

THE RIGHT OF MEN TO CHANGE THEIR NAMES UPON MARRIAGE

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"The name of a man is a numbing blow from which he never recovers."¹

INTRODUCTION

In her 1997 article, Omi Morgenstern Leissner described the following problem to her readers: "Fifteen months ago, as I was preparing for marriage, I found myself face-to-face with a dilemma from which my future husband was spared—whether to keep my surname or to swap it for his."² I was married to Joana Rosensaft on August 11, 2002 and changed my name from Michael Savere to Michael Rosensaft.³ Just five years later than Omi Morgenstern faced her dilemma, I wish that my own was as easy. Since the early 1970s, feminist groups have, for the most part, successfully fought the male dominated practice of women being forced to adopt their husband's name upon marriage.⁴ Now, in all fifty states, a woman has the right either to retain her maiden name, or to take her husband's surname upon marriage.⁵ Sociologists had thought that once the right to maintain one's maiden name was established it would become widespread; but sur-

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¹ MARSHALL MCLUHAN, UNDERSTANDING MEDIA 32 (1994).

² Omi Morgenstern Leissner, *The Name of the Maiden*, 12 WIS. WOMEN'S L.J. 253, 253 (Fall 1997).

³ See *Weddings*, N.Y. TIMES, Aug. 11, 2002, § 9, at 11 ("He realized the importance of my family's name, which unfortunately all but died out during the Holocaust," said Ms. Rosensaft, an only child. "Mike said he wanted to ensure the continuity not only of the name, but of the legacy attached to the name.").

⁴ In the 1960s and early 1970s, women began actively seeking ways to retain their maiden name upon marriage. Leissner, *supra* note 2, at 257. Beginning in 1972, many groups sprung up across the United States to promote the right of women to retain their name. Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 LAW & INEQ. J. 91, 96 n.9 (1985). As an example, one group still in existence that fought for this right was the Lucy Stone League. The Lucy Stone League, available at <http://www.lucystoneleague.org> (last visited Aug. 30, 2002). These groups fought against this practice due to its patriarchal roots that originally signified that a woman was a man's property. See Jennifer Christman, *The Name Game*, ARK. DEMOCRAT-GAZETTE, Mar. 8, 2000, at F1.

⁵ See MacDougall, *supra* note 4.

prisingly, roughly ninety percent of women still adopt their husband's name upon marriage.⁶ It was, however, the choice most feminists were fighting for, not a requirement that women retain their own name.⁷ The feminist fight was naturally never concerned with men's marital name change rights. The discrimination that women once faced in this realm has now turned into a right: the right to choose to keep their maiden name or adopt their husband's name.⁸ Men, however, never faced the discrimination of having to give up their name, but likewise do not everywhere have an absolute right to do so. As Shirley Raissi Bysiewicz remarked in her 1972 article: "It should be noted that women have a wider choice of the use of names than men have"⁹ Currently, men who want to change their names upon marriage must worry about the formal statutory scheme for changing one's name in their respective states. If the wife takes the groom's name then it is as simple as filling out the marriage certificate,¹⁰ but it is not so easy for grooms.

The trend of men giving up their own names and taking their wives' surnames has been growing in recent years in the United States.¹¹ However, only a handful of states give this right to men.

⁶ Patricia Wen, *Tradition in Name Only*, BOSTON GLOBE, Mar. 17, 2001, at A1.

⁷ *Id.* There was a great deal of prejudice against women who sought to retain their own names. For example, Hillary Rodham Clinton originally went by Hillary Rodham after she got married, but then decided to take her husband's name after it became clear that it would be a point of contention in the Arkansas gubernatorial elections. Christman, *supra* note 4. Even in 1985, Priscilla Ruth MacDougall reported that while writing her article entitled *The Right of Women to Name Their Children*, one woman had rented a post office box so that she could ask the author about the possibility of giving her child her surname instead of her husband's without jeopardizing her marriage. See MacDougall, *supra* note 4, at 102 n.18.

⁸ Hyphenating the groom and bride's last name is another alternative, but it is very rare. Less than one percent of women hyphenate names or use a combination of both names. Chris Poon, *The Name Game*, PROVIDENCE J.-BULL., Oct. 17, 1999, at 8L. Perhaps the reason hyphenated names are so scarce is because they are generally harder to pronounce or go by. For example, Holly Meyer for a while went by Holly Lodge Meyer, but she said it sounded like a "bad Boy Scout camp." Christman, *supra* note 4.

⁹ Shirley Raissi Bysiewicz & Gloria Jeanne Stillson MacDonnell, *Married Women's Surnames*, 5 CONN. L. REV. 598, 599 (Summer 1972).

¹⁰ In some states the wife just signs her new married name, if she takes one, on the marriage certificate, and that officially changes her name. See, e.g., 23 PA. CONS. STAT. ANN. § 1501 (West 1996). Other states have specific places on the certificate where the wife can put her previous surname and her new surname. See, e.g., N.Y. DOM. REL. LAW § 14-a (1999); N.D. CENT. CODE § 14-03-20 (1997).

¹¹ Because state and nationwide statistics of name changes are not really kept, anecdotal evidence is all there really is. According to one article, Milwaukee County Clerk Mark Ryan, who oversees marriage certificates, said the trend of a groom taking the bride's name is growing, and it is something he has only seen recently beginning in the mid-1990s. Jessica McBride, *More Grooms Are Saying 'I Do' to Taking Bride's Last Name in the Name of Love*, MILWAUKEE J. SENTINEL, Nov. 28, 1999, Lifestyle, at 1. A search on Lexis for stories about husbands taking their wives' names turned up four articles discussing the issue since 2000, while no articles were found from 1970 to 1990. Maya Blackmun, *By Whatever Name, Bride Still Herself*, OREGONIAN, Jan. 17, 2002, Southwest Zoner at 6; *Husband Takes Wife's Name*, DAYTON DAILY NEWS, Jan. 8, 2001, Local at 2B;

Luckily in New York, where I was married, the statute has been changed to read:

One or both parties to a marriage may elect to change the surname by which he or she wishes to be known after the solemnization of the marriage . . . [to] (i) the surname of the other spouse; or (ii) any former surname of either spouse; or (iii) a name combining into a single surname all or a segment of the premarriage surname or any former surname of each spouse; or (iv) a combination name separated by a hyphen, provided that each part of such combination surname is the premarriage surname, or any former surname, of each of the spouses.¹²

Most grooms do not have such luck. In most states, men who want to change their name upon marriage must go through the formal statutory name change proceeding.¹³ Although discussed in depth later on, going through the regular name change proceeding is at the very least, a hassle, and at the very most, an impossibility.

Although there is significant literature concerning the right of women to retain their maiden names, the right of men to change their names upon marriage has not really been addressed. Although certainly analogous issues, they have slightly different implications and analysis. In addition, most of the articles arguing for the women's right were written in the early 1970s before the intermediate scrutiny test was settled and thus would be written very differently today. This Comment argues that the victories that women have won in the marital name change battle have left men with rights that lag behind. The following section addresses why this question is important at all and argues that controlling one's naming practices is an immensely important right. Then, after an examination of the current name change upon marriage practices among the states, this Comment refutes the traditional rationales for perpetuating the gender bias inherent in these state statutes. The inequality in the current statutes and the way in which they are administered is shown to be a violation of the Fourteenth Amendment's Equal Protection Clause and are thus unconstitutional. Additionally, after an examination of the history of name change provisions and an analysis of current fun-

Jane Greig, *Prince or Pauper, Fish or Fowl, Creek or Canyon Have at Least One*, AUSTIN AMERICAN-STATESMAN, Mar. 25, 2000, Lifestyle, at D1 (giving advice to newlyweds who choose alternative surname schema); Lou Gonzales, *Man Finds Resistance to Name Change*, FLA. TIMES-UNION, Feb. 10, 2000, Lifestyle, at D2.

¹² N.Y. DOM. REL. LAW § 15 (West 1999). The practice commentary following this section reads: "Some men, it should be noted, have, after marriage, elected to adopt the surname of their spouses. These decisions are a matter of voluntary choice." Alan D. Scheinkman, *Practice Commentary: Options for Selecting Surname*, N.Y. DOM. REL. LAW § 15, C15:2 at 173 (West 1999).

¹³ As discussed in greater detail later on, a statutory name change proceeding entails paying extra fees, publishing information about the name change in a local paper, waiting for up to three months, and ultimately being at the mercy of a judge who may have absolute discretion. See *infra* Part II(c)(5) (examining de minimis injury in the equal protection context).

damental right doctrine, this Comment argues, in Part III, that it should be a fundamental right for both men and women to be able to choose whether to change or retain their names upon marriage.

I. THE IMPORTANCE OF NAMES

A common response among courts to those challenging name change statutes has been that they are trivial challenges and not really worth the court's time. For example, in the case of *In re Kayaloff*, the United States District Court for the Southern District of New York responded briefly and succinctly to a woman who felt she had been harmed by being forced to take her husband's name upon marriage: "It is my judgment that [not one professional woman] has been damaged professionally by the fact that, upon marriage, she took the surname of her husband."¹⁴ This argument might seem even stronger when we are dealing with a man's right to change his name. The court in *In re Kayaloff*—albeit in 1934—was speaking of the practice of forcing a woman to adopt her husband's name, while this Comment is simply arguing against the practice of not allowing a man to adopt his wife's name without extra hassle. It is a privilege denied rather than an action forced. What the court did not realize, however, is the extreme importance of this subject. Without much thought, it is a subject easy to dismiss, but deeper investigation into the meaning of names in our society reveals that control of one's name is anything but trivial and immensely important.

One's name is a person's first possession in the world, and one that a person lives with, in many cases, for the person's entire life. Parents agonize over what to name their children—as well they should.¹⁵ No one calls such a parent's agony trivial, because it is deemed very important by society. A person's name is what that person is known by in society, and as the district court of Hawaii correctly observed, "[o]ne's name becomes a symbol for one's self."¹⁶ Could one even imagine a democratic society where parents did not have the right to name their own children? In fact, in Nazi Germany, this was one of the first dehumanizing efforts of the Nazi regime: to force Jewish males to take the name "Israel" and Jewish women to take the name "Sarah" if their own name was not "Jewish enough" so

¹⁴ *In re Kayaloff*, 9 F. Supp. 176, 176 (S.D.N.Y. 1934).

¹⁵ See, e.g., Melissa Fyfe, *Monitoring Those Monikers*, AGE (MELBOURNE), May 27, 1997, at 1 (describing parents' agony about children's name because of their realization that names are "usually a tag for life").

