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FOR NONTRADITIONAL NAMES' SAKE: A CALL TO REFORM THE NAME-CHANGE PROCESS FOR MARRYING COUPLES

Meegan Brooks*

In a large number of states, women are encouraged to take their husbands' surnames at marriage by being offered an expedited name-change process that is shorter, less expensive, and less invasive than the statutory process that men must complete. If a couple instead decides to take an altogether-new name at marriage, the vast majority of states require that each spouse complete the longer statutory process. This name-change system emerged from a long history of naming as a way for men to dominate women.

This Note emphasizes the need for name-change reform, arguing that the current system perpetuates antiquated patriarchal values and violates the United States Constitution. By allowing both spouses to change their names on their marriage certificate without any legal incentive for choosing one name over another—an approach currently used by Minnesota, Iowa, and Massachusetts—states could effectively address these problems.

INTRODUCTION

Expecting a woman to take her husband's name is expecting her to give up something that she has not only had her whole life, but something that affiliates her with past generations and present family.¹ This is a serious sacrifice that should not be expected of the wife, and yet this has been the system in place in Western cultures for hundreds of years.

The problem with the current system is not that most women end up with their husbands' names. Instead, the problem is the reason behind this practice: the social assumption that women *should* change their names, which is the motivation behind the naming statutes in many states. In those states, women are encouraged to

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1. Yofi Tirosh, *A Name of One's Own: Gender and Symbolic Legal Personhood in the European Court of Human Rights*, 33 HARV. J.L. & GENDER 247, 255 (2010) (citing Janet Finch, *Naming Names: Kinship, Individuality and Personal Names*, 42 SOC. 709, 714–18 (2008) (analyzing the extent to which family names are used to show family connections in the United Kingdom)).

take their husband's surname at marriage by being offered an expedited name-change process that is shorter, less expensive, and less invasive than the statutory process that men must complete.² This bias reinforces gender stereotypes both within the household and in society as a whole. The traditional naming system may have been understandable when it began, at a time when a husband controlled his wife's legal and property rights.³ In today's world, however, it must be reformed to reflect the fact that women have long been socially and legally equal to men.

The current system should be changed to allow couples to choose which name they would like to use after marriage, without any incentive for choosing one name over another. This new system would allow couples to continue taking the husband's name, but it would no longer favor this as a norm. Instead, couples would be able choose from a variety of "nontraditional naming" approaches that the current dominant system discourages with a series of extra costs.⁴ These alternative approaches would offer spouses the opportunity to share ownership of a name, so that neither spouse feels that the wife is sacrificing her origins completely for the sake of her husband.

This Note emphasizes the need for name-change reform, arguing that the current system—which favors women who follow the traditional system of taking their husbands' names at marriage—perpetuates antiquated patriarchal values and violates the Constitution. Parts I and II offer a background for naming laws, first by describing the history of naming in the United States, and then by outlining the current legal structure for changing one's name at marriage. Part III argues that the current system which prefers husbands' names violates the Constitution and perpetuates outdated gender norms, and should be reformed. Part IV suggests that states could effectively address these problems by allowing both men and women to change their names on their marriage certificates.

I. HISTORY AND SIGNIFICANCE OF NAMING

The history of naming in the United States offers important insight into the significance of modern naming practices. This Part is divided into three sections, each describing a distinct chapter in the

2. See *infra* Part II.

3. See *infra* Part I.A.

4. This Note defines "nontraditional naming" to include the husband taking his wife's surname, hyphenating the husband's and wife's surnames, merging the two surnames into a single name, and choosing a new surname altogether.

history of naming in the United States. First, it explores the origins of surnames in England—practices later inherited by the United States. There, surnames carried a functional purpose and were changed often and without restriction. Second, it reviews the evolution of naming as a way for men to dominate women, first under the doctrine of coverture and later through a series of laws that punished married women for not using their husbands' names. Finally, it summarizes the second-wave feminists' arguments against such laws, many of which are still relevant today.

A. Common Law Surnames: Functional and Unrestricted

Because most people in eleventh-century England shared a limited number of Christian first names, surnames began as a way to distinguish people after the Norman Conquest.⁵ Surnames were not handed down generationally, but were instead used to describe the specific person using the name.⁶ Often, people chose names that conveyed something about themselves, such as where they were from (John Hill), a parent's name (John Thomas, John Williamson), a person's occupation (John Smith), or words that described that person's physical or moral characteristics (John Short, John Good).⁷ Men and women were able to change their surnames through common usage,⁸ and this flexibility made it common for members of the same family to use different surnames.⁹ Similarly, many men and women changed their names several times throughout their lives as a means of individual expression.¹⁰

5. With the Conquest, Saxon names were replaced by a list of about sixteen men's names and even fewer women's names. See *Doherty v. Wizner*, 150 P.3d 456, 458 (Or. Ct. App. 2006); Lisa Kelly, *Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings*, 99 W. VA. L. REV. 1, 10 (1996); ELSDON C. SMITH, *THE STORY OF OUR NAMES* 28 (1950).

6. See L. G. PINE, *THE STORY OF SURNAMES* 15 (1965).

7. See *Doherty*, 150 P.3d at 458 n.11; PINE, *supra* note 6, at 12–13.

8. Common law name changes were and in most states still are allowed in the absence of "fraud, misrepresentation, or interference with the rights of others." 57 AM. JUR. 2D *Name* § 16 (1988); see also *Egner v. Egner*, 337 A.2d 46, 48 (N.J. Super. Ct. App. Div. 1975); Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 770–71 (2007) (citing UNA STANNARD, *MRS MAN* 112, 115 (1977)).

9. See *Smith v. U.S. Cas. Co.*, 90 N.E. 947, 948 (N.Y. 1910).

10. See, e.g., PINE, *supra* note 6, at 15. One commentator described the casual nature of naming at the time as follows: "By the common law of England a man was entitled to adopt a new name for himself as one changes a coat." Emens, *supra* note 8, at 771 (citing Frederick Dwight, *Proper Names*, 20 YALE L.J. 387, 387 (1911)).

B. Coverture: Naming as a Means of Domination

This fairly unrestricted system led to the development of "coverture," a doctrine that emerged in England during the high Middle Ages, and which was inherited by the United States, lasting into the mid-nineteenth century.¹¹ Coverture dictated that the identities of a husband and wife merged upon marriage, and that the new unit retained only the husband's identity.¹² After marriage, the wife no longer had the rights to contract, appear in court, or possess land independently of her husband.¹³ At the same time, the husband gained the right to whatever property his wife brought into the marriage, along with rights to her paid and unpaid labor.¹⁴ Names were an important aspect of this system, because they identified the man who controlled a given woman's legal rights.¹⁵

The process of naming a person to demonstrate domination over him or her, however, was by no means a new phenomenon.¹⁶ In the mid-nineteenth century, women, including Elizabeth Cady Stanton, first recognized the oppressive nature of coverture after noticing

11. See STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE* 186 (2005); Claudia Zaher, *When a Women's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459, 461-62 (2002).

