Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (Minn. Sup. Ct., 1971), *appeal dismissed,* 41 U.S.L.W. 3167 (U.S. Oct. 10, 1972). Petitioners had applied for a marriage license under MINN. STAT. ANN. § 517.01 (1969), which does not specify the sex of the applicants:

> Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage hereafter may be contracted only when a license has been obtained therefor as provided by law and when such marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom the parties in good faith believe to be authorized, so to do.

The clerk of the court declined to issue the license on the sole ground that petitioners were of the same sex.

2. Baker v. Nelson, 41 U.S.L.W. 3167 (U.S. Oct. 10, 1972).

3. In addition to their Fourteenth Amendment argument, petitioners in Baker v. Nelson also based their claim on a variety of other constitutional provisions, including the First, Eighth, and Ninth Amendments. Although the arguments under these provisions raise some interesting legal issues, they probably cannot be sustained under existing court precedent.

The First Amendment right to free speech and free assembly, as construed by the Supreme Court, includes a number of other rights, among them the right to engage in free and private associations. Williams v. Rhodes, 393 U.S. 23 (1968); Elfbrandt v. Russell, 384 U.S. 11 (1966); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); NAACP v. Alabama, 357 U.S. 449 (1958).

Justice Douglas, writing for the Court in Griswold v. Connecticut, 381 U.S. 479 (1965), referred to the right of association as one of the "penumbras formed by emanations from those guarantees [specified in the Bill of Rights] that help give them life and substance." *Id.* at 484. Douglas' discussion of marriage is particularly significant:

> Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

However, the Supreme Court has never specifically declared the marriage unit to be an association within the terms of the First Amendment. Most right of association cases to date have dealt with associations organized for political purposes, and moreover, with existing associations rather than the formation of new ones.

Petitioners' Eighth Amendment claim was premised on the assertion that the denial of their right to marriage constituted punishment for a status or condition which they were powerless to change. They based their argument chiefly on the Supreme Court's decision in Robinson v. California, 370 U.S. 660 (1962), in which the Court struck down a state law under which a narcotics addict was sentenced to ninety days' imprisonment on the ground that to condemn a person for "an illness, which may be contracted innocently or involuntarily" constituted cruel and unusual punishment. *Id.* at 667. But *Robinson* concerned punishment for a "crime"; even Justice Fortas' liberal interpretation of *Robinson,* set forth in his dissent in Powell v. Texas, 392 U.S. 514, 567 (1968), does not extend the holding beyond the context of criminal sanctions.

Petitioners' Ninth Amendment claim was apparently based upon Justice Goldberg's

ties with this equal protection analysis, which make it questionable whether courts will uphold it under current precedent. Their claim, however, would almost certainly be vindicated under the proposed Equal Rights Amendment, which would establish a stricter prohibition against discriminatory treatment along sexual lines. This Note will first examine the constitutionality of restricting marriage licenses to heterosexual pairs under traditional equal protection doctrine, and will then turn to the implications of the Equal Rights Amendment for this practice.

I. The Fourteenth Amendment

It is by now well established that the Supreme Court varies the degree of scrutiny to which it subjects legislative classifications according to the groups and interests affected by any given classification.[4] The so-called "strict scrutiny" standard is usually triggered by legislation which either contains a classification that is suspect because of the nature of the group disadvantaged, or threatens a "basic civil right of man."[5] When this standard is employed, the government is required

concurring opinion in Griswold v. Connecticut, 381 U.S. 479, 488-97 (1965). Justice Goldberg there contended that the Ninth Amendment was inserted into the Bill of Rights to protect from federal infringement certain fundamental rights not otherwise mentioned (*e.g.*, in *Griswold*, the right to marital privacy). He argued that at least some of these fundamental rights, like some of the rights protected by the first eight amendments, were made applicable to the states by the Due Process Clause of the Fourteenth Amendment.

With this interpretation in mind, it might be argued that the Ninth Amendment shields the right to marry from governmental interference. Tangential support for this contention could be derived from Loving v. Virginia, 388 U.S. 1 (1967), in which the Court held that the right to marry was fundamental and that denial of that right on racial grounds violated the Due Process Clause. *Id.* at 12. However, it is doubtful that the Ninth Amendment significantly contributes to the resolution of this constitutional problem. If the right to marry persons of the same sex is fundamental and is not counterbalanced by important state interests, then an argument based on the Fourteenth Amendment, *infra* pp. 574-83, should carry Baker and McConnell's case. If not, the Ninth Amendment case can hardly stand on its own.

4. *See, e.g.*, Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural Law—Due Process Formula,"* 16 U.C.L.A.L. REV. 716, 739-46 (1969); Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969); Note, *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 60-71 (1970).

5. Every classification, other than racial, which has been found to be suspect by the Court has been considered in the context of an important constitutional right. In the cases in which wealth/poverty distinctions were overturned, the rights infringed included voting (Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)), the right to adequate appellate review (Griffin v. Illinois, 351 U.S. 12 (1956)), and the right to representation during such review (Douglas v. California, 372 U.S. 353 (1963)). Carrington v. Rash, 380 U.S. 89 (1965), in which the impermissible classification was between military and civilian members of a community, dealt with the right to vote; Shapiro v. Thompson, 394 U.S. 618 (1969), outlawing discrimination on the basis of residency for welfare recipients, centered on the right to travel. Thus, while the inherently unfair nature of a classification against a group is important and may be sufficient inde-

to prove the presence of a "pressing public necessity" to justify such classification.[6]

In actual practice, the Court has applied the full strict scrutiny standard only rarely outside the context of racial discrimination.[7] In cases involving non-racial classifications, the Court's approach can more realistically be viewed as a balancing process, perhaps best articulated by Justice Marshall in his dissenting opinion in *Dandridge v. Williams:*

> In my view equal protection analysis of this case is not appreciably advanced by the *a priori* definition of a "right," fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.[8]

There are thus three basic factors to be balanced: the degree to which legislative classifications disfavoring homosexuals should be "suspect," because of legislative motivation; the importance of obtaining marriage licenses to homosexuals as a class; and the interests of the government in denying such licenses to all same-sex couples.