¹⁶ *Jech v. Burch*, 466 F. Supp. 714, 719 (D. Haw. 1979) (finding that parents have the right to give their child any surname they wished).

that Nazis could readily identify them as Jews.¹⁷ A name carries with it our personal identity, familial and ethnic history, and encompasses part of ourselves.

Names also have certain implications in how we relate to society. There often exists the folklore that people with certain names exhibit certain characteristics,¹⁸ but at least one psychological study has established that society's conceptions of people's names directly affect their interactions with that individual and their perceptions of that individual.¹⁹ In a recent psychology study, elementary teachers in the United States were asked to rate children's performances in school, and even though the children performed similarly, teachers rated children with certain names as less able.²⁰ Kif Augustine-Adams summed it up best when she remarked that "[n]aming practices reflect conceptions of individuality, equality, family and community that are fundamental to identity."²¹

Naming practices are not just important in the United States, but the Court of Human Rights and the European Commission have also recognized their extreme importance. Aeyal Gross, in her article reviewing recent international case law in naming practices, noted: "Limits on the choice of one's own name are de facto limits on the individual's zone of privacy."²² Gross' statement was based in part on her examination of choice of name cases before the Court of Human Rights and the European Commission.²³ Those cases are examined under the privacy clause of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which states

¹⁷ The adopted middle name then had to be added to official documents, such as birth certificates, and used in all official communication upon threat of fine or imprisonment. Kif Augustine-Adams, *The Beginning of Wisdom Is To Call Things by Their Right Names*, 7 S. CAL. REV. L. & WOMEN'S STUD. 1, 28-29 (Fall 1997) (quoting Robert M. Rennick, *The Nazi Name Decrees of the Nineteen Thirties*, 18 NAMES 65, 76, 80 (1970)).

¹⁸ See, e.g., *Naming or Shaming?*, YORKSHIRE POST, Feb. 26, 2002 (discussing naming of children and its significance and noting that girls who are named Sharon or Tracy are assumed often times to be "fluffy good-time girls").

¹⁹ Luisa Dillner, *Parents: Remember, A Name Is for Life: It's One Thing To Call a Child Fifi Trixibelle, Says Luisa Dillner. But Osama bin Laden?*, GUARDIAN (LONDON), Nov. 7, 2001, Features, at 9. This idea is almost common sense, though. As the poet Robert Frost said:

A name with meaning could bring up a child,
Taking the child out of the parents' hands.
Better a meaningless name, I should say,
As leaving more to nature and happy chance.
Name children some names and see what you do.

Robert Frost, NEW HAMPSHIRE (1923).

²⁰ Dillner, *supra* note 19.

²¹ Augustine-Adams, *supra* note 17, at 1.

²² Aeyal M. Gross, *Note and Comment: Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names*, 9 HARV. HUM. RTS. J. 269, 269 (Spring 1996).

²³ *Id.*

that "everyone has the right to respect for his private and family life."²⁴ The international court apparently has decided that naming issues are so personal that they implicate very important privacy issues.

Being able to change one's name is also very important in society. Among the Sikhs, in India and around the world, all women adopt the surname Kaur and all men adopt the surname Singh to show a renouncement of family lineage and to create a casteless society.²⁵ This is an important religious and cultural statement that would not be possible without the unhindered freedom to change names. Using another famous example, Malcolm Little changed his last name to Malcolm X to signify his conversion to the Nation of Islam and to "obliterate family, friends, culture, lineage, even ethnicity. To be X is to be Muslim and nothing more."²⁶ There is also a contemporary movement of African-Americans to change their birth names to African names because it "connects them to their ancestry."²⁷ Such practices reflect the extreme significance one's name has in society. These are but a few examples of the many cultural and religious implications associated with naming practices. Names reach to our belief systems, lineages, and the core of our identity.²⁸ Being in control of our own names is anything but trivial - it is an extremely important right.

II. A SUMMARY OF CURRENT NAME CHANGE STATUTES

Currently, only seven of the fifty states have statutes that explicitly give a man the right to change his name upon marriage.²⁹ There are some states, no doubt, that do not grant an explicit statutory right,

²⁴ European Convention on Human Rights, Nov. 4, 1950, Europ. T.S. No. 5.

²⁵ The male surname Singh meant lion and the female surname Kaur meant princess. A Sikh prophet felt that giving all men and women one name would renounce family lineage and occupation as determinants of social status. Augustine-Adams, *supra* note 17, at 27.

²⁶ *Id.* at 28 (quoting JUSTIN KAPLAN & ANNE BERNAYS, *THE LANGUAGE OF NAMES* 87-88 (1997)).

²⁷ See, Allinece Taylor, *A Nod to Africa*, FLA. TIMES-UNION, May 1, 2000, at C1.

²⁸ To take a passage from Lewis Carroll which exemplifies this idea of a name representing ourselves to the community:

"Must a name mean something?" Alice asked doubtfully.

"Of course it must," Humpty Dumpty said with a short laugh: "*my* name means the shape I am and a good handsome shape it is, too. With a name like yours, you might be any shape, almost."

LEWIS CARROLL, *ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS* 160 (Donald Gray ed., Norton & Co. 1971) (1893).

²⁹ These states are: Georgia, Hawaii, Iowa, Louisiana, Massachusetts, New York, and North Dakota. GA. CODE ANN. § 19-3-33.1 (1999); HAW. REV. STAT. ANN. § 574-1 (Michie 1993); IOWA CODE ANN. § 595.5 (West Supp. 2001); LA. CIV. CODE ANN. art. 100 (West 2002); MASS. ANN. LAWS ch. 46, § 1D (Law. Co-op. 1991); N.Y. DOM. REL. LAW § 15 (McKinney 1999); N.D. CENT. CODE § 14-03-20.1 (1996).

but that will allow a man to change his name upon marriage nevertheless. For example, Wisconsin's marriage statutes do not mention such a right, but clerks in Milwaukee County reportedly just pencil in a modification to the marriage certificate and allow the man's name change.³⁰ However, without explicit statutory authority, there is a question whether such a name change would even be valid as these changes have not been authorized by the state legislature. In addition, most states are not so generous and require a groom to go through the formal statutory process of changing his name if he wants to change his surname upon marriage.³¹ A woman, on the other hand, has the right to either take her husband's surname or retain her maiden name upon marriage in all fifty states.³²

The same inequality can be seen with name change rights upon divorce.³³ Thirty-six states give women the statutory right to revert to their pre-marriage name upon divorce.³⁴ However, many of the states do not contemplate the same problem for men, and thus do not give them the same rights. There is not much consistency in this area as

³⁰ See McBride, *supra* note 11.

³¹ For example, Jeanne Conner, customer service representative for the Laramie County marriage license department, refers grooms who want to change their name upon marriage to the clerk of the district court in Cheyenne, Wyoming. Karen Jansen, *Play the Name-Change Game*, WYOMING TRIBUNE-EAGLE, June 4, 2000, High Plains Living.

³² See MacDougall, *supra* note 4.

³³ Name change statutes upon annulment usually parallel or are contained in the name change statutes upon divorce and do not need to be treated separately. See N.Y. DOM. REL. LAW § 240-a (McKinney 1999) ("In any action or proceeding brought under the provisions of this chapter wherein all or part of the relief granted is divorce or annulment of a marriage . . . each party may resume the use of his or her pre-marriage surname or any other former surname.").

³⁴ These states are: Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin. ALASKA STAT. § 25.24.165 (Michie 2000); ARIZ. REV. STAT. ANN. § 25-325 (West 2000); ARK. CODE ANN. § 9-12-318 (Michie 2000); CAL. FAM. CODE § 2080 (West 2000); CONN. GEN. STAT. ANN. § 46b-63 (West 2000); DEL. CODE ANN. tit. 13, § 1514 (2000); GA. CODE ANN. § 19-3-33.1 (1999); HAW. REV. STAT. ANN. § 574-5(B) (Michie 1993); IND. CODE ANN. § 31-15-2-18 (West 1999); IOWA CODE ANN. § 674.13 (West 1996); KAN. STAT. ANN. § 60-1610(c) (1994); KY. REV. STAT. ANN. § 403.230 (Michie 1999); ME. REV. STAT. ANN. tit. 19-A, § 1051 (West 1998); MD. CODE ANN., FAM. LAW § 7-105 (1999); MASS. ANN. LAWS ch. 208, § 23 (Law. Co-op. 1991); MICH. COMP. LAWS ANN. § 552.391 (Michie 1988); MINN. STAT. ANN. § 518.27 (West 2001); MONT. CODE ANN. § 40-4-108(4) (2001); NEB. REV. STAT. § 42-380 (1996); NEV. REV. STAT. ANN. 125.130(4) (Michie 1996); N.H. REV. STAT. ANN. § 458:24 (2001); N.J. STAT. ANN. § 2A:34-21 (West 2000); N.Y. DOM. REL. LAW § 240-a (McKinney 1999); N.C. GEN. STAT. § 50-12 (1999); OHIO REV. CODE ANN. § 3105.16 (Anderson 2000); OKLA. STAT. ANN. tit. 43, § 121 (West 2001); OR. REV. STAT. § 107.105 (1983); 54 PA. CONS. STAT. ANN. § 704 (West 1996); R.I. GEN. LAWS § 15-5-17 (2000); S.C. CODE ANN. § 20-3-180 (Law. Co-op. 2000); S.D. CODIFIED LAWS § 25-4-47 (Michie 1999); TEX. FAM. CODE ANN. § 6.706 (Vernon 1998); VT. STAT. ANN. tit. 15, § 558 (2001); VA. CODE ANN. § 20-121.4 (Michie 2000); WASH. REV. CODE ANN. § 26.09.150 (West 1997); W. VA. CODE ANN. § 48-5-613 (Michie 2001); WIS. STAT. ANN. § 767.20 (West 2001).

even Massachusetts, one of the five states that gives a statutory right to men to change their name upon marriage, still only allows women to change their name back upon divorce without going through the formal statutory name change procedure.³⁵ In fact, thirteen of the thirty-six states granting women the statutory right to revert to their pre-marriage names explicitly limit this right to women.³⁶ In addition, some states have just recently changed their statutes to make them more gender neutral.³⁷ As these numbers show, thirty-two percent of states with name change upon divorce provisions give that statutory right exclusively to women.