12. See *Mellott v. Sullivan Ford Sales*, 236 A.2d 68, 70 (Me. 1967); see also *In re Reben*, 342 A.2d 688, 691 (Me. 1975).

13. Daniel R. Coquillette, *The Legal Education of a Patriot: Josiah Quincy Jr.'s Law Commonplace (1763)*, 39 ARIZ. ST. L.J. 317, 346 (2007).

14. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 983 n.101 (2002).

15. Although this system never mandated that women take their husbands' names, the fact that a woman's legal and social identity was tied to her husband enabled this custom to develop naturally. Emens, *supra* note 8, at 771-72.

16. This is, for example, a recurring theme in the Bible. See, e.g., *Genesis* 2:18 ("It is an act of authority to impose names, and of subjection to receive them."); *Genesis* 17:5 ("No longer will you be called Abram; your name will be Abraham, for I have made you a father of many nations."); *Genesis* 41:45 ("Then Pharaoh named Joseph Zaphenath-paneah; and he gave him Asenath, the daughter of Potiphra priest of On, as his wife. And Joseph went forth over the land of Egypt."); 2 *Kings* 23:34 ("Pharaoh Neco made Eliakim the son of Josiah king in the place of Josiah his father, and changed his name to Jehoiakim. But he took Jehoahaz away and brought him to Egypt, and he died there."); 2 *Kings* 24:17 ("Then the king of Babylon made his uncle Mattaniah, king in his place, and changed his name to Zedekiah."); *Isaiah* 62:2 ("And the nations will see your righteousness, and all kings your glory; And you will be called by a new name, which the mouth of the Lord will designate."); *Daniel* 1:7 ("Then the commander of the officials assigned new names to them; and to Daniel he assigned the name Belteshazzar, to Hananiah Shadrach, to Mishael Meshach and to Azariah Abed-nego."); *John* 1:42 ("He brought him to Jesus. Jesus looked at him, and said, 'You are Simon the son of John; you shall be called Cephas.'").

the characteristics it shared with chattel slavery.¹⁷ American slaveholders used naming to dehumanize slaves, which they considered to be their property.¹⁸ Like slaves, whose names were changed by whomever owned them at a given time,¹⁹ women changed their names from that of their fathers to that of their husbands.²⁰ One feminist from that time stated, in reference to a wife adopting her husband's name, that "[l]ike a slave she was brought to life by being given a name by her master"²¹

The custom of women adopting their husbands' surnames "ripened into law" during the late-nineteenth and early-twentieth centuries.²² State courts during this period treated the common-law naming system as absolute by requiring married women to use their husbands' surnames to vote, drive, sue, and obtain passports; this punished women who refused to take their husbands' names by restricting their legal rights.²³ The courts justified their holdings by

17. See Omi [Morgenstern Leissner], *The Problem That Has No Name*, 4 CARDOZO WOMEN'S L.J. 321, 356 n.195 (1998) (citing UNA STANNARD, *MRS MAN* 161 (1977)).

18. Kelly, *supra* note 5, at 12–14. Slaves were only given first names, and the most common names were also common white person names, such as Jack, Tom, and Harry. J.N. HOOK, *FAMILY NAMES: HOW OUR SURNAMES CAME TO AMERICA* 289 (1982). Many slave owners instead chose to name their slaves ostentatious Roman or Greek names such as Caesar, Pompey, Jupiter, or Plato. *Id.* at 290. Many black men changed their names when they gained their freedom, sometimes to Liberty or Freeman. *Id.* at 291–93. Similarly, Nazis used naming to show domination over others. In one of their first efforts to dehumanize Jewish Germans, the Nazis renamed Jewish males "Israel" and Jewish females "Sarah." See Emens, *supra* note 8, at 770 & n.16 (citing Robert M. Rennick, *The Nazi Name Decrees of the Nineteen Thirties*, 18 NAMES 65, 76–77 (1970)).

19. See Emens, *supra* note 8, at 770.

20. See Omi, *supra* note 17, at 356.

21. Sheila Jeffreys, *The Need to Abolish Marriage*, 14 FEMINISM & PSYCHOL. 327, 328 (2004).

22. Dunn v. Palermo, 522 S.W.2d 679, 688 (Tenn. 1975); see also *In re Reben*, 342 A.2d 688, 699 (Me. 1975).

23. The foundational language came from *Chapman v. Phoenix National Bank*, 85 N.Y. 437 (1881), which involved the confiscation of property during wartime. Although the court set aside the action to confiscate, it stated in dicta, "For several centuries, by the common law among all English speaking people, a woman, upon her marriage, takes her husband's surname." *Id.* at 449. This analysis was incorrect, because although it was customary for a woman to take her husband's name at marriage, this was never required by law. For additional cases that treat the common law naming system as absolute, see also *In re Kayaloff*, 9 F. Supp. 176, 176 (S.D.N.Y. 1934) ("I feel that, if plaintiff is to receive naturalization, her certificate should indicate the surname of her husband as belonging also to petitioner."); *Roberts v. Grayson*, 173 So. 38, 39 (Ala. 1937) (stating that the general custom was for a wife to use her husband's surname and first name, together with the prefix "Mrs.," and that this identification was "more perfect and complete" than when a married woman used her own first name); *People ex. rel. Rago v. Lipsky*, 63 N.E.2d 642, 645 (Ill. App. Ct. 1945) ("[W]hen the Legislature expressly referred to the fact that the name of a registered voter might be changed by marriage it had in mind the long-established custom, policy and rule of the common law among English-speaking peoples whereby a woman's name is changed by marriage and her husband's surname becomes as a matter of law her surname."); *Bacon v. Boston Elevated Ry. Co.*, 152 N.E. 35, 37 (Mass. 1926) (denying recovery for female driver because automobile was registered in her pre-marriage name); *Freeman v. Hawkins*, 14 S.W. 364, 365 (Tex. 1890).

citing the "long-established custom" of a wife taking her husband's name upon marriage.²⁴ They also commonly discussed the social shame that the woman and her family would experience if she kept her own name, because others would assume that she and her husband were unmarried and that their children were born out of wedlock.²⁵

The Supreme Court validated the practice of punishing women for keeping their birth names after marriage in *Forbush v. Wallace*,²⁶ where it upheld an Alabama regulation requiring that married women's drivers' licenses be issued in their husbands' names.²⁷ This legally sanctioned naming system was even more severe than the one that Stanton and her colleagues had compared to the system for naming slaves a century earlier. Now, if women wanted to continue practicing certain aspects of everyday life, they had no choice but to use their husbands' names.

(holding that service of process on a married woman in her birth name was inherently invalid). Hawaii is the only state that passed a statute explicitly mandating that women change their names. See Emens, *supra* note 8, at 772 n.31 (quoting HAW. REV. STAT. § 574-1 (1968) ("Every married woman shall adopt her husband's name as a family name.")). For a chart of state name-change laws in the early 1970s, see Lois B. Gordon, *Statutory Development: Pre-Marriage Name Change, Resumption and Reregistration Statutes*, 74 COLUM. L. REV. 1508 app. at 1521-27 (1974). In addition, some government departments have required women to use their husbands' surnames after marriage. See, e.g., Allen v. Lovejoy, 553 F.2d 522, 523 (6th Cir. 1977); Comptroller General McCarl to the Secretary of the Interior, 4 Comp. Gen. 165, 165 (1924) (requiring married female federal government employees to use their husbands' surnames on the payroll).