A. *Suspect Classification*

The Supreme Court has never explicated its grounds for declaring certain classifications to be inherently suspect. However, examination of the classifications thus far held to be suspect does reveal certain common denominators which may have motivated the Court in so designating them.

Judge J. Skelly Wright expressly articulated one relevant criterion when he observed that classifications disfavoring "a politically voice-

pendently to render a classification suspect, *see, e.g.,* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) (dicta), the nature of the right infringed by that classification is often crucial in determining whether the Court will apply its stricter standard. *See* Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969).

6. Korematsu v. United States, 323 U.S. 214, 216 (1944).

7. One such case is Levy v. Louisiana, 391 U.S. 68 (1968), in which the denial to illegitimate children of the right to sue under a state wrongful death statute was held unconstitutional. Other strict scrutiny cases, while superficially turning upon non-racial classifications, have heavy racial overtones. *See, e.g.,* Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (poll tax requirement for voting found to discriminate against the poor); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948) (state statute barring issuance of fishing licenses to persons "ineligible to citizenship" held to violate the Fourteenth Amendment. The Court observed that the "Japanese are among the few groups still not eligible." *Id.* at 412 n.1).

8. 387 U.S. 471, 520-21 (1970).

less and invisible minority" should be subjected to "closer judicial surveillance and review."[9] Homosexuals as a group would appear to have no more political influence than the black and poor minorities with which Judge Wright was dealing.[10]

Classifications have also been found suspect when they are based on attributes which are inherent in the individual and wholly, or largely, beyond his control.[11] Whatever the causes of homosexuality, the orientation itself does not appear to be one that is freely chosen, nor in most instances can it be changed.[12] Groups which are the subjects of derogatory myths of stereotypes are among those which have been accorded the protection of the strict scrutiny standard, perhaps in part to insure that such stereotypes do not become the bases for legislative classifica-

9. Hobson v. Hansen, 269 F. Supp. 401, 508 (D.D.C. 1967), *remanded on other grounds sub nom.* Smuck v. Hobson, 402 F.2d 175 (D.C. Cir. 1969). Judge Wright's comments, made in the context of de facto school segregation, read in full:

> Judicial deference to these [legislative and administrative] judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political process, not so much because of the chance of outright bias, but because of the abiding danger that the power structure—a term which need carry no disparaging or abusive overtones—may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. Those considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary.

Id. at 507-08.

While Judge Wright mentioned specifically only two groups—the poor and racial minorities—shut out by the power structure, he did not preclude the existence of others similarly disadvantaged. Professor Karst has explicated the decision in Williamson v. Lee Optical Co., 348 U.S. 483 (1955), in which a statute requiring opticians to receive written prescriptions from ophthalmologists or optometrists before duplicating or replacing lenses was upheld, in terms that buttress this notion:

> In *Williamson*, the losers in the legislature were not permanently disadvantaged minorities. The opticians might well have anticipated new legislative alliances that would soften the impact of this legislation by amendment.

Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural Law —Due Process Formula,"* 16 U.C.L.A.L. Rev. 716, 724 (1969).

10. No publicly declared homosexual has been elected to any significant position of power in the United States. In fact, hostility is manifest even to the expression of views espousing civil liberties for homosexuals. *See, e.g.,* the comments of Judge Stevenson in McConnell v. Anderson, 451 F.2d 193, 196 (8th Cir. 1971), *cert. denied.* 405 U.S. 1046 (1972).

11. *See, e.g.,* Korematsu v. United States, 323 U.S. 214, 216 (1944) (classification disfavoring Japanese). *See also* Levy v. Louisiana, 391 U.S. 68 (1968) (classification disfavoring illegitimate children); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (classification disfavoring persons "ineligible to citizenship").

While it is true that some classifications found to be suspect, such as poverty or military status, are not wholly immutable or beyond the plaintiffs' control, they still represent statuses which are not always freely chosen or easily discarded.

12. *See* I. Bieber and Associates, Homosexuality: A Psychoanalytic Study 301, 310-19 (1962). For a recent discussion of the sociological and psychiatric debate centered on the concept of homosexuality as a disease which can be cured, see A. Karlen, Sexuality and Homosexuality 572-606 (1971).

tion.[13] Certainly disparaging misconceptions about homosexuals are endemic in Western society.[14]

Perhaps most importantly, a history of discrimination, both public and private, seems to characterize the groups granted this special judicial status.[15] Discrimination against homosexuals[16] represents a cultural theme in Western society which dates back to Biblical days.[17] Such dis-

13. It is arguable that special fears born of racial prejudice encouraged the perception of Japanese-Americans as a potential threat during the Second World War, leading to the internment camps and *Korematsu*, while Caucasians of German or Italian descent were left relatively undisturbed. *See* Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489, 496 (1945). Stereotypes also played a role in the controversy over the poll tax, which was ruled unconstitutional in Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), over the dissent of Justice Black:

> The Court gives no reason at all to discredit the long-standing beliefs that making the payment of a tax prerequisite to voting is an effective way of collecting revenue and that people who pay their taxes are likely to have a far greater interest in their government . . . .

Id. at 677. The Court majority, in finding suspect the wealth-poverty classification in *Harper*, may well have been expressing its belief that the poor had suffered too long from the "long-standing beliefs" mentioned by Justice Black.