As this Comment later notes, an obvious response to a lack of name change rights upon marriage or divorce is that there always exists a formalized statutory procedure to change one's name that either spouse can use.³⁸ While the validity of that argument will be analyzed later, one of the counterarguments presented is that statutory name change provisions are not as easy to obtain as the courts suggest. Therefore, it is helpful to understand how strict most state statutes are in granting general name change requests before looking at this argument. Using phrases such as "what a court shall deem right and proper," six of the fifty states give total discretion to the courts to decide whether to grant a name change.³⁹ With basically no standards, petitioners are at the mercy of whatever state judge they may receive. An additional eleven states give almost total discretion to the courts, applying vague standards such as "if not against the public in-

³⁵ MASS. ANN. LAWS ch. 208, § 23 (Law. Co-op. 1991) ("The court in granting a divorce may allow a *woman* to resume her maiden name . . .") (emphasis added).

³⁶ These states are Arkansas, California, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Montana, Nevada, Oklahoma, Rhode Island, South Dakota, and Vermont. ARK. CODE ANN. § 9-12-318 (Michie 2000); CAL. FAM. CODE § 2080 (West 2000); IND. CODE ANN. § 31-15-2-18 (West 1999); KY. REV. STAT. ANN. § 403.230 (Michie 1999); LA. CODE CIV. PROC. ANN. art. 3947 (West 2002); MASS. ANN. LAWS ch. 208, § 23 (Law. Co-op. 1991); MICH. COMP. LAWS ANN. § 552.391 (Michie 1988); MONT. CODE ANN. § 40-4-108(4) (2001); NEV. REV. STAT. ANN. § 125.130(4) (Michie 1996); OKLA. STAT. ANN. tit. 43, § 121 (West 2001); R.I. GEN. LAWS § 15-5-17 (2000); S.D. CODIFIED LAWS § 25-4-47 (Michie 1999); VT. STAT. ANN. tit. 15, § 558 (2001).

³⁷ For example, New Hampshire just made its statutes gender neutral in 1996, thus giving men the same right to revert to their pre-marriage name. 1996 N.H. ALS 32. South Carolina made the change in 2000. S.C. CODE ANN. § 20-3-180 (Law. Co-op. Supp. 2000).

³⁸ *Forbush v. Wallace*, 341 F. Supp. 217, 222 (M.D. Ala. 1971) ("In balancing these interests, this Court notes that the State of Alabama has afforded a simple, inexpensive means by which any person, and this includes married women, can on application to a probate court change his or her name.").

³⁹ These states are: Idaho, Montana, South Carolina, Washington, Connecticut, and Georgia. IDAHO CODE § 7-804 (Michie 2001); MONT. CODE ANN. § 27-31-204 (2001); S.C. CODE ANN. § 15-49-20 (Law. Co-op. 2000); WASH. REV. CODE ANN. § 4.24.130 (West 1997); *Don v. Don*, 114 A.2d 203, 205 (Conn. 1955) (permitting a child's name to be changed to that of the adopted parent despite objections from the biological parent); *In re Mullinix*, 262 S.E.2d 540, 541 (Ga. Ct. App. 1979) (overturning the trial court's denial of a name change).

terest”⁴⁰ or “for good reasons shown.”⁴¹ Thus, there exists virtually unfettered judicial discretion with respect to name changes in a total of seventeen states.

Even in the remaining thirty-three states, most courts have gone beyond the restrictions listed in the statutes and rejected name change applications due to public policy or just their own whim. For example, the Minnesota Supreme Court denied the petition of a man who wished to change his name to “1069” for no other reason than the court did not think such a name conformed with their ideal of social norms.⁴² With so much discretion given to, and sometimes taken by, the courts, there is no assurance that any application will necessarily be approved. It might be argued that many judges would automatically allow name changes for marital purposes. However, a groom taking his wife’s name is not a widely accepted practice, and judges have denied applications where they did not think it fit certain social structures. For instance, some courts have denied gay couples’ petitions to have the same last name.⁴³ This example is not so important because it directly applies to marital name change statutes, but because it shows that giving discretion to courts means that they are free to apply the social norms that they find acceptable. Forcing grooms to put up with the whims of the state courts is certainly not treating them equally to women in changing their name upon marriage when all that women have to do to change their name is to fill

⁴⁰ Alaska, Massachusetts, Oregon, and Texas only instruct the judge that the name change should not be granted if against the public interest. ALASKA STAT. § 25.24.165 (Michie 2000); MASS. ANN. LAWS ch. 210, § 12 (Law. Co-op. 1991); OR. REV. STAT. § 33.410 (1983); TEX. FAM. CODE ANN. § 45.103 (Vernon 1998).

⁴¹ The statutes of Arkansas, Nebraska, Nevada, North Carolina, North Dakota, Ohio, and South Dakota say that the petitioner must present a “good reason” for a name change. ARK. CODE ANN. § 9-2-101 (Michie 2000); NEB. REV. STAT. § 25.21,271 (1996); NEV. REV. STAT. 41.290 (1996); N.C. GEN. STAT. § 101-2 (1999); N.D. CENT. CODE § 32-28-02 (1996); OHIO REV. CODE ANN. § 2717.01 (Anderson 2000); S.D. CODIFIED LAWS § 21-37-5 (Michie 1999).

⁴² *In re Dengler*, 287 N.W.2d 637, 639 (Minn. 1979). In a similar case, the California Appellate Court refused to allow a man to change his name to “III.” *In re Ritchie*, 159 Cal. App. 3d 1070, 1072 (1984). Courts have also routinely disallowed name changes for people trying to mask their ethnic identity or for those who merely wish to change their name to one that is more easily pronounced. See Jane M. Draper, Annotation, *Circumstances Justifying Grant or Denial of Petition To Change Adult’s Name*, 79 A.L.R.3d 562 (1977).

⁴³ See *In re Bicknell*, No. CA2000-07-140, 2001 Ohio App. LEXIS 650 (Ohio Ct. App. Feb. 12, 2001) (holding that allowing a gay woman to adopt her partner’s surname would go against public policy and would be sanctioning their lifestyle); see also *In re Bacharach*, 780 A.2d 579, 581 (N.J. Super. Ct. App. Div. 2001) (holding that permitting a name change for a same-sex couple was against public policy). However, at least one judge in New Jersey has put “public policy” aside in granting the name change of a transsexual. *In re Eck*, 584 A.2d 859, 861 (N.J. Super. Ct. App. Div. 1991):

[W]e perceive that the [lower court] judge was concerned about a male assuming a female identity in mannerism and dress. That is an accomplished fact in this case, a matter which is of no concern to the judiciary, and which has no bearing upon the outcome of a simple name change application.

out a marriage certificate. And lest one think a judge would always approve a man's wish to adopt his wife's surname, at least one Florida judge was resistant to this idea when he told Dan Cipoletti that he "needed a better reason than getting married to change his name."⁴⁴

III. EQUAL PROTECTION ISSUES IN MARITAL NAME CHANGE STATUTES

A. *Standard of Review*

Two separate equal protection issues are applicable here, although both are analyzed under the same standard of review. Probably due to the widespread custom of having the wife take the husband's name, not one state statute specifies that the wife takes the husband's name upon marriage.⁴⁵ Certainly, though, it is the custom that a wife take her husband's surname upon marriage, and all fifty states give the wife that option.⁴⁶ The question presented in this Comment, however, is not whether it is unconstitutional to require the wife to take her husband's name—all fifty states have addressed that issue, and now a woman has the right to retain her maiden name in the United States.⁴⁷ The question at issue here is whether it is unconstitutional to allow the wife to change her name upon marriage, but not to allow a husband to change his name by the same process. Thus, the first proposed equal protection challenge would be raised in those states that give the option for a woman to change her name to her husband's surname upon marriage, but do not afford that same opportunity to the husband.⁴⁸

The second proposed equal protection challenge relates to the name change statutes upon divorce. Because most of the marriage statutes do not mention the name change issue at all, they are not themselves facially discriminatory. However, those statutes that cover name change upon divorce are facially discriminatory. Upon divorce, many states allow a wife to legally change her name to her pre-marriage name, but do not afford the same opportunity to men.⁴⁹

⁴⁴ Gonzales, *supra* note 11. It is unclear from the article whether the name change was ultimately granted, but regardless, this demonstrates the whims of judges and their discretion over name changes.

⁴⁵ See MacDougall, *supra* note 4.

⁴⁶ *Id.*

⁴⁷ By statute, caselaw, or attorney general opinion, all fifty states allow a wife to retain her name upon marriage, and thus she has a choice whether to change her name to the husband's surname or retain her maiden name. *Id.*

⁴⁸ For a list of these states, see *supra* note 34.

⁴⁹ See, e.g., NEV. REV. STAT. ANN. 125.130(4) (Michie Supp. 2001) ("[I]f a divorce is granted, the court may, for just and reasonable cause and by an appropriate order embodied in its decree, change the name of the *wife* to any former name which she has legally borne.") (emphasis added).

Both equal protection challenges deal with practically the same issue: the right to change one's surname upon a change in one's marital status. The difference is one between facially discriminatory statutes for divorce and facially neutral statutes for marriage that are carried out in a discriminatory manner.

Whether facially discriminatory or effectively discriminatory, each of these cases can be considered with the same level of scrutiny. *Craig v. Boren* firmly introduced the intermediate scrutiny test for equal protection challenges to gender discrimination cases.⁵⁰ Under the intermediate scrutiny test, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."⁵¹ The Court has said that it does not matter if the discriminatory laws disadvantage men rather than women because any gender classification, whether disadvantaging men or women, must meet the intermediate scrutiny standard.⁵² The same standard of review is also applied if, as in the name change upon marriage case, the statutes themselves are facially neutral, but they are administered in a discriminatory way.⁵³ This is not analogous to disparate impact analyses which hold that facially neutral laws which have disparate impacts only receive heightened review if motivated by a discriminatory purpose.⁵⁴ If a statute is neutral, but men are being denied the opportunity to change their name upon marriage, there is no question that the statute is being administered in a

⁵⁰ *Craig v. Boren*, 429 U.S. 190, 210 (1976) (holding an Oklahoma statute to be unconstitutional which allowed women to purchase 3.2% beer at a younger age than men as a violation of the Equal Protection Clause).

⁵¹ *Id.* at 197.

⁵² *Craig v. Boren* itself was a challenge to a statute which discriminated against men rather than women. Justice Rehnquist found this troubling in his dissent, but later cases reinforced that discrimination against both men and women is treated with the same level of scrutiny. *Id.* at 217 (Rehnquist, J., dissenting) ("First is [the Court's] conclusion that *men* challenging a gender-based statute which treats them less favorably than women may invoke a more stringent standard of judicial review Most obviously unavailable to support any kind of special scrutiny in this case, is a history or pattern of past discrimination"); cf. *Michael M. v. Sonoma County Super. Ct.*, 450 U.S. 464, 468 (1981) (analyzing a statute which makes men alone criminally liable for statutory rape under intermediate scrutiny); *Califano v. Goldfarb*, 430 U.S. 199, 210-211 (1977) (invoking intermediate scrutiny to analyze a statute which automatically paid survivor benefits to widows, but only paid them to widowers if he was receiving at least one-half of his support from his deceased wife).