24. *Rago*, 63 N.E.2d at 645.

25. See, e.g., *In re Hauptly*, 312 N.E.2d 857, 860 (Ind. 1974) (denying a woman's name-change petition because it would embarrass future children and be an "insult to her husband"); *In re Evetts*, 392 S.W.2d 781, 784 (Tex. Civ. App. 1965) (denying a woman the right to use a surname different from her husband's because of the social shame arising from the appearance of cohabitation); *In re Lawrence*, 319 A.2d 793, 801 (Bergen County Ct. 1974), *rev'd*, 337 A.2d 49 (N.J. Super. Ct. App. Div. 1975) ("The situation which would be created by the granting of plaintiff's [name change] application, viz., plaintiff and her husband each continuing to use the surnames with which they were born, would cause great confusion in the community in which they live and could well have traumatic effect upon any children they might have."); *In re Erickson*, 547 S.W.2d 357, 359 (Tex. Civ. App. 1977) (quoting lower court's holding) ("[T]o grant the change of name would give 'the appearance of an illicit cohabitation against the morals of society,' that it would not be in the best interest of their minor children, and that without evidence of some advantage in her professional capacity, the grant 'would be detrimental to the institution of the home and family life and contrary to the common law and customs of this state.'").

26. 405 U.S. 970 (1972).

27. *Forbush v. Wallace*, 341 F. Supp. 217, 222 (M.D. Ala. 1971) *aff'd*, 405 U.S. 970 (1972). Circuit courts have relied on *Forbush* as recently as 1996, when the Ninth Circuit, in an immigration case, insisted on referring to the female petitioner by her husband's last name, even when she referred to herself by her birth name. *Fisher v. INS*, 79 F.3d 955, 967 (9th Cir. 1996) (Noonan, J., dissenting). The dissent referred to the majority's opinion as "cruelly ironic," because it found the petitioner's marriage to be invalid. *Id.*

C. Second-Wave Feminists Respond

Largely in response to *Forbush*, the women's rights movement launched another attack on the naming system in the late 1960s and early 1970s.²⁸ Like Stanton and other early feminists, women's rights activists during this period believed that securing the right of women to control their own names was a crucial step towards gender equality.²⁹ Omi, who has written extensively on modern naming laws, explained the social significance of naming as follows:

Over time, a woman's use of her husband's name came to symbolize acquiescence to a culture that viewed women as accessories to men, devoid of independent dignity and status. . . . Recognition of this sought-after right [to keep one's birth name after marriage] would "represent a momentous advance in the struggle for [a woman's] separate identity."³⁰

Given the significance of a woman's ability to keep her surname and the hard blow that *Forbush* dealt to women's naming rights,³¹ it was a major victory when courts and state legislatures began striking down and repealing laws that pressured women to take their husbands' names at marriage.

This shift was exemplified by the Tennessee Supreme Court's decision to strike down a state law requiring married women to register to vote under their husbands' names.³² The court recognized that naming restrictions were a barrier for women, and that, in order for women to progress socially, the law had to be reformed.³³ The court stated:

We cannot create and continue conditions and then defend their existence by reliance upon the custom thus created. Had we applied the rules of custom during the last quarter of a century, the hopes, aspirations and dreams of millions of

28. See, e.g., Shirley Raissi Bysiewicz & Gloria Jeanne Stillson MacDonnell, *Married Women's Surnames*, 5 CONN. L. REV. 598, 602–20 (1973); Julia C. Lamber, *A Married Woman's Surname: Is Custom Law?*, 1973 WASH. U. L.Q. 779, 783–807.

29. Omi [Morgenstern Leissner], *The Name of the Maiden*, 12 WIS. WOMEN'S L.J. 253, 257 (1997).

30. *Id.* at 258 (quoting Marija Matich Hughes, *And Then There Were Two*, 23 HASTINGS L.J. 233, 247 (1971)).

31. *Id.* at 258–62.

32. *Dunn v. Palermo*, 522 S.W.2d 679, 688 (Tenn. 1975).

33. *Id.*

Americans would have been frustrated and their fruition would have been impossible.³⁴

By the early 1980s, a woman's right to keep her birth name after marriage was well recognized,³⁵ and represented a major accomplishment for the feminist movement.³⁶ Unfortunately, as the following section explains, there has been little progress since.

II. CURRENT NAMING SYSTEM

Forty years after the women's movement challenged naming laws, the tradition of taking a husband's surname continues to serve as an "agent for preserving the present social structure."³⁷ Although women now have the right to keep their birth names at marriage, the system nonetheless favors the traditional approach of women taking their husbands' names.

A. Statutory Name-Change Processes

Even though women now have the right to keep their birth names after marrying, the gender-normative naming practices previously forced upon couples in the United States and England are still encouraged in most states.³⁸ The steps that a person must take to change his or her name varies based on the applicant's gender, whether the name change is occurring at marriage or another time, and whether the applicant is requesting to take his or her spouse's surname.

34. *Id.*

35. See *Allen v. Lovejoy*, 553 F.2d 522, 525 (6th Cir. 1977) (awarding back pay to a woman after she was suspended from employment at a county health department for refusing to adopt her husband's surname after marriage); *Dunn*, 522 S.W.2d at 688 (holding that a married woman is not required to take her husband's surname, and that she may vote without re-registering under her husband's name); *Stuart v. Bd. of Supervisors of Elections for Howard County*, 295 A.2d 223, 226 (Md. 1972) ("It is only by custom, in English speaking countries, that a woman, upon marriage, adopts the surname of her husband in place of the surname of her father."); *Davis v. Roos*, 326 So. 2d 226, 229 (Fla. Dist. Ct. App. 1976) (holding that a woman cannot be refused a driver's license in her birth name); *State ex rel. Krupa v. Green*, 177 N.E.2d 616, 619-20 (Ohio Ct. App. 1961) (holding that a married woman was permitted to be listed on a voting ballot under her birth name).

36. Omi, *supra* note 29, at 267.

37. *Id.* at 257.

38. See *infra* Part II.A.1.

1. Rules for Women Who Change Their Names at Marriage

In all fifty states, a woman can automatically change her surname to her husband's at marriage by simply using his surname on the marriage certificate.³⁹ The marriage certificate will serve as official documentation of a woman's name change, though it is only the first of many steps. A woman must then use the marriage certificate to register her new name with the Social Security Administration (SSA) and with her state's Department of Motor Vehicles, re-register to vote, and apply for a new passport.⁴⁰ Additionally, she must also change the name she has on record with private institutions, including on her credit card accounts, mailing addresses, bank accounts, insurance policies, leases, and titles to property.⁴¹ By the end of this process, most women will have contacted at least thirty-three different types of entities about their new name.⁴²

2. Rules for Men Who Change Their Names at Marriage

Currently, only nine states explicitly allow men to change their name at marriage through the process available to women.⁴³ The SSA, however, has created an interim policy which states that the Administration will accept a marriage document as a legal name change for the groom if the new name "can be derived from the marriage document," for example, if his new surname is the same as his wife's birth name.⁴⁴ Though less expansive than the SSA's

39. SOCIAL SECURITY ADMINISTRATION, PROGRAM OPERATIONS MANUAL SYSTEM, RM 00203.210: CHANGING NUMIDENT DATA (2010), available at <https://secure.ssa.gov/poms.nsf/0/151912149da1ef4f8525754c00058990!OpenDocument&Click=>; see also Michael Rosensaft, Note, *The Right of Men to Change Their Names Upon Marriage*, 5 U. PA. J. CONST. L. 186, 186 (2002) (citing Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 LAW & INEQ. 91, 96 n.9 (1985)).