14. *See generally* Taylor, *Historical and Mythological Aspects of Homosexuality*, in SEXUAL INVERSION 140-64 (J. Marmor ed. 1965). Common misconceptions abound; one is that homosexuals are disposed to pedophilia, *see* M. SCHOFIELD, SOCIOLOGICAL ASPECTS OF HOMOSEXUALITY 149 (1965); D. WEST, HOMOSEXUALITY 114-20 (1967), and sources therein cited; another is that they predominate in certain social classes or professions, *see* REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 17 (1957) [hereinafter cited as WOLFENDEN REPORT]; a third is that most male homosexuals are effeminate, *see* M. HOFFMAN, THE GAY WORLD 180-86 (1968), and that most female homosexuals are over-masculine, *see* Martin & Lyon, *The Realities of Lesbianism*, in THE NEW WOMEN (J. Cooke, C. Bunch-Weeks & R. Morgan eds. 1970), 79-80.

15. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879) (state denial to Negro citizens of right to serve on juries held to violate the Fourteenth Amendment):

> This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.

Id. at 306.

16. One of the most serious areas of discrimination has been in the area of federal employment. *See generally* Note, *Dismissal of Homosexuals from Government Employment: The Developing Role of Due Process in Administrative Adjudications*, 58 GEO. L.J. 632 (1970); Note, *Government-Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738 (1969); Note, *Is Governmental Policy Affecting the Employment of Homosexuals Rational?*, 48 N.C.L. REV. 912 (1970).

The Civil Service Commission, while tolerating other instances of "sexual misconduct" such as adultery, once applied strict standards to homosexual behavior because of what it perceived to be widespread public repugnance to homosexuality. *See* Note, *Government-Created Employment Disabilities of the Homosexual, supra*, at 1741-43. Such overt discrimination has since been modified as a result of Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969), in which the District of Columbia Court of Appeals held that there must be a specific connection between an employee's conduct and the efficiency of the civil service before such an employee could be dismissed.

17. Early aversion to homosexuality is seen in the Torah. *See Leviticus* 18:22, 20:13. The Talmudic law codes, relying on Biblical references, further elaborated the laws of sodomy. *See, e.g.*, MISHNAH, SANHEDRIN VII, 4.

These codes were transmitted to the Christian church by its early leaders, particularly St. Paul. A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 482 (1953). *See generally* D. BAILEY, HOMOSEXUALITY AND THE WESTERN TRADITION (1955). By the late Middle Ages, homosexuality was identified with heresy and often punishable by death. Modern views have modified but not erased this hostile attitude. *See* A. KARLEN, *supra* note 12, at 1-39, 44-62, 66-81, 85-99; T. SZASZ, THE MANUFACTURE OF MADNESS ch. 10 (1970); Taylor, *supra* note 14, *passim*.

crimination arguably has been at least as burdensome as that which has afflicted several of the minorities (including aliens and the poor) which have been shielded on occasion by the stricter judicial standard of review. However, the Court might reasonably find that discrimination against homosexuals has not been as burdensome as that affecting other minority groups, particularly blacks.

B. *The Interests of Homosexuals*

With respect to the second element in the balance—the importance of marriage licenses to homosexuals—Court precedent is again of little help. Even in the heterosexual context, the Supreme Court has never specifically ruled that marriage, standing alone, is a sufficiently fundamental right to elicit use of the strict scrutiny standard. However, the plausibility of such a holding is evident from a variety of cases. In the context of the Due Process Clause of the Fourteenth Amendment, the Court has stated that the right to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men . . . one of the 'basic civil rights of man,' fundamental to our very existence."[18] This fact was found to be crucial to the Court's conclusion that anti-miscegenation statutes deprive interracial couples of due process of law.[19] The Court's plurality opinion in *Griswold v. Connecticut*[20] again stressed the fundamental nature of the marriage relationship, noting that it draws special protection from a variety of constitutional safeguards, including the right of association.[21] Most importantly, in *Skinner v. Oklahoma*,[22] the progenitor of strict scrutiny cases, the Court held that the state's sterilization statute required use of that more stringent standard in an equal protection context because of the fundamentality of "[m]arriage and procreation."[23]

However, even explicit judicial recognition of marriage as a fundamental interest to a heterosexual couple would not prove a fortiori that homosexuals have interests of a comparable magnitude in being per-

18. Loving v. Virginia, 388 U.S. 1, 12 (1967).
19. *Id.* *See also* Meyer v. Nebraska, 262 U.S. 390 (1923), which stated in dicta that marriage is part of that "liberty" protected by the Due Process clause because it is "essential to the orderly pursuit of happiness by free men." *Id.* at 399. *See also* Boddie v. Connecticut 401 U.S. 371 (1971) (due process forbids denial of access to divorce courts because of inability to pay court fees and costs). The holding was based in part upon "the basic position of the marriage relationship in this society's hierarchy of values." *Id.* at 374.
20. 381 U.S. 479 (1965).
21. *Id.* at 486. *See* note 4 *supra.*
22. 316 U.S. 535 (1942).
23. *Id.* at 541. *See also* United States v. Kras, 41 U.S.L.W. 4117, 4121 (U.S. Jan. 10, 1973) (dicta).

mitted to obtain marriage licenses. *Skinner* is not alone among Supreme Court cases in linking marriage with procreation when considering the importance of those rights.[24] It is unlikely, in light of Court dicta[25] and of the evolving attitudes toward marriage in our society, that constitutional protections surrounding the institution of marriage would be made dependent on the ability or willingness to bear children.[26] But it is still true that part of the importance of the marriage license to heterosexual couples derives from the social acceptance and legal protection which it guarantees for their natural children.[27] Such considerations would not apply to a same-sex pair.