⁵³ The argument that the text was facially neutral has failed under the Fourteenth Amendment when the statute plainly has a discriminatory effect or it is administered in a discriminatory fashion. See *Loving v. Virginia*, 388 U.S. 1, 8-11 (1967) ("The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race.").

⁵⁴ See, e.g., *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that disparate impact alone was not enough evidence of a violation of the Equal Protection Clause, but that there also must be an "invidious discriminatory purpose" which may be inferred in some cases from the facts, but not always so).

discriminatory manner, not just with a discriminatory effect, and thus intermediate scrutiny applies.

*B. Former Equal Protection Challenges to Name
Change upon Marriage Statutes*

There is no case directly on point that challenges either the name change upon divorce or name change upon marriage statutes as being discriminatory towards men for not giving them the choice to change their name. This is primarily due to the fact that the practice of men changing their name upon marriage is both recent and still hardly practiced.⁵⁵ There are, however, similar cases in the federal courts that would be highly analogous to such a challenge. Some of these cases focus upon the right of a woman to retain her name upon marriage, and others concern the right of a child to bear a surname other than his or her father's name. There may be some cosmetic differences in the treatment of these cases, but the general equal protection analysis is the same.

In the case of *O'Brien v. Tilson*, the United States District Court for the Eastern District of North Carolina struck down a statute forcing a child to bear his father's surname as an unlawful "classification based on gender."⁵⁶ The parents wished to name their son in accordance with the Swedish custom of combining the father's given name, Arne, with the suffix, son, to make Arneson, but the North Carolina statute mandated that the child's surname be the same as the father's.⁵⁷ The court did not even reach the question of the standard of review, as it found that, "[t]he [c]ourt need not decide whether the state must show a compelling state interest or some lesser interest . . . because even under the most relaxed of standards . . . the statute proves to be patently defective."⁵⁸ The State argued that it would complicate record keeping of newborns and also create difficulties in keeping accurate health records to allow the child to bear a different name from the father, but the court sharply responded: "In this age of electronic data processing, the Court cannot conclude that permitting plaintiffs to do as they wish would render it impossible or even minimally more costly or difficult for the State of North Carolina to keep track of its new citizens."⁵⁹ The State basically seemed to be arguing that their records were set up according to the long-standing tradition of the

⁵⁵ See McBride, *supra* note 11.

⁵⁶ *O'Brien v. Tilson*, 523 F. Supp. 494, 496 (E.D.N.C. 1981).

⁵⁷ *Id.* at 495.

⁵⁸ *Id.* at 496.

⁵⁹ *Id.* at 497. Furthermore, the district court noted that how the state keeps records is their own business, and the State is free to file the birth certificate under the father's surname and call the children "Huey, Duey, and Louey, or however [the State] sees fit." *Id.*

child bearing the father's surname, but the court clearly did not think that the extra hassle of having to rearrange state records would survive even a rational basis review. Although the court did not reach the issue of the appropriate standard of scrutiny, presumably, since the statute was facially discriminatory, the court would have used an intermediate standard of review had the State proffered a more compelling interest than mere administrative convenience.⁶⁰

In *Forbush v. Wallace*, the United States District Court for the Middle District of Alabama rejected an equal protection challenge to a statute that required a wife to take her husband's surname upon marriage.⁶¹ First of note in this opinion is the fact that the court used a rational basis review as if no heightened scrutiny was warranted.⁶² *Craig v. Boren*, which solidified the use of the intermediate scrutiny test, had not yet been decided, and the standard to apply to gender classifications was very much up in the air in 1972. The Court in 1971 had applied rational basis review to a gender classification in *Reed v. Reed*, and then in 1973, Justice Brennan, writing for only a plurality of the Court, applied strict scrutiny to a gender classification in *Frontiero v. Richardson*.⁶³ It is not surprising then that the *Forbush* court applied a rational basis review and that the Supreme Court affirmed the decision without an opinion.⁶⁴ The Supreme Court itself could not decide on a standard of review for gender discrimination. A number of the Justices on the Court may not have wanted to articulate a standard, thinking that the Equal Rights Amendment,⁶⁵ which in 1973 was pending ratification by the states, but which never passed, would re-

⁶⁰ Mere administrative convenience certainly does not meet an intermediate standard of review. See *Craig v. Boren*, 429 U.S. 190, 198 (1976) ("Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender based classifications.").

⁶¹ *Forbush v. Wallace*, 341 F. Supp. 217, 222-23 (M.D. Ala. 1971) (per curiam), *aff'd without opinion*, 405 U.S. 970 (1972).

⁶² *Id.* at 222 ("This judicial pronouncement, as with any state statute or regulation, must have a rational basis.").

⁶³ *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (invalidating a law which allowed male servicemen to claim their wife as a dependent, but requiring female servicewomen to demonstrate that their spouse was in fact dependent upon her for at least one-half of his support); *Reed v. Reed*, 404 U.S. 71, 77 (1971) (holding invalid an Idaho statute which provided that when two people were of the same entitlement class to administer an estate of a decedent who died intestate, that preference should be given to the male).

⁶⁴ *Frontiero*, 411 U.S. at 683. Interestingly enough, in response to the Supreme Court affirming *Forbush* without an opinion, a young feminist attorney by the name of Ruth Bader Ginsburg said, "[i]n American Civil Liberties Union women's rights litigation, we are attempting to limit the potential harm by urging that a Supreme Court *per curiam* affirmance without opinion has scant, if any, precedential value." 2 WOMEN TODAY, No. 8, Apr. 17, 1972. It would seem at least one Justice on the Court might be sympathetic to this argument.

⁶⁵ For a discussion of the Equal Rights Amendment and the effects it would have had, See Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

solve the issue.⁶⁶ Clearly, however, under the *Craig v. Boren* standard of review, which has been reaffirmed by subsequent cases, this statute should have been analyzed using the intermediate scrutiny test.⁶⁷

Regardless of the standard used, however, *Forbush* is still very informative in understanding the state interests that did pass a rational basis review. The court noted that among the state interests were uniformity among the several states and administrative convenience.⁶⁸ In addition, the court said that the injury was de minimis because Alabama had a "simple, inexpensive means by which any person . . . can on application to a probate court change his or her name."⁶⁹ This referred to the general statutory name change procedure. It is also of note that the court found that the statute requiring a woman to bear her husband's surname upon marriage was a continuation of English common law.⁷⁰

As previously mentioned,⁷¹ all fifty states now recognize the right of a woman to retain her maiden name, and *Forbush* was overturned by the Alabama Supreme Court in its 1982 decision in *State v. Taylor*.⁷² In *State v. Taylor*, the Alabama statute that required women to register to vote in their husband's surnames was challenged.⁷³ Interestingly enough, the Alabama Supreme Court did not re-evaluate the equal protection analysis of *Forbush*, but addressed whether the wife taking her husband's surname was really the common law of Alabama as descended from English common law.⁷⁴ The court eventually held that it was not.⁷⁵ This effectively sidestepped the gender issue that *Forbush* presented. Thus, even though *Forbush* was overturned on other grounds, it continues to stand in that jurisdiction for the proposition that such name change upon marriage statutes should be held up to a rational basis of review.

⁶⁶ See *Frontiero*, 411 U.S. at 692 (1973) (Powell, J., concurring) ("There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment . . . will resolve the substance of this precise question . . .").

⁶⁷ See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (applying intermediate scrutiny in the analysis of a female only entrance policy); *Califano v. Goldfarb*, 430 U.S. 199, 210-11 (1977) (invoking intermediate scrutiny to analyze a statute which automatically paid survivor benefits to widows, but only paid them to widowers if he was receiving at least one-half of his support from his deceased wife).

⁶⁸ *Forbush v. Wallace*, 341 F. Supp. 218, 222 (M.D. Ala. 1971).

⁶⁹ *Id.* at 222 (internal citation omitted).

⁷⁰ *Id.*

⁷¹ See MacDougall, *supra* note 4.

⁷² *State v. Taylor*, 415 So.2d 1043 (Ala. 1982).

⁷³ *Id.* at 1043.

⁷⁴ *Id.* at 1047.

⁷⁵ *Id.* ("Our research has convinced us that *Forbush v. Wallace* does not accurately state the common law on names . . .").

Other evidence tends to show that Congress supports the right to control one's name upon marriage. In 1964, Congress passed Title VII of the Civil Rights Act, which holds that it is unlawful for an employer to discriminate against any individual with respect to their sex.⁷⁶ The Sixth Circuit has applied this statute to marital name change. In *Allen v. Lovejoy*, the court invoked Title VII when a woman was fired from her job because she refused to go by her husband's surname after marriage and wanted to sign her own maiden name to company forms.⁷⁷ The Sixth Circuit stated that a "rule which applies only to women, with no counterpart applicable to men, may not be the basis for depriving a female employee who is otherwise qualified of her right to continued employment."⁷⁸ In addition to Title VII, Congress has added a section to the Equal Credit Opportunity Act that is specifically gender neutral and states: "A creditor shall not refuse to allow an applicant to open or maintain an account in a birth-given first name and a surname that is the applicant's birth-given surname, the spouse's surname, or a combined surname."⁷⁹ Clearly, considering the Sixth Circuit's construction of Congress' intent in enacting Title VII and the additions Congress has made in the Equal Credit Opportunity Act, Congress feels it important that a spouse who wishes to either change their name upon marriage or keep it the same not be discriminated against. While Congress has not specifically addressed the issue of a man changing his name upon marriage, it is more likely that this is due to the practice being relatively infrequent rather than it not falling in line with their aforementioned policies.

*C. Equal Protection Analysis in Not Allowing Men
To Change Their Name Upon Marriage or Divorce*

Using the above cases as a guide, if the constitutionality of the aforementioned statutes were challenged, it is very unlikely that any of the aforementioned state interests would survive the now required intermediate scrutiny level of review. Omi Morgenstern Leissner divides the *Forbush* justifications into four categories: "1) custom; 2) administrative convenience; 3) prevention of fraud; and 4) de minimis injury."⁸⁰ She goes on to list another justification which usually falls in the custom category, "preservation of the family unit."⁸¹ Under the intermediate scrutiny test, these five interests would have to

⁷⁶ See 42 U.S.C. § 2000 (1964).