40. Emens, *supra* note 8, at 817–18.

41. Emens, *supra* note 8, at 818.

42. *Id.* at 817–18.

43. Those states are: California (CAL. CIV. PROC. CODE § 1279.6 (West 2013)), Georgia (GA. CODE ANN. § 19-3-33.1 (2010)), Hawaii (HAW. REV. STAT. § 574-1 (2006)), Iowa (IOWA CODE § 595.5 (2011)), Massachusetts (MASS. GEN. LAWS ch. 46, § 1D (2010)), Minnesota (MINN. STAT. ANN. § 517.08 (West 2006)), New York (N.Y. CIV. RIGHTS LAW § 65 (McKinney 2009)); N.Y. DOM. REL. LAW § 15 (McKinney 1999)), North Dakota (N.D. CENT. CODE § 14-03-20.1 (2009 & Supp. 2011)), and Oregon (OR. REV. STAT. § 106.220 (2011)). Professor Elizabeth Emens found that, as a matter of formal law, it is harder for men to take their wives' name than vice versa in only seven states; in eleven states, however, "it appeared practically more difficult to change his name than to change hers." Emens, *supra* note 8, at 821–22.

44. See SOCIAL SECURITY ADMINISTRATION, *supra* note 39, at § B.1.b. The name change system for passports also changed recently. Until 2008, the United States passport office reinforced this outcome by refusing to allow men to change their names with a marriage

policy for women's name changes, this provision seems to allow men in most states to take their wives' names. Despite the availability of the SSA procedure, however, in many states—including some that formally allow men to take their wives' names for state purposes under the SSA policy—a man must obtain a court order in order to take his wife's name at marriage.⁴⁵ This means that, before notifying the thirty-plus entities described above, a man must go through a series of additional steps to obtain legal documentation of the name change.

Though the process differs for each state, obtaining a court order generally involves several steps and can take months to complete.⁴⁶ First, a person must publish notice of the name change in a local newspaper continually for a period of several weeks; this process sometimes requires revealing personal information, such as previous crimes and bankruptcies.⁴⁷ The individual must then appear before a judge and answer questions about the requested name change.⁴⁸ This lengthier process replaces what for women simply involves writing a new name on a marriage certificate.

certificate. This issue was especially relevant for same-sex couples who married in states allowing men to change their names at marriage. In 2008, the United States Department of State changed its policy to permit a marriage certificate to serve as a basis for a change of name. Department of State Passports Rule, 22 C.F.R. § 51.25 (2012). This change recognized that a marriage certificate is equivalent to a court decree in terms of changing one's name on a passport. *See id.*

45. *See, e.g.,* Christina Lopez, *Florida Accuses Man of Fraud for Taking Wife's Name, Then Backs Off*, ABC News (Jan. 31, 2013, 6:00 AM), <http://abcnews.go.com/blogs/headlines/2013/01/florida-accuses-man-of-fraud-for-taking-wifes-name-then-backs-off/>. The case of Michael Buday and his wife Diana Bijon demonstrates how the SSA procedure does not effectively protect a man's right to change his name at marriage. *See Buday v. California Dep't of Health & Servs.*, No. 2:06-CV-08008 (C.D. Cal. filed Dec. 15, 2006); *see also Name Equality Bill Wins Assembly Vote*, ACLU OF N. CAL., https://www.aclunc.org/legislation/bills_to_watch/2007/ca_ab_102_marriage_domestic_partnerships_name_equality_act.shtml (last visited Aug. 15, 2013). Despite the fact that California, because of the SSA provisions, allowed both men and women to change their names at marriage, S. JUDICIARY COMM., 2007-2008 REG. SESS., MARRIAGE LICENSES AND DOMESTIC PARTNERSHIP CERTIFICATES: NAME CHANGE. 6-7 (Cal. 2007), available at www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0101-0150/ab_102_cfa_2007_0627_145741_sen_comm.html, the California records office, a county clerk, and the Department of Motor Vehicles all refused to grant Mr. Buday's request for a name change based on his marriage papers. *Buday*, No. 2:06-CV-08008. As a response to Mr. Buday's complaint—as well as a lawsuit from the American Civil Liberties Union (ACLU)—California adopted the Name Equality Act to clearly establish a man's right to take his wife's surname at marriage. *Name Equality Bill Wins Assembly Vote*, *supra*. The American Civil Liberties Union and Equality California, both sponsors of the Name Equality Act, stated that the bill “simply codifies equal name change options available to everyone” S. JUDICIARY COMM., *supra*.

46. Esther Suarez, Note, *A Woman's Freedom to Choose Her Surname: Is It Really a Matter of Choice?*, 18 WOMEN'S RTS. L. REP. 233, 237 (1997) (citing Sue Ann Wood, *For Many Women, There's Lots in a Name*, ST. LOUIS POST-DISPATCH, Aug. 3, 1994, at 1F).

47. Rosensaft, *supra* note 39, at 208.

48. *E.g., In re Ross*, 67 P.2d 94, 95 (Cal. 1937) (en banc).

Obtaining a court order also has financial costs that do not apply when a woman takes her husband's name at marriage. Court fees alone can cost hundreds of dollars.⁴⁹ Applicants must also pay the cost of publishing a legal notice in a newspaper,⁵⁰ in addition to the opportunity cost of having to appear in court and missing work. People who are nervous about appearing in court without legal counsel would also be responsible for lawyer fees.

Perhaps the most discriminatory part of this process is that judges are not required to approve a couple's new name. In seventeen states, there is "virtually unfettered judicial discretion" to grant name changes,⁵¹ and some jurisdictions explicitly require evidence of "good character,"⁵² placing the burden on the party seeking the change. Judicial discretion can make it especially hard for couples to choose nontraditional names, because judges have the power to deny name-change requests if they do not agree with a couple's decision to choose a nontraditional name. In one Florida case, for example, the judge refused to grant a man's request to adopt his wife's name, stating that marriage was not a good enough reason

49. See Kelly Snyder, *All Names Are Not Equal: Choice of Marital Surname and Equal Protection*, 30 WASH. U. J.L. & POL'Y 561, 569 (2009). For example, Lake County, Illinois charges \$271 for a name change. *Adult Change of Name*, LAKE COUNTY, ILL., <http://www.lakecountyil.gov/CircuitClerk/Publications/County%20Forms/Adult%20Name%20Change%20Information.pdf> (last visited Aug. 16, 2013).