On the other hand, state sanctioning of the marriage relationship brings with it numerous other legal, social and even psychic benefits which are of undiminished importance to homosexuals. Married individuals enjoy substantial tax benefits,[28] tort recovery for wrongful

24. *Skinner* states that the two rights together are "fundamental to the very existence of the race." 316 U.S. at 541. The Court implied a similar connection in Meyer v. Nebraska, 262 U.S. 390, 399 (1923):

> The liberty thus guaranteed [by the Fourteenth Amendment] . . . denotes . . . freedom . . . to marry, establish a home and bring up children.

25. *See* the characterization of marriage by Justice Douglas in Griswold v. Connecticut, 381 U.S. 479, 486 (1965), set forth in note 4 *supra.*

26. The Minnesota Supreme Court in *Baker* itself recognized that any attempt by the state to require such intent might be both unworkable and unconstitutional. 291 Minn. at 313-14, 191 N.W.2d at 187.

27. *See, e.g., 1971 Midyear Reports and Recommendations of the Family Law Section to the ABA House of Delegates on the Uniform Marriage and Divorce Act,* 5 FAMILY L.Q. 133 (1971), and *The Uniform Marriage and Divorce Act, id.* at 205. Note that the present draft of the act provides for both maintenance and child support. *Id.* at 233-35. The *Baker* court's reason for denying mandamus to the petitioners was that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." 291 Minn. at 312, 191 N.W.2d at 186.

28. Benefits available under the present federal income tax law, for example, include: *Joint Returns.* INT. REV. CODE OF 1954, § 6013(a) provides that "A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions . . . ." *See id.* at § 1 for rate of tax. In addition to the general advantage of factoring two incomes of different amounts into a single tax return, there are instances of joint returns being given other preferential treatment: *See, e.g., id.* at § 179(b) (with regard to additional first year depreciation allowance for small business, the ordinary limitation of $10,000 is raised to $20,000 for husband and wife filing jointly); *id.* at § 1244(b) (with regard to losses on small business stock, loss from the sale or exchange of an asset which is not a capital asset shall not exceed $25,000 or $50,000 in case of husband and wife filing joint returns); *id.* at § 121 (if taxpayer has attained age of 65, gross income does not include gain from the sale or exchange of property). For husband and wife filing a joint return, even though only one spouse satisfies the age requirement, both shall be treated as satisfying it; *id.* at § 37(i)(2)(A) (similar provision for retirement income).

Deductions. Spouses are allowed deductions for each other as dependents in certain instances. *See* INT. REV. CODE OF 1954, § 214 (when incapacitated or institutionalized); *id.* at § 213 (for medical expenses not compensated by insurance); *id.* at § 151 (generally, $750 and an additional $750 if one is blind).

However, certain provisions of the Internal Revenue Code potentially disfavor married people. *See, e.g.,* INT. REV. CODE OF 1954, § 1239(a) provides that the gain from the sale of certain property between spouses is not considered a capital gain; *id.* at § 46(a)(4) (with regard to computing credit for investment in certain depreciable property, married individuals filing separate returns normally have only a $12,500 limitation per individual

death,[29] intestate succession,[30] and a host of other statutory and common law privileges.[31] They also incur special liabilities, such as the responsibility for support[32] and maintenance[33] during marriage and for similar provision after divorce,[34] which may on balance be viewed as beneficial by a couple regardless of sexual orientation.[35] Beyond these strictly legal benefits, the formal status of marriage might reasonably be viewed as enhancing the stability, respectability, and emotional depth of any relationship between two individuals, regardless of whether the relationship is homosexual or heterosexual.[36]

C. *The Interests of the Government*

Against the interests of homosexuals and the suspect nature of classifications disfavoring them must be placed the interests of the government in uniformly denying marriage licenses to same-sex couples. One possible argument against any official attempt to normalize the

instead of $25,000); *id.* at § 48(c)(2)(B) (with regard to limitation on deductible cost of used property there is a $25,000 ceiling for married persons filing separately instead of the normal $50,000); *id.* at § 141 (standard deduction normally shall not exceed $2,000, but for a married person filing separately, it shall not exceed $1,000). *See also* Richards, *Discrimination Against Married Couples under Present Income Tax Laws*, 49 TAXES 526 (1971); Richards, *Single v. Married Income Tax Returns under the Tax Reform Act of 1969*, 48 TAXES 301 (1970).

29. Coliseum Motor Co. v. Hestor, 43 Wyo. 298, 305, 3 P.2d 105, 106 (1931).

30. *See, e.g.*, CONN. GEN. STAT. REV. § 46-12 (Supp. 1969).

31. Other benefits of legally sanctioned marriage include employee's family health care, group insurance, and social security survivor's benefits. Automobile insurance premiums are often lower for married people. *See generally* L. KANOWITZ, WOMEN AND THE LAW 35-93 (1969); H. KYRK, THE FAMILY IN THE AMERICAN ECONOMY (1953); J. MADDEN, THE LAW OF PERSONS AND DOMESTIC RELATIONS (1931). All benefits mentioned in this section which distinguish unfairly on the basis of sex may be subject to the effects of the Twenty-seventh Amendment if ratified. *See* p. 583 *et seq. infra.*

32. At common law and under various statutes the husband is bound to support his wife. *See, e.g.*, In Re Fawcett's Estate, 232 Cal. App. 2d 770, 777, 43 Cal. Rptr. 160, 165 (1965).

33. The husband is primarily liable for necessaries furnished to his wife. *See, e.g.*, Cromwell v. Anderson Furniture Co., 195 A.2d 264, 265 (D.C. Ct. App. 1963). *See also* Wanderer, *Family Expense Legislation as Affecting Common Law Liability of Husband for Necessaries*, 68 COM. L.J. 36 (1963).

34. *See, e.g.*, Rambo v. Rambo, 155 So. 2d 817 (Fla. App. 1963).