⁷⁷ *Allen v. Lovejoy*, 553 F.2d 522 (6th Cir. 1977).

⁷⁸ *Id.* at 524.

⁷⁹ 12 C.F.R. § 202.7 (2001).

⁸⁰ See Leissner, *supra* note 2, at 262.

⁸¹ *Id.*

serve important governmental objectives and be substantially related to those objectives to survive intermediate scrutiny.⁸² Justice Rehnquist in his dissent in *Craig v. Boren* rightly asked: "How is this Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' related to the achievement of such objective . . . ?"⁸³ However, since the statutes in question do not even pass rational basis review, it is unnecessary to even consider the question of what objectives are important when looking at the claimed state interest.

1. Custom

The idea that custom should control an issue completely ignores the idea that our social values can ever evolve.⁸⁴ If custom could control an equal protection issue, then interracial marriages would have never been allowed in *Loving v. Virginia*,⁸⁵ and, according to their custom, no one but white jurors would have ever served in the state of West Virginia.⁸⁶ Omi Morgenstern Leissner rightfully argued that "[t]o subject different groups to disparate treatment because society historically has done so undermines the very purpose of equal protection."⁸⁷ Custom may raise some administrative convenience questions as changing current structures will cost time and money, but the argument that custom controls for its own sake is meritless.

2. Preservation of the Family Unit

It is also easy to dispense with preservation of the family unit as a justification for male name change practices. As Leissner notes, this rationale was based on the fact that children with different names than their mother would be assumed illegitimate and would carry that stigma with them.⁸⁸ In contemporary society, this argument carries little, if any, weight. First, even if society was structurally the same as in earlier decades, giving a man the right to adopt his wife's name would not present any illegitimacy problems. The mother and child would, in fact, have the same name—as would the husband and wife. Most importantly, though, society has changed, and today it is not all

⁸² *Craig v. Boren*, 429 U.S. 190 (1976).

⁸³ *Id.* at 221.

⁸⁴ See Leissner, *supra* note 2, at 263 (explaining that the use of custom to determine whether a practice is justifiable rejects the notion of evolving social values).

⁸⁵ *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that Virginia's scheme which prevent marriages based on racial classifications was in violation of the Fourteenth Amendment).

⁸⁶ *Strauder v. West Virginia*, 100 U.S. 303 (1879) (holding that only allowing white jurors was a violation of the Fourteenth Amendment).

⁸⁷ Leissner, *supra* note 2, at 263.

⁸⁸ *Id.* at 265.

that uncommon for a child to have a different last name than his or her mother.⁸⁹ Upon considering the effect of women being able to retain their names upon marriage, Charlotte Perkins Gilman wrote: "As to illegitimate children, the term will disappear from the language When women have names of their own, names not obliterated by marriage . . . there will be no way of labeling a child at once, as legitimate or otherwise."⁹⁰ Given the changes made in society since preservation of the family unit was given as a state interest in these case, there is really no viable argument that this would pass as an important state interest. A child having a different last name than his or her mother no longer indicates any status of illegitimacy if indeed that word even has much effect anymore, and certainly would not survive intermediate scrutiny.

3. Administrative Convenience

Additionally, mere administrative convenience cannot withstand intermediate scrutiny.⁹¹ In fact administrative convenience did not even withstand rational basis review in the case of *Jech v. Burch* where the district court struck down a statute requiring a newborn child to have either the father's last name, the mother's last name, or a hyphenated combination of both.⁹² The parents in *Jech* wanted their child to bear the name "Jebef," a combination of Jech, the mother's last name, and Befurt, the father's last name.⁹³ The State argued that it would have to change its entire record keeping system to accommodate the parents.⁹⁴ As the court explained, though, this is hardly a valid reason for the discriminatory conduct.⁹⁵ First and foremost, indexing the child's name under "Jebef" instead of a hyphenated name or one of the parent's last names hardly takes much additional work. In fact, after lengthy arguments, the court was bewildered that "[f]or reasons which have still not been explained satisfactorily to me, the

⁸⁹ Justice Wilson, in a recent English family court case, noted: "In these days of such frequent divorce and remarriage and such frequent cohabitation and indeed the preservation of different surnames even within marriage, there was no opprobrium nowadays for a child to have a different surname from that of the adults in the household." *Children's Wishes on Name Thwarted*, TIMES (LONDON), Dec. 1, 1995, Features.

⁹⁰ MacDougall, *supra* note 4, at 152 (quoting Charlotte Perkins Gilman, *Illegitimate Children*, 4 FORERUNNER 295, 297 (1913)).

⁹¹ See *supra* notes 56-60 and accompanying text.

⁹² *Jech v. Burch*, 466 F. Supp. 714 (D. Haw. 1979).

⁹³ *Id.* at 715.

⁹⁴ The State argued that changing their system would "involve the expenditure of substantial public funds." *Id.* at 720.

⁹⁵ It is of note that the district court in *Jech v. Burch* did not address the equal protection argument at all, but rooted the problem in terms of a Fourteenth Amendment right. However, the state interest rationale is still applicable. See *id.* at 719.

department [of Health] is completely defeated by the problem of indexing a child's surname such as 'Jebef,' which does not belong to either of the parents."⁹⁶ It is possible that limiting the last name as the State wished would more easily identify the child's lineage, but this argument does not hold much water. First, there are certainly children and adults with the same last name who are not related and thus being able to trace lineage in this manner would only be marginally useful. Second, if records of lineage were kept, it would be just as easy to put different surnames for the parents in the child's record as it is to put the same surname. In addition, in today's technological age, this argument loses even more weight as computerized records can easily be changed and modified without significant effort. In fact, the court dismissed as simply "ludicrous" the idea that it would be too difficult to keep the records in this manner.⁹⁷

By the same token, the argument that it would be administratively inconvenient to allow men to change their surnames upon marriage or divorce is also lacking. First and foremost is the fact that states are already set up to easily change the names of women upon marriage or divorce. Unless states have different databases based on the gender of their citizens, allowing men to change their names would be as simple as inputting the same information currently entered for women. Also, any argument that it is necessary to have certain surname conventions due to the need to trace lineage is refuted by the same argument articulated by the *Jech* court. The only real increased cost might have to do with updating certain forms that ask women for their maiden name to make the forms more generic.⁹⁸ Even then, it would be as simple as telling a husband who changed his name upon marriage to write it in the maiden name box. In short, it is certainly doubtful whether any administrative convenience argument could withstand even rational basis scrutiny, let alone intermediate scrutiny.

4. *Fraud*

The prevention of fraud is another state interest used to justify these restrictions. The Eighth Circuit, in *Henne v. Wright*, another right to name your child case, held that prevention of fraud was in-

⁹⁶ *Id.* at 718.

⁹⁷ *Id.* at 720 ("The State argues that it is necessary to name and register children as presently done in order to trace relationships for purposes of determining devolution of property and title to lands. There may have been a day when this argument had some validity. Today it is ludicrous.").

⁹⁸ Interestingly enough, there is no real equivalent word for "maiden name" for men. The best that people have come up with is the hard-to-say "birth surname." McBride, *supra* note 11.

deed a legitimate state interest.⁹⁹ We must then move to the second prong of the intermediate scrutiny test and ask if the restriction is substantially related to meet that objective. It is almost certain that allowing unfettered name changes would cause substantial fraud. In fact, lack of fraudulent intent is a requirement for a general name change petition in all states.¹⁰⁰ Of note among the state statutes, and ultimately a response to this state interest, is the text of Tennessee's general name change statute: "persons who have been convicted of the following offenses shall not have the right to legally change their names: (A) First or second degree murder; or (B) Any offense, the commission of which requires a sexual offender to register"¹⁰¹ Allowing convicted murderers or sex offenders who have recently been released to easily change their names could promote fraudulent or unlawful conduct. Tennessee, concerned about potential fraud enough to create a special statute that deals with it, allows even felons to change their name upon marriage, though.¹⁰² Evidently, when marriage is the vehicle, Tennessee does not believe fraudulent name changes would be a problem. This comes down to the simple reasoning that most people will not get married just so that they can change their name and hide their identity.¹⁰³ Assuming that the defrauder could find someone willing to participate in a "sham" marriage just to effect a name change, the defrauder would be limited to changing his or her name to the person to whom he or she was getting married. Furthermore, that person would then have to get out of the marriage, which is easier said than done in many states, requiring extra cost, time, and hassle. Finally, the defrauder could not already be married. Thus, effecting a name change in this manner would only be

⁹⁹ *Henne v. Wright*, 904 F.2d 1208, 1215 (8th Cir. 1990) (noting that a child's surname could fraudulently indicate paternity where none exists). In fact, the prevention of any crime is an important governmental objective. See *Craig v. Boren*, 429 U.S. 190, 199-200 (1976) ("Clearly, the protection of public health and safety represents an important function of state and local governments.").

¹⁰⁰ See, e.g., N.H. REV. STAT. ANN. § 547:3-i (Supp. 2002); *In re Reben*, 342 A.2d 688, 693 (Me. 1975) (interpreting the Maine general name change statute as requiring a lack of fraud); *In re Hauptly*, 312 N.E.2d 857 (Ind. 1974) (stating that the only job of the Indiana courts with regard to name change is to make sure there is no fraudulent attempt).

¹⁰¹ TENN. CODE ANN. § 29-8-101(b) (2000).

¹⁰² *Id.*

¹⁰³ Sham marriages are much more of a concern in the immigration context than in the name change context. *INS Charges Travel Agencies with Setting Up Fake Marriages*, THE RECORD (BERGEN CO., NJ) Aug. 19, 1999, News, at 2 Star B. The fact is that there are better ways to get an official name change than by marriage, and entering into a fraudulent marriage is a felony in some states. Dan Herbeck, *Alien Going from Sham Wedlock to Lockup*, BUFFALO NEWS, May 2, 1996, at 1A (sentencing a man to four months in prison, five hundred dollars in fines, and putting a felony on his record). It is unlikely that someone would risk being convicted of a felony to effectuate a name change rather than go through the hassle of the formal name change procedure.

available to those that were single. Given all these factors, it is easy to see why Tennessee does not believe fraudulent name changes upon marriage are problematic and also why the state interest of preventing fraud is not very pressing.

Even if we were to dismiss the above, though, we come back to the argument that women already have such a right. If the states were so concerned with fraudulent abuse of name change upon marriage, then curtailing a man's right to change his name upon marriage or divorce would not be substantially related to meet that objective. If this were an important state objective, then the state should place restrictions on both men and women with regard to name change upon marriage and divorce—not only men. Therefore, due to the unlikelihood of fraudulent abuse combined with the fact that women, but not men, are already permitted to change their name upon marriage and divorce, it can hardly be argued that not giving men this choice is substantially related to meet the objective of preventing fraud.