50. In Montgomery, Ohio, for example, notice of name change costs 45 dollars, and must be published at least thirty days prior to the hearing. See *How to Submit Legal Notifications for Publication in the Daily Law Journal*, COX MEDIA GRP. OHIO, http://www.mcoho.org/government/probate/docs/DailyLawJournalSubmissions_1.pdf (last visited Aug. 16, 2013); *Name Change*, MONTGOMERY COUNTY, OHIO, http://www.mcoho.org/government/probate/name_change.html (last visited Aug. 16, 2013).

51. See Rosensaft, *supra* note 39, at 193–94. Six of these states give total discretion to the court, using phrases such as "what a court shall deem right and proper." See IDAHO CODE ANN. § 7-804 (2010); MONT. CODE ANN. § 27-31-204 (2011); S.C. CODE ANN. § 15-49-20(C) (Supp. 2012); WASH. REV. CODE § 4.24.130(1) (2012); *Don v. Don*, 114 A.2d 203, 205 (Conn. 1955) (finding that a child's name change was in the best interest of the child, 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). Eleven other states give significant discretion to the courts, applying standards such as "if not against the public interest" or "for good reasons shown." Rosensaft, *supra* note 39, at 194 (citing 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); ALASKA STAT. ANN. § 09.55.010 (2012) ("A change of name of a person may not be made unless the court finds sufficient reasons for the change and also finds it consistent with the public interest."); MASS GEN. LAWS ch. 210, § 12 (2010) ("The change of name of a person shall be granted unless such change is inconsistent with public interests."); OR. REV. STAT. § 33.410 (2011); TEX. FAM. CODE ANN. § 45.103 (Vernon 1998)). But see *In re Rusconi*, 167 N.E.2d 847, 849 (Mass. 1960) (stating that while one's right to change his name is not absolute, it is very broad).

52. Rosensaft, *supra* note 39, at 208 (citing N.C. GEN. STAT. § 101-4 (1999)).

for the change.⁵³ Similarly, judges have repeatedly denied unmarried same-sex couples the right to change their names for reasons of “public policy.”⁵⁴ Other courts have discussed the “‘fundamental,’ ‘primary,’ ‘natural,’ and ‘time-honored’ right of a father to the naming of his family,” implying that the tradition is in some way rooted in laws of nature.⁵⁵ The fact that judges have this discretion and are using it in discriminatory ways makes change all the more imperative.⁵⁶

3. Choosing an Altogether-New Name

A handful of states offer couples naming options other than simply choosing either the name of the husband or wife.⁵⁷ As of May 2013, only California, Iowa, Massachusetts, Minnesota, New York, and North Dakota permit merged names through marriage (for example, Mary Wilson and Tim Dickson combine to form the Wicksons).⁵⁸ Of these, only Iowa, Massachusetts, and Minnesota permit wholly new surnames through marriage, and only Iowa and Minnesota allow married couples to change their full names

53. See Lou Gonzales, *Man Finds Resistance to Name Change*, FLA. TIMES-UNION, Feb. 10, 2000, at D-2.

54. See *In re Bicknell*, Nos. CA2000-07-140, CA2000-07-141, 2001 WL 121147, at *3–5 (Ohio Ct. App. Feb. 12, 2001), *rev'd*, 771 N.E.2d 846 (Ohio 2002) (affirming lower court’s decision that allowing a gay woman to adopt her partner’s surname would go against public policy); see also *In re Bacharach*, 780 A.2d 579, 581 (N.J. Super. Ct. App. Div. 2001) (overturning case that held that denial of same-sex couple’s name-change petition was justified for reasons of public policy).

55. Deborah J. Anthony, *A Spouse by Any Other Name*, 17 WM. & MARY J. WOMEN & L. 187, 208 (2010) (quoting *Rio v. Rio*, 504 N.Y.S.2d 959, 961 (App. Div. 1986); *In re Trower*, 66 Cal. Rptr. 873, 874 (Ct. App. 1968), *overruled by In re Schiffman*, 620 P.2d 579, 583 (Cal. 1980)).

56. Although each of the cases described above was overturned on appeal, see *supra* note 54, they demonstrate a judge’s power to decide who may change their names based on the judge’s personal beliefs. Further, the fact that some couples have been denied nontraditional name changes in the past may deter other marrying couples from applying for nontraditional names. Similarly, even though couples whose name changes are denied have the option of appealing, the additional work involved in an appeal would likely stop many couples from further pursuing the names they want.

57. My parents chose an entirely new name when they married in California in 1987: Al Leveille and Kay Upchurch became Al and Kay Brooks. Because such name changes were not allowed through marriage licenses in California at the time (and still are not allowed today), they completed the process of obtaining a court order described above.

58. Name Equality Act, CAL. CIV. PROC. CODE § 1279.6 (West 2013); IOWA CODE § 595.5 (2011); MASS. GEN. LAWS ch. 46, § 1D (2010); MINN. STAT. ANN. § 517.08 (2006); N.Y. CIV. RIGHTS LAW § 65 (McKinney 2009); N.D. CENT. CODE §§ 14-03-20.1 to -20.2 (2009 & Supp. 2011).

through this process.⁵⁹ Marriage applications in these states have sections that ask each spouse to write the name that they would like to use after marriage.⁶⁰ In both Iowa and Minnesota, this approach has been used for years,⁶¹ showing that such a system is administratively possible. In states that do not explicitly allow altogether-new names, both spouses are required to obtain a court order if the new name cannot be derived from the marriage certificate.⁶²

B. Social Norms

Even though women are no longer legally obligated to take their husbands' names at marriage, this practice continues to be the overwhelming norm in the United States.⁶³ This pattern is partly due to the legal burdens described above, and partly due to established social norms—including administrative biases and negative social stereotypes—which help to perpetuate the current system.

59. IOWA CODE § 595.5 (2011) ("A party may indicate on the application for a marriage license the adoption of a name change. The names used on the marriage license shall become the legal names of the parties to the marriage. The marriage license shall contain a statement that when a name change is requested and affixed to the marriage license, the new name is the legal name of the requesting party."); MASS. GEN. LAWS ch. 46, § 1D (2010); MINN. STAT. ANN. § 517.08 (West 2006) ("Application for a marriage license shall be made by both of the parties upon a form provided for the purpose and shall contain . . . (8) the full names the parties will have after marriage and the parties' Social Security numbers.").

60. See, e.g., *Application for License to Marry in Iowa*, IOWA DEP'T OF PUB. HEALTH, BUREAU OF HEALTH STATISTICS & VITAL RECORDS, http://Co.Black-Hawk.Ia.Us/Recorder/Forms/Marriage_App.Pdf (last visited Aug. 16, 2013); *Marriage License Application*, HENNEPIN COUNTY, MINN., http://hennepin.us/files/HennepinUS/TSD/Service%20Centers/Birth%20Marriage%20and%20Death/Files/CC_FORM_MAL_HC2910_MarriageLicenseApp.pdf (last visited Aug. 16, 2013); *Notice of Intention of Marriage*, COMMONWEALTH OF MASS., DEP'T OF PUB. HEALTH, REGISTRY OF VITAL RECORDS & STATISTICS, http://www.nahant.org/townhall/forms/Clerk/Intent_To_Marry.pdf (last visited Aug. 16, 2013).