35. While some observers condemn the strictures of such laws, it cannot be denied that they often act to preserve the marriage relationship or at least insure that its break-up will follow an orderly pattern. *See Reports and Recommendations on the Uniform Marriage and Divorce Act* and *The Uniform Marriage and Divorce Act, supra* note 27.

36. *See* E. GRIFFITH, MARRIAGE AND THE UNCONSCIOUS 12 (1957); E. JAMES, MARRIAGE AND SOCIETY 204 (1952); A. MEARES, MARRIAGE AND PERSONALITY 7-8 (1958). *See also* New Jersey Welfare Rights Organization v. Cahill, 41 U.S.L.W. 1059 (U.S. Oct. 4, 1972), in which the Court observed that nonceremonial marriages lack "the aura of permanence that is concomitant with" ceremonial marriages and often do not provide "the stability necessary for the instillment" of proper social norms. *Id.* at 1059. Since few clergies are presently willing to marry a same-sex couple, the state's refusal to grant marriage licenses to such couples effectively deprives most of them of either a religious or a secular marriage ceremony.

homosexual relationship is that the government's approach toward homosexuality should be one of treatment and rehabilitation rather than tolerance and legalization. However, the implied assumption that most homosexuals can be "cured" is now widely questioned.[37]

Another possible state interest lies in preventing an increase in the incidence of homosexuality among adolescents. However, it is highly questionable whether anyone can freely select his sexual orientation on the basis of comparative legal advantages.[38] Moreover, those countries which have legalized homosexual activity between consenting adults have recorded no perceptible increase in the incidence of homosexuality since such legalization.[39]

Perhaps the most telling argument which the state might raise to justify the denial of marriage licenses to homosexual couples is that issuance of such licenses would run counter to the existing laws in many states against homosexual acts.[40] It is undoubtedly true that the legalization of homosexual marriage would put the states in the anomalous position of officially sanctioning a relationship which is very likely to encourage the commission of illegal sex acts. However, it should be noted that such statutes—forbidding specified sexual activities between consenting adults in the privacy of their home—are very possibly unconstitutional.[41] In any case, they are rarely enforced, even against homosexuals.[42]

37. *See* WOLFENDEN REPORT, *supra* note 14, at 25-30. For a more recent examination of this continuing controversy and a discussion of the literature, *see* A. KARLEN, *supra* note 12, at 572-606. Even the most optimistic psychotherapists rarely put the "cure" rate at above one-third of the willing patients. A. KARLEN, *supra* note 12, at 572.

38. BIEBER AND ASSOCIATES, *supra* note 12, at 310-19.

39. H. HYDE, THE LOVE THAT DARED NOT SPEAK ITS NAME 269 (1970). THE WOLFENDEN REPORT, *supra* note 14, at 24, noted that in Sweden where reforms of laws dealing with homosexual acts had been instituted some time before, there had been no noticeable increase in homosexual activity over a ten-year period. In fact, it has been suggested that, to the extent that legalization may lessen some of the problems of homosexual life and make for more stable, long-term relationships, the amount of homosexual proselytizing of minors may well *decrease* in the wake of such reforms. *See* E. SCHUR, CRIMES WITHOUT VICTIMS 111 (1965). For the same reason, a similar decrease might follow the legalization of homosexual marriage.

40. A similar argument was accepted in New Jersey Welfare Rights Organization v. Cahill, 41 U.S.L.W. 1059 (U.S. Oct. 4, 1972), in which the Court justified the restriction of "Aid to Families of the Working Poor" to ceremonially married couples on the ground *inter alia* that the state has a proper and compelling interest in refusing to subsidize a living unit that encourages the violation of laws against fornication and adultery.

41. Such an argument might be based on the right to privacy as developed in such cases as Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); and Griswold v. Connecticut, 381 U.S. 479 (1965). *See* Note, *Homosexuality and the Law*, 17 N.Y.L.F. 273, 295-96 (1971).

42. It is estimated that there are twenty convictions for every six million homosexual acts. Fisher, *The Sex Offender: Provisions for the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded?*,

A final state interest which should be mentioned is of a more theoretical nature. The vast majority of Americans view marriage to be *by definition* a union of man and woman; a scarcely smaller number see homosexuality as "unnatural" and morally reprehensible.[43] The easy answer to these propositions is that the Fourteenth Amendment was passed for the express purpose of preventing the enforcement of exclusionary classifications based upon deeply felt beliefs which are not grounded on objective, rational distinctions. Not long before the passage of that Amendment, thousands of Americans sincerely believed that a voter was "by definition" a white, male, property owner, and that interracial marriages were immoral. Despite this argument, however, society's basic institutional conceptions must inevitably carry some weight in the balance of interests, even though they may not suffice alone to justify the denial of concrete legal benefits to those whose conceptions differ.[44]

D. *Interests in the Balance*

In light of the difficulties with the equal protection analysis, it appears doubtful that classifications infringing upon homosexual marriage will receive the penetrating scrutiny evidenced in cases dealing with racial discrimination or with established fundamental interests such as criminal justice and the vote. Discrimination against homosexuals, while pervasive, has not involved the degree of government complicity which was largely responsible for the development of the strict scrutiny standard. Similarly, the interests of homosexuals in obtaining marriage licenses, while not inconsiderable, are not fully comparable to the corresponding interests of heterosexuals, which have not yet themselves formally attained the status of a "fundamental right" in the equal protection context.

However, even if strict scrutiny is not expressly applied to this issue,

30 MD. L. REV. 91, 95 (1970). *See generally Project: The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A.L. REV. 643, 689, 734-42 (1966).

43. As an indicator of this attitude, it should be noted that in most states, offenses described in the sodomy statutes are characterized by such terms as "abominable," "detestable," or "unnatural." Cantor, *Deviation and the Criminal Law*, 55 J. CRIM. L.C. & P.S. 441, 446 (1964). *See also* note 17 *supra*.