5. *De Minimis Injury*

Finally, we come to the argument that the injury in such a case is *de minimis*. This argument can be divided into three separate arguments: 1) there is in fact no injury in not allowing a man to take his wife's name; 2) the common law already affords a man an easy way to change a his last name to his wife's name; and 3) general name change statutes already allow a man to change his last name to his wife's surname.

Given the importance of names in our society, it is hard to see how to substantiate the reasoning that there is no injury in not allowing a man to change his name upon marriage.¹⁰⁴ This argument mirrors the exact idea already discussed in the case of *In re Kayaloff* where the court told a woman in 1934 that there was no harm in not allowing her to retain her professional name when she got married.¹⁰⁵ As Part I showed, a name is a symbol for one's self that carries with it personal identity, familial ties, and ethnic history. Our names have a substantial effect on how society perceives us. In fact, the specific decision regarding choice of surnames upon marriage often carries with it connotations in society.¹⁰⁶ Furthermore, putting restrictions on

¹⁰⁴ See discussion *supra* Introduction.

¹⁰⁵ *In re Kayaloff*, 9 F. Supp. 176 (S.D.N.Y. 1934).

¹⁰⁶ In a 1993 study, it was determined that sixty-eight percent of males and almost eighty-five percent of females thought it was more acceptable for a woman to retain her own name if she is a professional, indicating that women who do keep their surname will be often times lumped into that category. Laurie Scheuble & David R. Johnson, *Marital Name Change: Plans and Attitudes of College Students*, 55 J. OF MARRIAGE & FAM. 747, 750 (1993). Conversely, many in society

changing one's name can interfere with important religious practices, ethnic customs, and assertions of identity.¹⁰⁷ It is evident that names are not merely trivial, and that denying people the right to change their names is much more than a "de minimis" injury.¹⁰⁸

Still, it is true that in almost all fifty states, people possess the right to change their names by common law just by beginning to use another name.¹⁰⁹ Therefore, upon marriage, if a man simply just starts using his wife's last name, without any official documents at all, then by common law it becomes his name. At least one state has made statutory name change procedures exclusive, and for this state, this argument has absolutely no applicability.¹¹⁰ For the majority of states, this common law right would seemingly end the inquiry as a de minimis injury. However, the fact is that in contemporary society, the common law right to change one's name is practically meaningless. The realities of contemporary society requires a state-sponsored corroboration to establish our identity. In advising a bride or groom on changing one of their names upon marriage, Karen Jansen, of the *Wyoming Eagle-Tribune*, notes that "a wife or groom who changes their name must have official documentation to change their social security card for tax purposes, to change their driver's license, and usually to change their credit cards, just to name a few."¹¹¹ It is doubtful whether a credit card company will issue new cards to someone calling up and declaring a common law name change. It is little comfort or help to grooms who might want to change their last name that they can call themselves whatever they want, if they will not be able to obtain credit cards, bank accounts, mortgages, or many other necessities of today's life.

In addition, some states do not even recognize this supposed common law right fully. These states have erected additional barriers such that one must have additional documentation of a name change

will look down on men who adopt their wives' surname as thirty-three percent of college men surveyed said it was never acceptable for a man to change his name to that of his spouse. *Id.*

¹⁰⁷ See *supra* Part I (discussing Malcolm X and the Sikh practice of naming).

¹⁰⁸ For a fuller discussion, see *supra* Introduction.

¹⁰⁹ Almost all states provide that the statutory name change provision does not impede the common law right to change one's name simply by using a new name. See, e.g., *State v. Taylor*, 415 So.2d 1043 (Ala. 1982); *Hosmer v. Hosmer*, 611 S.W.2d 32 (Mo. Ct. App. 1980); *Traugott v. Petit*, 404 A.2d 77 (R.I. 1979). *Contra Sneed v. Sneed*, 585 P.2d 1363, 1365 (Okla. 1978) (holding that in Oklahoma, the statutory name change proceeding has replaced the common law right).

¹¹⁰ See, e.g., *Sneed*, 585 P.2d at 1363 (holding that statutory name change is the exclusive method of changing one's name in Oklahoma).

¹¹¹ See Jansen, *supra* note 31. This really is just the tip of the iceberg. Banks and any other financial institutions must have some concrete evidence of name change as well. Rebecca Simons, *What's in a Name?*, KNOXVILLE NEWS-SENTINEL, Mar. 11, 1999, at B1.

even to interact with certain state agencies.¹¹² The common law solution is not a serious answer to the inequity presented by male name change upon marriage or divorce provisions. In 2000, the California Attorney General acknowledged the inadequacy of the common law right: "the inability to establish one's name for purposes of life's daily transactions, although perhaps only occasionally resulting when sole reliance is placed on the common law method, can be a substantial inconvenience when it occurs."¹¹³ The California Attorney General was being generous when he called it an inconvenience. Not being able to use a bank account or obtain a driver's license is much more than an inconvenience in our society.

Satisfied that the presence of a common law right does not make the injury *de minimis*, the *Forbush* court noted that states provide a separate statutory method to change one's name, thus apparently again ending our inquiry into the inequity of the name change upon marriage and divorce provisions.¹¹⁴ Even the American Law Reporter stated:

The statutory method, it should be borne in mind, has the advantage of being speedy and definite, of providing a convenient record of the name change which may be later resorted to, and of eliminating the necessity of elaborate evidence where the name change is later sought to be proven in court.¹¹⁵

While this Comment does not dispute the advantages of having a statutory name change rather than a common law name change, the premise of the American Law Reporter is simply not true. As Margaret Eve Spencer noted in her article that attacked the refusal of courts to recognize a woman's right to retain her maiden name, "[t]here are two basic flaws in this reasoning: First, the 'simple procedure' is not cheap; and second, in many states there are legal obstacles to a married woman changing her name."¹¹⁶ In Tennessee, for example, the name change procedure can cost as much as \$150 just for the court fees (much more if a lawyer is hired).¹¹⁷ Additionally, although some states are exceptions, many states do not allow the

¹¹² The Attorney General of South Dakota advised all state agencies that it was up to their general discretion whether or not to accept a name change without appropriate documentation. 65 Op. Att'y Gen. S.D. No. 77-31 (1977).

¹¹³ 83 OP. ATT'Y. GEN. CAL. No. 00-205 (2000).

¹¹⁴ *Forbush v. Wallace*, 341 F. Supp. 217, 222 (M.D. Ala. 1971) ("This Court notes that the State of Alabama has afforded a simple, inexpensive means by which any person, and this includes married women, can on application to a probate court change his or her name.") (citation omitted).

¹¹⁵ Ronald A. Case, Annotation, *Right of Married Woman To Use Maiden Surname*, 67 A.L.R.3d 1266, 1272 (1975).

¹¹⁶ Margaret Eve Spencer, *A Woman's Right to Her Name*, 21 U.C.L.A. L. REV. 665, 688 (1973).

¹¹⁷ Jan Galleta, *Hyphen-ation: There's More to Hyphenated Names Than Saying 'I Do'*, CHATTANOOGA TIMES, Nov. 5, 2000, at E1.

name change procedure filing fees to be waived if the petitioner does not have the money.¹¹⁸ In addition to the filing expense, many states require publication in a newspaper for a period of time, creating yet another expense and also arguably constituting an invasion of privacy as the entire community will be advised of one's personal affairs.¹¹⁹ Furthermore, the petitioner is often required to make public very private information, such as if he or she has ever been convicted of a crime or gone into bankruptcy.¹²⁰ While this information is often times a matter of public record, it is not always so. In addition, even if it is a matter of public record, it is another matter to be forced to advertise this information in newspapers through the publication requirements of the name change provisions.

Besides being expensive and arguably an invasion of privacy, the statutory name change proceedings are also not without restrictions. In many states, whether to accept a name change is totally within the discretion of the court, and it is not obvious that all courts would accept a man wanting to adopt his bride's surname.¹²¹ There are other more specific restrictions as well. For example, in North Carolina, a petitioner has to file with the court proof by at least two witnesses of good character.¹²² Also, in some states, there are additional restrictions on changing one's name for felons and sex offenders.¹²³

Thus, a man who wants to change his name upon marriage and must use the general state statutory schemes for name changes will not only incur a substantial expense, but must declare to the court and the community in which he lives through publication, private details of his life including his financial situation and his reasons for changing his name. Even after this, there is no assurance in many states that his request will be granted as many state courts have wide discretion and additional restrictions exist depending upon the

¹¹⁸ See MO. REV. STAT. § 527.280 (West 2002); N.D. CENT. CODE § 14-02-20.1 (1996); Robinson v. Clark, 632 N.E.2d 1393 (Ohio Ct. App. 1994) (stating that the court does not have to waive the filing fee for an indigent petitioner); *In re Moser*, 65 Pa. D. & C.2d 356 (Pa. Ct. Com. Pleas 1974). But see WASH. REV. CODE ANN. § 36.18.022 (West 1997 & Supp. 2002) (stating that the court can waive the filing fees if an affidavit is produced showing financial hardship).

¹¹⁹ See, e.g., S.D. CODIFIED LAWS § 21-37-4 (Michie 1999) (requiring publication for four weeks in a legal newspaper in order to issue notice of a name change).

¹²⁰ See Case, *supra* note 115, at 1273.

¹²¹ See WASH. REV. CODE ANN. § 4.24.130 (West 1997) (stating that the court has full discretion in whether to accept a name change). Other statutes require the petitioner to satisfy similarly discretionary standards such as "reasonable cause." See *supra* Part II (discussing in depth the standards for general name change petitions).

¹²² N.C. GEN. STAT. § 101-4 (1999).

¹²³ See, e.g., MINN. STAT. § 518.27 (West Supp. 2001) (citing MINN. STAT. § 259.13 (West 2001)). Although some states specifically provide that felons can change their surnames if they are getting married. TENN. CODE ANN. § 29-8-101 (2000) (limiting the name change rights of only those convicted of first or second degree murder or any defense requiring a sexual offender to register).

groom's specific circumstances. Considering that women do not have to go through this ordeal, it is ludicrous to call this injury de minimis. In *Jech v. Burch*, the district judge, upon facing a similar de minimis argument when considering the right of parents to name their child what they wanted at birth, as opposed to using the statutory name change provisions later, remarked, "[w]hat is the state interest in refusing to allow parents to give their child at birth a name which they may immediately confer by way of change of name? I fail to see any such interest."¹²⁴ Likewise, what is the interest of the state in refusing to allow a groom to change his name upon marriage when he can do so through statutory means, albeit with much more expense and hassle? Calling the injury de minimis should not be the end of the inquiry. The statutory provisions involve time, money, perhaps embarrassment, and do not always provide the relief sought. If women have a right to change their names upon marriage and divorce, a de minimis argument should not succeed in refusing that right to men.