61. In Iowa, couples have had this right for more than ten years. 1999 Iowa Legis. Serv. Ch. 150 (West), available at <https://www.legis.iowa.gov/DOCS/GA/78GA/Legislation/HF/00700/HF00714/Current.html>; see also Email from Darlene Maneval, Becker County, Minn. Recorder, to author (Nov. 26, 2012, 12:58 EST) (on file with author) ("The process has existed for ages for women but you will notice the language does not limit who it is.").

62. See SOCIAL SECURITY ADMINISTRATION, *supra* note 39, at § B.1.d. Alternatively, under this scheme, one spouse could change his or her name via court order prior to the marriage, making it possible for the surname to be derived from the marriage certificate; at least in theory, that person's spouse could adopt that surname through the marriage certificate.

63. Snyder, *supra* note 49, at 566 n.23. Although estimates vary as to what percentage of women choose to change their surnames to their husband's, it is thought to be about 90 percent. See Emens, *supra* note 8, at 785.

1. Relying on Desk Clerks and Sexist Instructions

Since most states do not offer details to the public about who may change their name at marriage,⁶⁴ people considering different name-change options are often forced to rely on advice from the administrators processing name changes at the county clerk's office, along with generalized online instructions. Professor Elizabeth Emens describes this phenomenon as "desk-clerk law."⁶⁵ The idea is simple: people who have questions are directed to their county clerk's office, and whatever the person in the office decides to tell them determines their understanding of their options. Frequently, such government workers give "incorrect or normatively driven responses that discourage unconventional choices. In this informal way, desk clerks effectively make the rules for many citizens."⁶⁶

Desk-clerk law can even replace state law in states that explicitly allow men and women to choose new names upon marriage. For example, despite the plain language of the Minnesota statute,⁶⁷ one county clerk contacted by the author insisted that a couple would need a court order in order to choose an entirely new name.⁶⁸ Even

64. Only twelve states have laws that explicitly address marital name changes. These states are: Alaska, California, Georgia, Hawaii, Illinois, Iowa, Louisiana, Massachusetts, Minnesota, New York, North Dakota, and Oregon. This list includes all of the nine states that explicitly allow men to take their wives' names at marriage. See *supra* note 43. None of the remaining three states offer details on who may change their names or how they may do so. See ALASKA STAT. ANN. § 09.55.010 (2013) ("A change of name of a person may not be made unless the court finds sufficient reasons for the change and also finds it consistent with the public interest. A change of name upon marriage, dissolution, or divorce meets these requirements."); 735 IL. COMP. STAT. § 5/21-105 (2010) ("All name changes shall be made pursuant to marriage or other legal proceedings."); LA. CIV. CODE ANN. art. 100 (1987) ("Marriage does not change the name of either spouse. However, a married person may use the surname of either or both spouses as a surname.").

65. Emens, *supra* note 8, at 811–27. Emens contacted desk clerks in every state and asked whether local policy allowed a man to take his wife's surname at marriage. *Id.* at 811 n.175. "Clerks in nine states gave information that directly conflicted with a state statute, and clerks in twenty-six states gave information that conflicted with a stated DMV policy." *Id.* at 824 (internal citation omitted). At least one clerk in each of 24 states endorsed a traditional name choice. *Id.* at 825.

66. *Id.* at 765.

67. See *supra* note 59.

68. Email from Hennepin County, Minn. Serv. Ctr. to author (Nov. 20, 2012, 13:03 EST) (on file with author) ("In Hennepin County you can not [sic] just change your name that way. . . . You can check with any of the other counties and see if they allow you to do that but Hennepin doesn't."). Clerks at the other Minnesota county offices I contacted, however, told me that a couple could choose an entirely new name at marriage without a court order. Email from Sharon K. Anderson, Cass County, Minn. Auditor-Treasurer, to author (Nov. 26, 2012, 13:32 EST) (on file with author); Email from Susan Anderson, Anoka County, Minn., to author (Nov. 27, 2012 at 12:06 EST) (on file with author); Email from Debra Duhamel, Beltrami County, Minn., to author (Nov. 26, 2012, 14:07 EST) (on file with author); Email from Betti Kamolz, Brown County, Minn. Recorder, to author (Nov. 26, 2012, 13:25 EST) (on file with author); Email from Darlene Maneval, Becker County, Minn. Recorder, to author

if this was the county's official policy, rather than one clerk's misunderstanding of the law, it is notable that the right to choose a new name may not be consistently protected even in the states that explicitly recognize it.

Counties can also encourage traditional naming practices with the language they use to describe name-change options for marrying couples.⁶⁹ Several county websites use normative language on their websites when describing the name-change process for marrying couples.⁷⁰ For example, the Auditor's Office website for Cowlitz County, Washington, says "NOTE TO THE BRIDE: Remember to sign your current name (not your new husband's name) on all the enclosed marriage documents."⁷¹ This language assumes that the wife will take her husband's name, rather than keeping her own or using a nontraditional naming option.

Even when counties recognize a husband's right to change his name at marriage, some emphasize that the norm is for the wife to take her husband's name. This is often done by prefacing any procedural information with, "Traditionally, the bride takes the last name of her husband"⁷² Even though such websites give couples some information about the logistics of changing their names, the biased language reinforces social norms and perpetuates the notion that women are supposed to take their husbands' names.

(Nov. 26, 2012, 12:58 EST) (on file with author); Email from Elaine Martig, Big Stone County, Minn. Recorder & Office of Vital Statistics, to author (Nov. 27, 2012, 12:12 EST) (on file with author); Email from Marilyn Novak, Benton County, Minn., to author (Nov. 27, 2012, 9:44 EST) (on file with author); Email from Kathy Smith, Taxpayer Servs. Clerk, Carver County, Minn. Taxpayer Servs. Department, to author (Nov. 26, 2012, 16:21 EST) (on file with author).

69. See, e.g., *Marriage Licensing*, COWLITZ COUNTY AUDITOR'S OFFICE, www.co.cowlitz.wa.us/auditor/marriage_license.htm (last visited Aug. 7, 2013).

70. *Id.*

71. *Id.* Cf. *Obtaining a Certified Copy for Your Name Change*, JOHNSON COUNTY REGISTER OF DEEDS, http://www.johnstonnc.com/mainpage.cfm?category_level_id=661&content_id=2270 (last visited Aug. 16, 2013) ("If the bride plans to change her name"); Circuit Court Clerk—Changing the Brides Name After Marriage [sic], CIRCUIT COURT CLERK, CHESTERFIELD COUNTY, VA, <http://www.chesterfield.gov/content2.aspx?id=8007> (last visited Aug. 16, 2013).