44. A stronger position is taken in P. DEVLIN, THE ENFORCEMENT OF MORALS 20 (1959); "[S]ociety is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions." For a critique of this position, *see* H.L.A. Hart, *Immorality and Treason*, 62 LISTENER 163 (1959). The Devlin-Hart controversy has been discussed extensively. *See, e.g.*, Anastaplo, *Law and Morality: On Lord Devlin, Plato's Meno, and Jacob Klein*, 1967 WIS. L. REV. 231; Blackshield, *The Hart-Devlin Controversy in 1965*, 5 SYDNEY L. REV. 441 (1967); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966).

the Court would not be justified in falling back upon the simple "rationality" test which it developed primarily for the protection of economic interests.[45] Rather, in accordance with Justice Marshall's articulation, the Court should balance the conflicting interests of the state and homosexuals, taking into consideration the danger that legislative classifications disfavoring homosexuals may in fact be based upon prejudice and misinformation about the nature of that condition.

II. The Equal Rights Amendment

The Court's decision that the denial of marriage licenses to homosexuals does not abridge existing equal protection law would not save that practice from attack under the proposed Twenty-seventh Amendment. The version of the Amendment which is now before the states for ratification[46] declares, in relevant part, that "Equality of rights under law shall not be denied or abridged by the United States or by any State on account of sex."[47] The legislative history of the Amendment clearly supports the interpretation that sex is to be an impermissible legal classification, that rights are not to be abridged on the basis of sex.[48] A statute or administrative policy which permits a man to marry a woman, subject to certain regulatory restrictions, but categorically denies him the right to marry another man clearly entails a classification along sexual lines.

The possibility that such a classification would violate the Equal Rights Amendment was raised during both the congressional hearings and debates on that proposal.[49] The Amendment's chief sponsor in the

45. For cases applying the rationality test, see Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911).

46. The Equal Rights Amendment was passed by Congress on March 23, 1972. 118 CONG. REC. H. 2423 (daily ed. March 23, 1972). Less than two hours after the Senate acted, Hawaii became the first state to ratify the amendment. Congressional Quarterly 692 March 25, 1972. It will become effective two years after its ratification by a minimum of thirty-eight states.

47. H.R.J. Res. 208, S.R.J. 8 92d Cong., 1st Sess. (1971).

The first attempt at an equal rights amendment was the 1923 version: "Men and women shall have equal rights throughout the United States and in every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation." H.R.J. Res. 75. 68th Cong., 1st Sess. (1923).

48. *See, e.g.,* 118 CONG. REC. § 4561 (daily ed. March 22, 1972) (remarks of Senator Stevenson, co-sponsor of the amendment):

> There is but one principle involved . . . sex, by and of itself cannot be used as a classification to deny or abridge any person of his or her equal rights under the law.

49. *See* 118 CONG. REC. § 4372 (daily ed. March 21, 1972) (remarks of Senator Ervin):

> Now, Mr. President, the idea that this law would legalize sexual activities between persons of the same sex or the marriage of persons of the same sex did not originate with me. I do not know what effect the amendment will have on laws which make homosexuality a crime or on laws which restrict the right of a man to marry another man or the right of a woman to marry a woman or which restricts the

Senate, Birch Bayh, rejected that interpretation, reasoning that a prohibition against homosexual marriage would not constitute impermissible discrimination so long as licenses were denied equally to both male and female pairs.[50] Senator Bayh's opinion should, of course, be given considerable weight in determining the legislative intent in phrasing and passing the Equal Rights Amendment.[51] However, it cannot be seen as controlling unless it is at least reasonably consistent with established constitutional doctrine and the more general interpretation of the proposed Amendment as evidenced in the legislative history.

As Professor Paul Freund observed during the congressional debates, the Bayh reasoning runs counter to the Supreme Court's handling of the anti-miscegenation statutes under the Fourteenth Amendment.[52] In *Loving v. Virginia*,[53] the Court ruled that a marriage license cannot be denied merely because the applicants are of different races. Such a denial was deemed to be an impermissible racial classification, even though it affected the races equally.[54]

In light of the frequently asserted claim that the Equal Rights Amendment was designed to prohibit sex discrimination to at least

> right of a woman to marry a man. But there are some very knowledgeable persons in the field of constitutional law . . . who take the position that if the equal rights amendment becomes a law, it will invalidate laws prohibiting homosexuality and laws which permit marriages between men and women.

See also 118 CONG. REC. § 4373 (daily ed. March 21, 1972) (remarks of Senator Ervin, quoting the testimony of Professor Paul Freund before the Judiciary Committee during hearings on the Amendment):

> Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation. Whether the proponents of the amendment shrink from these implications is not clear.

50. 118 CONG. REC. § 4389 (daily ed. March 21, 1972):

> The equal rights amendment would not prohibit a State from saying that the institution of marriage would be prohibited to men partners. It would not prohibit a State from saying the institution of marriage would be prohibited from two women partners. All it says is that if a State legislature makes a judgment that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a woman—or if a State says it is wrong for a woman to marry a woman, then it must say that it is wrong for a man to marry a man.

Another of the Amendment's principal supporters, Professor Thomas Emerson of Yale Law School, has also expressed his belief that the Equal Rights Amendment was not intended to force the states to grant marriage licenses to homosexual couples and would not be so construed by the courts. Letter on file with the *Yale Law Journal*.

51. It should be noted, however, that various legislators dispute the importance of legislative history as a guide to interpretation of the Equal Rights Amendment. *See, e.g., Hearings on H.J. Res. 35, 208 Before Subcomm. no. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 75 (1971) (remarks of Representative Wiggins, paraphrasing the position of Senator Ervin):

> The Senator just made the point that the Court at some future time will look at the words of the statute itself or the amendment itself and will not look to the legislative history, one of the reasons being that the States are not ratifying legislative history. They are ratifying the language itself.