D. Conclusion of Equal Protection Analysis

None of the traditionally proffered reasons for denying name changes to men seem to hold much weight under a rigorous equal protection analysis. Preservation of the family unit and custom are very weak arguments that would probably not even pass rational basis review. As discussed above, administrative convenience is not a strong enough state interest to overcome the intermediate level of scrutiny. While the prevention of fraud is certainly a compelling state interest, denying names changes exclusively to men upon marriage or divorce is simply not substantially related to it. Finally, the harm in these cases is far from de minimis, as a person's name is one of the person's most sacred possessions, and both common law and statutory name change provisions are no substitute for the simple marital name change options that women now have.

Throughout gender discrimination case law, the Court has often focused its efforts on trying to eliminate "stereotyped distinctions between the sexes"¹²⁵ and "archaic and overbroad generalization[s]."¹²⁶

¹²⁴ *Jech v. Burch*, 466 F. Supp. 714, 720 (D. Haw. 1979).

¹²⁵ *Frontiero v. Richardson*, 411 U.S. 677, 684-87 (1973) (noting that the United States has had a long and unfortunate history of sex discrimination and that these classifications based on sex are "inherently invidious").

¹²⁶ *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (characterizing *Frontiero v. Richardson* as standing for the fact that gender classifications based on "archaic and overbroad generalization[s]" are unconstitutional); see also *Craig v. Boren*, 429 U.S. 190, 198 (1976) (arguing that "archaic and overbroad generalizations" could not justify discrimination based on gender). Likewise, when the discrimination is not based on mere generalizations or stereotypes, but real

The current name change schema which exist in most states was put into place when women were deemed inferior to men, and many commentators have argued that it was solely an effort "to render women socially and politically invisible" with the idea that "a woman has practically no identity apart from her husband."¹²⁷ It is a relic, left over from this nation's "long and unfortunate history of sex discrimination."¹²⁸ The state legislatures and courts have recognized this and finally given women the right to women to change or retain their names upon marriage,¹²⁹ but men must still deal with those pieces of the old schema that remain. As currently executed and written the name change upon marriage and divorce statutes treat men and women differently—giving a right to women which men do not have. They are therefore unconstitutional and should be declared invalid.

IV. MEN AND WOMEN SHOULD HAVE A FUNDAMENTAL RIGHT TO CHANGE THEIR NAME UPON MARRIAGE

Thus far, this Comment has attacked name change upon marriage and divorce practices in terms of gender discrimination. One way for a state legislature to rectify this gender discrimination would be to not allow men or women the right to change their name upon marriage or divorce. This would effectively eradicate the different ways men and women are treated with respect to name change upon marriage and divorce. This Comment further argues that even if a state legislature were to pass a statute that did this, the statute should still be unconstitutional as a violation of the Fourteenth Amendment.¹³⁰ A denial of the right to change one's name under reasonable circumstances is a denial of due process. A court has never recognized the right to change one's name upon marriage as a fundamental right. However, as shown below, it has been a right of our society since the common law of England, and the statutory restrictions now placed on that right should be disallowed unless they are narrowly tailored to

differences, the Court has upheld those statutes. *See Michael M. v. Sonoma County Super. Ct.*, 450 U.S. 464, 469 (1981) ("[T]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.").

¹²⁷ Leisner, *supra* note 2, at 350; *see also* Christman, *supra* note 4.

¹²⁸ *Frontiero*, 411 U.S. 684 (discussing how "such discrimination was rationalized by an attitude of romantic paternalism which, in practical effect, put women, not on a pedestal, but in a cage").

¹²⁹ *See* MacDougall, *supra* note 4.

¹³⁰ U.S. CONST. amend. XIV, § 1:

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.

achieve a compelling state interest—something to which denying the right to change one's name upon marriage does not adhere.¹³¹

Under English common law, it was long held to be the right of every person to change his or her name at will as long as he or she did not have fraudulent intentions.¹³² This right extended to both men and women and did not depend at all on marital status.¹³³ Under common law, fraudulent intent in this regard meant that the specific purpose of the name change was to conceal one's true identity.¹³⁴ Except for Louisiana, which inherited its laws mainly from French civil law,¹³⁵ all fifty states inherited this English common law right.¹³⁶ The statutory method of changing one's name has generally been held to be an aid to the common law right and not in place thereof, and almost all fifty states with few exceptions have held that the common law right still exists.¹³⁷ Judge Arnold, in his dissent in *Henne v. Wright*, remarked that "[t]he early tradition . . . did not restrict one's own choice of a surname So far as the choice of one's own name is concerned, then, it seems well established that the tradition, still extant, is a complete absence of statutory prohibition."¹³⁸

As discussed above, the common law right is no longer sufficient in today's society to achieve its original aim. In eighteenth century England, people did not have to worry about driver's licenses, social security cards, or bank applications. If the common law right is to

¹³¹ This Comment does not explore the right to change one's name as a violation of First Amendment free speech. However, it has been argued by commentators that restricting the freedom to change one's name is such an infringement. For example, Margaret Eve Spencer has argued:

The married woman in modern America who wishes to retain her maiden name, or to use the title Ms. instead of Mrs. is generally making, and is understood by most people to be making, a statement that she rejects certain aspects of the traditional female role or stereotype.

Spencer, *supra* note 116, at 684. Judge Arnold, in *Henne v. Wright*, remarked, "The question could well be analyzed as a First Amendment issue. What I call myself or my child is an aspect of speech. When the State says I cannot call my child what I want to call her, my freedom of expression, both oral and written, is lessened." *Henne v. Wright*, 904 F.2d 1208, 1216 (8th Cir. 1990) (Arnold, J., concurring in part, dissenting in part). This is an interesting slant on the right to change one's name, but due to the tenuous nature of the argument, it is not dealt with here in detail. For a more in-depth analysis, see Spencer, *supra* note 116.

¹³² See N.Y. DOM. REL. LAW § 15 (McKinney 1999) ("The opportunity to make [the choice of surname upon marriage] is supported by ancient common law principles."). See also MacDougall, *supra* note 4, at 103 (reiterating that under common law people can use the surname they chose "as long as they do not do so for a fraudulent purpose"). For an extended discussion of the common law right, see *id.* at 102-10.

¹³³ *Id.* at 106.

¹³⁴ *Id.* at 103.

¹³⁵ Most commentators and courts contend that Louisiana follows French civil law. See *id.* at 102 n.19.

¹³⁶ *Id.* at 102-03.

¹³⁷ Draper, *supra* note 42, 79 A.L.R.3d at 565.

¹³⁸ *Henne v. Wright*, 904 F.2d 1208, 1218 (8th Cir. 1990).

have any meaning today, then the common law right must now be a state recognized name change with appropriate documentation. In our society, a change of name is meaningless unless it is accompanied by proof that one's name has actually been changed.

Courts already seem to be in agreement that the right to choose and change one's name is protected under the Due Process Clause. In *Jech v. Burch*, the court, in examining whether parents have a right to name their children, noted that "a proper interpretation of Anglo-American political and legal history and precedent leads to the conclusion that parents have a common law right to give their child any name they wish, and that the Fourteenth Amendment protects this right from arbitrary state action."¹³⁹ There, the court applied a rational basis test to find that the parent's right was violated.¹⁴⁰ Similarly in *Henne v. Wright*, the majority analyzed the state's restrictions on the right of parents to name their child under a rational basis test, holding that the right was not fundamental, but was protected under the Fourteenth Amendment.¹⁴¹ Both cases recognized the Fourteenth Amendment protections, but did not recognize the right as fundamental.

If, however, the right to name a child is at least somewhat protected by the Fourteenth Amendment, it follows that the right to change one's own name upon marriage should likewise be protected. It would not make much sense for all of us to have the right to choose our children's names, but lack the right to control our own names. In fact, in his dissent in *Henne*, Judge Arnold assumes the right to choose one's own name is very strongly protected, and tries to use that fact to influence the degree of protection for choosing one's child's name: "I take it the [c]ourt would not deny a citizen the right to choose her own name, absent some compelling governmental interest There is something sacred about a name. It is our own business, not the government's."¹⁴² Judge Arnold goes so far as to assume that the right to choose one's own name is in fact fundamental, as he indicates by invoking the compelling interest language.¹⁴³ No other court has gone so far, but as discussed above courts have assumed that this right is at least protected to some degree. The question, then, is to what degree.

¹³⁹ *Jech v. Burch*, 466 F. Supp. 714, 719 (D. Haw. 1979).

¹⁴⁰ *Id.* at 919-20.

¹⁴¹ *Henne*, 904 F.2d at 1213-15.

¹⁴² *Id.* at 1217 (Arnold, J., dissenting).

¹⁴³ *Id.* at 1216. It is well established that only compelling state interests will stand against fundamental rights. See *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . .") (citations omitted).

The right to change one's name non-fraudulently falls both within the general scope of the right to privacy, as described by the United States Supreme Court, and also follows from other fundamental rights which the Court has established. The importance of one's name has already been emphasized—it represents our identity, lineage, and ethnic heritage.¹⁴⁴ Although Justice O'Connor was speaking of abortion, her words in *Planned Parenthood v. Casey* seem to conjure up this idea of fundamental rights encompassing the notion of control over one's own identity: "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹⁴⁵ Given the cultural, religious, ethnic, and societal implications of one's name already discussed, being able to name oneself is defining oneself and should be included among other similar fundamental rights.

The right to change one's name upon marriage also follows more concretely from other fundamental rights. Most notably is the general right to marry¹⁴⁶ and the freedom from government intrusion into the marital relationship.¹⁴⁷ These rights go hand in hand with the right to change one's name upon marriage. In fact, Justice Blackmun remarked that the right to marry, the right to use contraception, and other such privacy rights could be grouped together and described as a "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children."¹⁴⁸ Certainly deciding what names each spouse will take as a couple starts their lives together—thereby defining their relationship in some ways—is one of the core decisions that have to be made when a marriage occurs. It has been argued, for example, that forcing a woman to take her husband's surname upon marriage would be defining the entire marriage as an unequal partnership.¹⁴⁹ Denying marital name choice may also go against marital norms in some cultures and beliefs, thus preventing

¹⁴⁴ See *id.* at 1213-15 (discussing in detail the importance of one's name).