72. *Court Services*, BUTLER COUNTY PROBATE COURT, <http://www.butlercountyprobate.court.org/index.cfm?page=englishMarriage> (last visited Aug. 16, 2013); see also *Name Change after Marriage*, KING COUNTY, www.kingcounty.gov/courts/marriage/Namechanges.aspx (last visited Aug. 16, 2013); *Marriages*, PROBATE COURT OF STARK COUNTY, OHIO, <http://www.probate.co.stark.oh.us/marriages.html> (last visited Aug. 16, 2013).

2. Negative Perceptions

One significant reason that women take their husbands' names at marriage may be that most women never even realize that there are alternatives.

On a basic level, it makes sense that when children grow up knowing that the majority of adult married couples use the husband's birth name, they may never seriously consider other options.⁷³ The likelihood that a person chooses a traditional name is likely reinforced by the child's parents, who may have followed the tradition themselves: a woman's parents may be insulted if their daughter avoids the traditional name because she thought it was sexist, and a man's parents have an interest in their son maintaining the family name.

Furthermore, social forces may deter a person from pursuing a nontraditional name, even where he or she is aware of the option. Studies have specifically researched peoples' opinions about each others' naming choices, and there is evidence that many people have negative reactions to couples who choose nontraditional names.⁷⁴ Bill and Hillary Clinton experienced this kind of stereotyping during Bill's 1980 gubernatorial race, when Hillary used her birth name, Hillary Rodham. This sparked criticism from conservative voters, who saw her name choice as a signal that her husband did not share their values.⁷⁵ Bill lost the election to Frank White, who made a point of calling his wife "Mrs. Frank White" throughout his campaign.⁷⁶ Bill went on to win the governorship in the next election, however, after Hillary replaced her birth name with his.⁷⁷ Although dropping her birth name probably did not swing the election, it is considered to have been a contributing factor.⁷⁸ When Bill eventually became president, Hillary reintroduced her birth name, and began going by Hillary Rodham Clinton, even though 62 percent of the public at the time preferred the name "Hillary Clinton,"

73. See Emens, *supra* note 8, at 784–85.

74. Kif Augustine-Adams, *The Beginning of Wisdom Is to Call Things by Their Right Names*, 7 S. CAL. REV. L. & WOMEN'S STUD. 1, 19 (1997). See generally Penelope Lockwood et al., *Tampering with Tradition: Rationales Concerning Women's Married Names and Children's Surnames*, 65 SEX ROLES 827–39 (2011) (comparing the opinions about name choice of male and female college students in Canada).

75. Anthony, *supra* note 55, at 194–95 (citing Jennifer Christman, *The Name Game Despite Options, 90% of Women Choose to Take Husband's Name*, ARK. DEMOCRAT-GAZETTE, Mar. 8, 2000, at F1).

76. Michael Kelly, *Again: It's Hillary Rodham Clinton. Got That?*, N.Y. TIMES (Feb. 14, 1993), <http://www.nytimes.com/1993/02/14/us/again-it-s-hillary-rodham-clinton-got-that.html>.

77. *Id.*

78. See *id.*

compared to six percent who preferred "Hillary Rodham Clinton."⁷⁹ During her own campaign for president in 2008, however, she again went by Hillary Clinton.⁸⁰

Such electoral impact makes sense, given evidence that married women who retain their surnames are more likely to be viewed as career oriented, secular, independent, assertive, well educated, and feminist than those who adopt their husbands' names.⁸¹ Women who keep their birth names have also been stereotyped as harboring less commitment to their marriages,⁸² even though there is apparently no evidence that this is actually the case.⁸³ These stereotypes can sometimes even translate into bullying within a woman's social or professional environment.⁸⁴

At the same time, men are often ridiculed if their wives do not take their names at marriage. Men in this position have been called "'gay,' 'wimp,' 'the feminine spouse,' and not 'real men,' with references to drinking 'sissy juice' and 'turn[ing] in [their] man card[s].'"⁸⁵ When the California legislature was reviewing the Name Equality Act of 2007, which allowed men to take their wives' names at marriage, opponents argued that "[g]overnment needs to encourage men to be stronger fathers who provide for and protect their families, . . . not to be sissy men who abdicate their masculine leadership role because they're confused."⁸⁶

79. *Id.*

80. *Hillary Clinton Drops Maiden Name 'Rodham' From 2008 White House Campaign*, Fox News (April 30, 2007), <http://www.foxnews.com/story/0,2933,269263,00.html#ixzz2e8f4oD8G>. Notably, two polls from the prior year indicated that most voters preferred "Hillary Rodham Clinton" to "Hillary Clinton." *See Poll: Spare the 'Rodham,' Spoil Her Election*, CNN (Oct. 20, 2006, 6:47 PM), <http://www.cnn.com/2006/POLITICS/10/20/poll.08/>; *To Be or Not to Be Hillary Clinton*, CNN (May 1, 2006, 10:49 AM), <http://www.cnn.com/2006/POLITICS/04/27/rodham.poll/>.

81. Donna L. Atkinson, *Names and Titles: Maiden Name Retention and the Use of Ms.*, 10 WOMEN & LANGUAGE 37, 37 (1987).

82. Laurie Scheuble & David R. Johnson, *Marital Name Change: Plans and Attitudes of College Students*, 55 J. MARRIAGE & FAM. 747, 750 (1993); see also Jen Doll, *Women Are Still Being Judged for Not Taking Their Husbands' Last Names*, THE ATLANTIC WIRE (Feb. 24, 2012), <http://www.theatlanticwire.com/entertainment/2012/02/women-are-still-being-judged-not-taking-their-husbands-last-names/49133/>.

83. Doll, *supra* note 82.

84. See, e.g., Amy Dickinson, *Bullies Riled by Maiden Name*, ORLANDO SENTINEL, Feb. 16, 2012, at D.7.

85. Anthony, *supra* note 55, at 212; Steve Friess, *Post-Wedding Names Get New Look*, WZZM 13 (Mar. 21, 2007, 11:12 AM), <http://www.wzzm13.com/news/story.aspx?storyid=72829>.

86. Yury Kolesnikov, *Chapter 567: Saying "I Do" to Name Changes by Husbands and Domestic Partners*, 39 McGEORGE L. REV. 429, 441 n.126 (2008) (citing Frank D. Russo, *Why Did 26 of 32 California Assembly Republicans Vote Against the Name Equality Act?*, CAL. PROGRESS REP. (May 9, 2007), <http://www.californiaprogressreport.com/site/why-did-26-32-california-assembly-republicans-vote-against-name-equality-act>).

These negative stereotypes are a direct extension of the patriarchal system that made it the norm for women to take their husbands' names at marriage. If, as some people claim, a woman's last name no longer carries the patriarchal symbolism that it once did, these stereotypes would not be so widespread or strong. Their persistence is clear evidence that the traditional naming system continues to reflect sexist values, and that this trend will likely continue unless a more egalitarian naming system is adopted.

III. NEED FOR REFORM

This Part argues that the current naming system used by most states violates the Equal Protection Clause and likely the Due Process Clause. First, this Part describes potential Equal Protection Clause violations, arguing that justifications for the current laws are not substantial enough or narrowly tailored enough to justify separate name-change processes for men and women. Second, this Part argues that state laws likewise violate the Due Process Clause, because people have a fundamental right to choose their own names, free from government involvement.