52. *See* note 49 *supra*.

53. 388 U.S. 1 (1967).

54. *Id.* at 8.

the degree that the Fourteenth Amendment presently prohibits racial discrimination,[55] *Loving* would appear to raise a strong presumption that homosexual couples could not be uniformly denied marriage licenses after ratification of the Twenty-seventh Amendment. That presumption can only be overcome by a showing that homosexual marriage falls within the scope of a particular countervailing interest or outright exception to the Equal Rights Amendment which would not have applied to the equal protection analysis in *Loving*. Such a showing cannot be made.

It was the clear intent of Congress to forbid classifications along sex lines regardless of the countervailing government interests which might be raised to justify such classifications. The language of the Equal Rights Amendment, which speaks of an "equality" that "shall not be denied or abridged," is much less flexible than that of the Fourteenth Amendment,[56] which has been held to permit the consideration of countervailing interests.[57] Professor Emerson explained that the new Amendment

> means that differentiation on account of sex is totally precluded, regardless of whether a legislature or administrative agency may consider such a classification to be "reasonable," to be beneficial rather than "invidious," or to be justified by "compelling reasons."[58]

The legislative history supports this proposition that the new Amendment represents an unqualified prohibition—an absolute guarantee.[59]

55. *See, e.g.*, 118 CONG. REC. § 4394 (daily ed. March 21, 1972) (remarks of Senator Gurney) in which the Senator maintained that passage of the Amendment was intended to compensate for the fact that the Supreme Court in Reed v. Reed, 404 U.S. 71 (1971), had failed to subject a sex classification to the strict scrutiny routinely afforded classifications based on race.

56. Compare the language of the Equal Rights Amendment, p. 583 *supra*, with the corresponding prohibition in the Fourteenth Amendment: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

57. *See* authorities listed in note 4 *supra*.

58. Emerson, *In Support of the Equal Rights Amendment*, 6 HAR. CIV. RIGHTS-CIV. LIB. L. REV. 225, 231 (1971). Professor Freund has agreed that "the proposal evidently contemplates no flexibility in construction but rather a rule of rigid equality." *Hearings*, *supra* note 51, at 72, quoted by Senator Ervin.

59. The House Judiciary Committee Report on the proposed amendment contained an additional section proposed by Congressman Wiggins. *See* p. 586 *infra*. Fourteen members of the Committee recorded their views separately, supporting the Amendment but opposing the additional section. H.R. REP. No. 359, 92d Cong., 2d Sess. 5 (1971). This separate statement specifically cited Professor Emerson for the view that the Amendment establishes "the fundamental proposition that sex shall not be a factor in determining the legal rights of women or of men." *Id.* at 6. The House as a whole evidently adopted this separate statement when it rejected the Wiggins addition. Furthermore, the Senate Report on that body's version of the Equal Rights Amendment

In order to forestall this construction, the House Judiciary Committee recommended the following addition to the Amendment:

> This article shall not impair the validity of any law of the United States which exempts a person from compulsory military service or any other law of the United States or of any State which reasonably promotes the health and safety of the people.[60]

The purpose of the addition was to make it clear "that Congress and the State legislatures can take differences between the sexes into account in enacting laws which reasonably promote the health and safety of the people."[61] The proposed addition was rejected in the House by a vote of 87-265.[62]

While even an absolutist interpretation would not prevent the courts from balancing the Equal Rights Amendment against other *constitutional* provisions which conflict with its commands,[63] no such considerations were raised in defense of the anti-miscegenation laws and none would appear to be relevant to homosexual marriage. In discussing the Equal Rights Amendment, the only constitutional conflict envisioned by the commentators and legislators concerned the right to privacy,[64] and it can hardly be argued that the denial of a marriage license to a same-sex couple would in any way serve the interest of the individual in being *protected* from government intrusion into his private life.

The "absolute" prohibition contained in the Equal Rights Amendment is subject to only one exception, or what Professor Emerson and his associates have termed a "subsidiary principle":[65] the Amendment "would not prohibit reasonable classifications based on [physical] characteristics that are unique to one sex."[66] This exception was designed to shield laws, such as many of those applying to pregnancy or sperm donation, which affect only one sex but which cannot realistically be

stated that "the separate views of [the fourteen Committee members] in the House Report . . . state concisely and accurately the understanding of the Amendment . . . ." S. REP. No. 689, 92d Cong., 2d Sess. 11 (1972).

60. H.R. REP. No. 92-359, 92d Cong., 1st Sess. 1 (1971).

61. *Id.* at 2.

62. 117 CONG. REC. § 9390 (daily ed. October 12, 1971).

63. *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 900 (1971). *But see* 118 CONG. REC. § 4258 (daily ed. March 20, 1972), in which Senator Ervin claims that the Equal Rights Amendment is "absolute in its terms" and is therefore not subject to balancing against other constitutional provisions.

64. *See* Brown, Emerson, Falk & Freedman, *supra* note 63, at 900; *Hearings, supra* note 51, at 40 (statement of Representative Griffiths).

65. Brown, Emerson, Falk & Freedman, *supra* note 63, at 893.

66. 118 CONG. REC. § 4585 (daily ed. March 22, 1972) (Senate Report, quoting H.R. Rep. 92-359).

said to "discriminate" against the other.[67] It might be argued that heterosexual intercourse and procreation are activities which, because of the unique physical characteristics of men and women, may only be performed by different-sex couples, that these activities are central to the societal concept of marriage, and that the state can therefore restrict the granting of marriage licenses to different-sex couples.