¹⁴⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

¹⁴⁶ *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that Virginia's statutory scheme preventing marriages based on racial classifications was in violation of the Fourteenth Amendment). This right has not been extended to marrying members of the same sex, but that is seen as a specific exception to the general right to marry whomever one chooses. Congress has recently passed the Defense of Marriage Act which makes it illegal for the federal government to recognize any gay marriages. Benjamin Geden, *Ballot Effort Eyes Gay Marriage Ban*, BOSTON GLOBE, July 25, 2001, at B2. This was on the heels of the Hawaii State Supreme Court opinion which held that disallowing same sex marriages is a violation of the state Equal Protection Clause. *Id.*

¹⁴⁷ *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) ("I believe that the right of privacy in the marital relation is fundamental and basic . . .").

¹⁴⁸ *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (holding that a Georgia statute which restricted abortions was unconstitutional).

¹⁴⁹ Case, *supra* note 115, 67 A.L.R.3d at 1272-73.

normal marriage customs from being followed.¹⁵⁰ This kind of decision seems to fit squarely within Justice Blackmun's language.

The dialogue in *Henne* between the majority and the dissent concerning whether parents should have a fundamental right to name their children mirrors the argument that the right to change one's own name upon marriage should similarly be a fundamental right. The court in *Henne* ultimately decided that it was not a fundamental right to name one's child without restrictions, but Judge Arnold, dissenting in part, disagreed.¹⁵¹ The majority argued:

The custom in this country has always been that a child born in lawful wedlock receives the surname of the father at birth, . . . and that a child born out of wedlock receives the surname of the mother at birth [W]e can find no American tradition to support the extension of the right of privacy to cover the right of a parent to give a child a surname with which that child has no legally recognized parental connection.¹⁵²

Judge Arnold conceded that it had never been the custom to give a child a surname that is neither the father's nor mother's, but argued that the majority had narrowed the issue and did not have the right focus: "by the same token, there is no solid tradition of legislation denying any such right, and under *Michael H.*, that is the relevant question."¹⁵³ The dispute between the majority and the dissent in *Henne* is not really over the scope or importance of the right to name one's children, but focuses on whether this right has been granted or disallowed throughout history. The majority argues that custom has never granted the right to give the child an unmarried father's sur-

¹⁵⁰ For example, in Scottish culture, it is the custom for the man to take his wife's surname upon marriage. See Bysiewicz, *supra* note 9.

¹⁵¹ *Henne v. Wright*, 904 F.2d 1208, 1216 (8th Cir. 1990) (Arnold, J., concurring in part, dissenting in part) ("The fundamental right of privacy, in my view, includes the right of parents to name their own children.").

¹⁵² *Id.* at 1214-15 (holding that the right to name a child "McKenzie" a name other than that of the father or mother is not deeply rooted in American tradition and thus not fundamental).

¹⁵³ *Id.* at 1219 (Arnold, J., concurring in part, dissenting in part). Judge Arnold was writing of the 1989 plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). Because no majority was reached, the opinion is not binding on the Eighth Circuit, but from the plurality and dissenting opinions, the Justices would agree with the above point that Judge Arnold made. In the *Michael H.* case, the California courts rejected Michael H.'s claims that he was the father of the child in question even when blood tests established a 98.07% probability because the child's mother, Carole, was married to another man at the time. Justice Scalia denied labeling Michael H.'s parental right as fundamental because "our traditions have protected the marital family (Carole, [her husband], and the child they acknowledge to be theirs) against the sort of claim Michael asserts." *Id.* When speaking of very general rights such as paternity rights, Justice Scalia focused the analysis on whether such rights had ever been protected, and whether such rights had ever been denied, finding in that case the latter. Likewise, Justice Brennan's dissent, while objecting to Justice Scalia's narrowing of the issue, also zeroed in on whether the right had ever been denied or protected. It is easy to see that both would agree that whether such rights have been denied is a related issue.

name, but the dissent points out that laws have never disallowed that right.

The analysis of whether there exists a fundamental right to change one's name nonfraudulently upon marriage is the same under the reasoning of both the majority and the dissent in *Henne*. The right to change one's name at all has always been protected by the courts, and only in recent years have statutory methods replaced this right, with the great majority of states retaining both the common law and statutory rights. In addition, the ability to change one's name upon marriage has been a long standing custom has never been disallowed or restricted by statute as long as it was not for a fraudulent purpose. Seemingly, the issue plaguing the *Henne* court would not be a problem as being able to change one's name nonfraudulently upon marriage has always been a protected right and never been denied.

Fundamental rights have been denied when not "deeply rooted in this nation's history and tradition," but the right to change one's name upon marriage would pass that test as well.¹⁵⁴ Certainly if we narrowed the issue to the right of a man to take his wife's last name automatically upon marriage, we would find no precedent in the nation's history and thus the majority in *Henne* might have a problem with calling that a fundamental right. However, while custom might have dictated a different course of events, the law is clear that men have actually always had the option to change their name at any time—including upon marriage. There also have never been restrictions on this common law right. There is no question whether this right is deeply rooted in our nation's history and tradition—it clearly is.

Therefore to change one's name nonfraudulently upon marriage would seemingly fall within the wide net that the Court has cast in giving fundamental rights to people to make decisions about their marriage and their identity. Changing one's name nonfraudulently is deeply rooted in the history and tradition of the United States as passed down from England. And although it has never been the custom for men to change their name upon marriage in this country, it is clear that it has always been their right to do so. This legal right must be distinguished from the general practice that has prevailed in the past. Just because only a small number of people have availed themselves of such a right does not mean that the right should be ab-

¹⁵⁴ *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (holding that the right to engage in homosexual sodomy is not fundamental because it is not deeply rooted in this nation's history and tradition). See also *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (Harlan, J., concurring) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution for the family is deeply rooted in this Nation's history and tradition.").

brogated or deemed not to exist. For example, if only five percent of the population used contraceptives, it would not follow that the right to use them is not fundamental.¹⁵⁵

Declaring this a fundamental right would not pose any substantial problems to the States. First and foremost, the right argued for in this article is not a general fundamental right to change one's name, but only a fundamental right for a spouse to take his or her spouse's name upon marriage. This is a very narrow right which would not include the same kind of problems that a general name change right would present. For example, while fraud may be a significant concern if the states were to allow anyone to officially adopt any name they choose, it is much less of a concern in the marriage context. Considering the social and monetary cost of getting married, it is unlikely that many people would use marriage fraudulently solely to effectuate a name change. The problems which would be faced in declaring changing one's name in any circumstance a fundamental right are less at issue when the right is limited to marriage.

Supposing a right to change one's name nonfraudulently upon marriage was recognized as fundamental, any restrictions on that right would have to be narrowly tailored to meet compelling state interests.¹⁵⁶ States may argue that declaring this a fundamental right would tie their hands in preventing fraud. They would be right in noting that passing strict scrutiny is difficult, but, echoing Justice O'Connor's words in *Adarand Constructors, Inc. v. Peña*, it is not true that strict scrutiny is "strict in theory, but fatal in fact."¹⁵⁷ As noted above, it was the common law right to change one's name as long as it wasn't done for fraudulent purposes. There is little argument whether this would be a compelling state interest. It has never been the right of someone to change their name for fraudulent purposes.

Besides achieving a compelling state interest, any restriction placed on the right must be narrowly tailored. A state may argue that a name change upon marriage right could be abused by two people getting married just to effectuate a name change. As previously discussed, it is unlikely that two people would marry just to effectuate a name change, but if a state were very concerned with this right being abused, perhaps a state could have restrictions on choosing totally new names and limit marital name changes to only the wife's sur-

¹⁵⁵ See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a state law which made using birth control by a married couple illegal).

¹⁵⁶ See *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake.") (citation omitted).

¹⁵⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (holding that strict scrutiny is the proper standard of review for all racial classifications).

name, the husband's surname, or both names hyphenated. If this were done, it is very unlikely that this right would be abused to conceal one's identity.¹⁵⁸ The same argument also applies for current provisions in name change statutes which put additional restrictions on sex offenders and recently released felons. Marriage would be a very costly and burdensome way to try to conceal their identities, but even so reasonable restrictions put on such a class of people would probably withstand strict scrutiny.¹⁵⁹

In short, declaring the right to change one's name upon marriage as fundamental would not pose any substantial problems for states. It is a right that can be traced to the common law of England and has always been protected. It is certainly deeply rooted in our nation's history and tradition. In addition, it follows from the long line of precedent set by the United States Supreme Court that prevents government from intruding into the marital relationship and establish that we have the right to make decisions concerning our own identity.

CONCLUSION

Margaret Eve Spencer, in writing to persuade state lawmakers and the court system to recognize a woman's right to retain her maiden name wrote:

There are doubtless many women who would freely choose under such a law to take their husbands' names upon marriage, from conviction or convenience. However, there are also many women who would choose to retain their maiden names. The function of the law should be to afford each woman the right to that choice.¹⁶⁰

Decades after this right was granted to women, I now ask state lawmakers and the court system to recognize the same for men: that men have the right to the choice between retaining their birth surname or adopting their wife's surname. As previously noted, many states have drafted legislation which heads in that direction including the laws of New York and Hawaii. These states should serve as a model for other lawmakers. The fact remains, though, that most states marital name change statutes violate the Equal Protection Clause of the Fourteenth Amendment in that they do not provide the same choices to men that they now do for women. The victories won by women in the last few decades with regard to marital name change choice should not give women greater rights than men now have.

¹⁵⁸ Certainly allowing the wife and husband to hyphenate their name would not facilitate fraud as each of the original names is included in the new hyphenated name.

¹⁵⁹ For example, for felons and sex offenders, any name changes could be automatically reported to police databases, parole officers, or other law enforcement personnel such that the name change could not be used to conceal their true identity.

¹⁶⁰ Spencer, *supra* note 116, at 690.

Even in states with gender neutral laws, the Court should recognize a fundamental right to change one's name upon marriage. The right is deeply rooted in our nation and tradition, and is directed to the very core of our identity—our own name. It follows easily from other fundamental rights and the language used in those opinions saying that we have a right to control our own identity and make decisions about marriage. Names are no trivial matter, but represent our very core to society, and lawmakers and courts should not consider any denial of name change rights as merely *de minimis*. As Erica Jong wrote, "To name oneself is the first act of both the poet and the revolutionary. When we take away the right to an individual name, we symbolically take away the right to be an individual."¹⁶¹

¹⁶¹ ERICA JONG, *HOW TO SAVE YOUR OWN LIFE: A NOVEL* (1977).