This reasoning, however, would import into the Equal Rights Amendment precisely those traditional societal judgments that the Amendment was designed to circumvent. For example, a law regulating the manner in which hospitals treat pregnant persons would not ordinarily discriminate against men, because it deals directly and narrowly with a unique physical characteristic which men do not possess. However, a law which stated that persons subject to pregnancy may not enlist in the armed services would probably be considered discriminatory, because it deals not only with an objective physical characteristic but also with overbroad societal judgments about the capabilities of persons having that characteristic.[68]

In order to guard against illegitimate use of the "unique physical characteristics" principle, Professor Emerson and his associates have developed a series of factors which should be weighed by a court in determining the constitutionality of a physical characteristics classification under the Equal Rights Amendment.[69] These factors, which are not readily applicable to the peculiar circumstances presented by a ban on homosexual marriage, can be restated in terms of two more general tests: (1) are the physical characteristics upon which the classification is based truly unique to the class being regulated, and (2) is the regulation involved "closely, directly and narrowly confined to [those] unique physical characteristic[s]. . ."?[70]

A statute restricting marriage licenses to heterosexuals would fail both of these tests. While it is perfectly true that no one has the physical characteristics to accomplish either procreation or heterosexual intercourse with a member of the same sex, it is equally true that many individuals, perhaps because of age or illness, are incapable of engaging in these activities with members of the opposite sex. Nor is there

67. *Hearings, supra* note 51, at 40 (statement of Representative Griffiths). *See also* Bayh, *The Need for the Equal Rights Amendment,* 48 NOTRE DAME LAWY, 80, 81 (1972); Brown, Emerson, Falk & Freedman, *supra* note 63, at 893.

68. *See* Brown, Emerson, Falk & Freedman, *supra* note 63, at 894-96, in which the authors come to a similar conclusion concerning the exclusion of women from government employment because of the absenteeism which might result from their potential to become pregnant.

69. Brown, Emerson, Falk & Freedman, *supra* note 63, at 895-96.

70. *Id.* at 894.

the necessary close relationship between these activities and the institution of legal marriage as it is now permitted. As shown above, the ability or willingness to procreate is not a prerequisite of legal marriage in this country,[71] nor is the legality of an existing marriage in any way affected by the decision of both partners to forego heterosexual intercourse. More generally, the belief that two persons having the same primary sexual characteristics *cannot* benefit from many of the emotional, social and legal consequences of the legal status of marriage is factually untrue;[72] the belief that they *should* not so benefit is a subjective conclusion beyond the scope of the unique physical characteristics principle.

With no relevant or countervailing interests to place against the rule of "absolute" equality of treatment, the proposed Equal Rights Amendment should be interpreted as prohibiting the uniform denial of marriage licenses to same-sex couples. If such a denial were to be permitted, it would have to be on the basis of an analysis which was consistent with the strict interpretation described above, and in addition, as Professor Emerson has pointed out, in matters as important as marriage "the burden of persuasion is on those who would impose different treatment on the basis of sex."[73] In the case of laws prohibiting homosexual marriage, such a burden cannot be carried.

III. Quasi-Marital Status—an Alternative Approach

Although private consensual homosexual activity might be legalized in this country without creating many problems, as it was in Great Britain, the expansion of marriage to encompass homosexual couples would alter the nature of a fundamental institution as traditionally conceived.

The Supreme Court may in the future decide that such alteration is beyond its competence and therefore that marriage should be confined to its present definition absent a positive move on the part of individual state legislatures to broaden it.[74] If such proves to be the

71. *See* p. 579 and note 26 *supra.*
72. *See* pp. 579-80 *supra.*
73. Brown, Emerson, Falk & Freedman, *supra* note 63, at 893.
74. This was essentially the Court's approach to polygamy in Reynolds v. United States, 98 U.S. 145, 165 (1878).
Whether that nineteenth century ruling would be affirmed today is at least open to question in light of the *Loving* decision. Mormons would appear to have a particularly strong argument against the *Reynolds* decision based on Wisconsin v. Yoder, 406 U.S. 205 (1972) (Wisconsin's attempt to force Old Amish children to attend school

case, particular legal benefits available only to married couples might still be attacked on equal protection grounds under both the Fourteenth and Twenty-seventh Amendments.

If the Court granted homosexuals some of these benefits—without compelling states to grant marriage licenses—it might eventually create in effect a "quasi-marital" status. State legislatures might explicitly grant such a status, and specify the attendant rights.[75] For example, benefits such as tax advantages, wrongful death rights and intestate inheritance could be granted more easily to the homosexual couple than could inclusion within the complete maintenance-divorce-alimony complex of laws involving substantial state regulation. An analogy can be drawn to the line of Supreme Court decisions which has given illegitimate children certain rights, albeit a less-than-equal status in comparison to their legitimate siblings.[76]

IV. Conclusion

In the final analysis, the Court should not avoid granting full relief from discriminatory legislation simply because that legislation is based on deeply held beliefs. A quasi-marital status might satisfy many of the interests of homosexuals in gaining marriage licenses, but it would inevitably fall short of fully normalizing their relationships. A legislative stigma of deviance would remain. The stringent requirements of the proposed Equal Rights Amendment argue strongly for removal of this stigma by granting marriage licenses to homosexual couples who satisfy reasonable and non-discriminatory qualifications.

through age sixteen held an unconstitutional infringement on freedom of religion), as noted by Justice Douglas in dissent, *id.* at 247. *See generally* H. Foster, *Marriage: A "Basic Civil Right of Man,"* 37 FORDHAM L. REV. 51 (1968).

75. The possibility of such a legislatively created quasi-marital status for homosexuals was suggested in J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW 9 n.1 (1965).

76. Labine v. Vincent, 401 U.S. 532 (1971); Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).