A. *Equal Protection*

As the current system provides for distinct name-change processes for men and women without any compelling reason, the system likely violates the Equal Protection Clause. When states allow only women to change their names at marriage, they discriminate against both men and women. Men, of course, are discriminated against because it is more difficult for them to change their names than it is for women. This system also has a discriminatory effect on women because it is "symbolic of women's inferiority and powerlessness."⁸⁷

Only one case has directly addressed the potential equal protection violation involved in allowing only women to change their names at marriage. In December 2006, Michael Buday sued the state of California for unlawful discrimination after being denied the ability to change his name on his marriage certificate.⁸⁸ Before

87. Omi, *supra* note 29, at 264 (citing Joan S. Kohout, *The Right of Women to Use their Maiden Names*, 38 ALB. L. REV. 105, 105 (1973); Lamber, *supra* note 28, at 807; Margaret Eve Spencer, *A Woman's Right to Her Name*, 21 UCLA L. REV. 665, 686 (1973)).

88. Buday v. California Dep't of Health & Servs., No. 2:06-CV-08008 (C.D. Cal. filed Dec. 15, 2006).

the case could be decided on its merits, however, California altered the law to permit such changes, mooted the question.⁸⁹ Although no court has directly ruled on the constitutionality of naming laws under the Equal Protection Clause, the laws' differential treatment of individuals based on gender makes them good candidates for claims of discrimination.⁹⁰

The Supreme Court has established that gender discrimination claims are to be analyzed through the lens of intermediate scrutiny.⁹¹ To satisfy this standard, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."⁹² The most commonly advanced "objectives" for statutes that create different naming laws for men and women are 1) custom and tradition, 2) preservation of the family unit, 3) administrative convenience, and 4) prevention of fraud.⁹³ As the following sections demonstrate, none of these interests rise to the level of an important governmental objective that would constitutionally justify such discriminatory laws.

1. Custom and Tradition

First, some states rationalize the current dominant statutory framework because it is consistent with centuries of tradition.⁹⁴ As

89. Press Release, ACLU of S. Cal., ACLU/SC and Partners Win Settlement in Equal Rights Fight for a Husband to Adopt His Wife's Surname (May 5, 2008), *available at* <http://www.aclu-sc.org/aclusc-and-partners-win-settlement-in-equal-rights-fight-for-a-husband-to-adopt-his-wifes-surname/>.

90. In a series of related cases, courts have repeatedly struck down laws automatically assigning newborns the surnames of their fathers, finding that this default violates the Equal Protection Clause by favoring male parents over their female spouses. *See O'Brien v. Tilson*, 523 F. Supp. 494, 496 (E.D.N.C. 1981) ("The [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."); *Jech v. Burch*, 466 F. Supp. 714, 719 (D. Haw. 1979) ("[P]arents have a common law right to give their child any name they wish, and . . . the Fourteenth Amendment protects this right from arbitrary state action."); *see also Rio v. Rio*, 504 N.Y.S.2d 959, 960 (Sup. Ct. 1986) (denying father's petition, which was based on the "time honored right" of fathers to have their children bear their names, to change his child's surname from a hyphenation of both parents' surnames to solely his own).

91. *Craig v. Boren*, 429 U.S. 190, 210 (1976) (Powell, J., concurring).

92. *Id.* at 197 (majority opinion).

93. *Omi*, *supra* note 29, at 262. *Omi* also cited a fifth argument, that the harm created by naming inequalities is *de minimis*. As she explains, this claim can be easily dismissed, because, among other reasons, "the matter of the name is not a *de minimis* injury and that this dismissive attitude ignored the function of names and vastly underestimated their impact." *Id.* at 264.

94. *See Rio*, 504 N.Y.S.2d at 963; *Doherty v. Wizner*, 150 P.3d 456, 459 (Ore. Ct. App. 2006) (citing Richard H. Thornton, *The Controversy Over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests*, 1979 UTAH L. REV. 303); *In re Marriage of*

Omi has explained, however, “[t]o subject different groups to disparate treatment because society historically has done so undermines the very purpose of equal protection.”⁹⁵ In many of the Supreme Court’s most prominent equal protection cases—regarding segregation,⁹⁶ anti-miscegenation,⁹⁷ gender discrimination,⁹⁸ and, most recently, the Defense of Marriage Act⁹⁹—the Court has struck down disparate treatment practices, even though they were rooted in longstanding traditions.

The notion that men are stronger than women and that they control women is deeply ingrained in the history of this tradition of discriminatory naming and should be abandoned. The current naming system originated under coverture, which stripped a woman of her legal identity when she married. This system is a “relic, left over from this nation’s long and unfortunate history of sex discrimination,”¹⁰⁰ something that “belongs in the same trash can as dowries.”¹⁰¹ Though rooted in tradition, that tradition is not a proud one, and certainly not one worth protecting.

2. Preservation of the Family

The “preservation of the family” justification originated at a time when courts feared that children with different names than their mothers would be presumed illegitimate and scorned by society.¹⁰² This argument carries little weight in contemporary society, where it is not uncommon for a child to have a different last name than

Schiffman, 28 Cal. 3d 640, 645, 620 P.2d 579, 582 (1980) (“It is argued that rules preferring the paternal surname are justified because they formalize long-standing custom”); *see also* United States v. Virginia, 518 U.S. 515, 566–70 (1996) (Scalia, J., dissenting) (“[The majority’s opinion counts] for nothing the long tradition, enduring down to the present, of men’s military colleges supported by both States and the Federal Government.”); *Caban v. Mohammed*, 441 U.S. 380, 388–89 (1979) (“We reject, therefore, the claim that the broad, gender-based distinction of [the statute] is required by any universal difference between maternal and paternal relations at every phase of a child’s development.”). *See generally* Michael Mahoney Frandina, *A Man’s Right to Choose His Surname in Marriage: A Proposal*, 16 DUKE J. GENDER L. & POL’Y 155, 167 (2009).

95. Omi, *supra* note 29, at 263.

96. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

97. *Loving v. Virginia*, 388 U.S. 1, 6, 11 (1967).

98. *Craig v. Boren*, 429 U.S. 190, 209–10 (1976).

99. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

100. Rosenshaft, *supra* note 39, at 210 (citation omitted) (internal quotation marks omitted).

101. Greg Risling, *Man Files Lawsuit to Take Wife’s Name*, WASH. POST (Jan. 12, 2007, 5:52 PM) (quoting Mark Rosenbaum, director of ACLU in Southern California), http://www.washingtonpost.com/wp-dyn/content/article/2007/01/12/AR2007011201370_pf.html.

102. Omi, *supra* note 29, at 265.

his or her mother.¹⁰³ Divorced, same-sex, and inter-cultural married couples are also becoming more common, none of which fit within the antiquated naming system described above.¹⁰⁴ Additionally, if couples were allowed to take any surname at marriage, they would be able to choose an altogether-new name, allowing both parents to share a name with their child, while also having mutual ownership of the family name.

3. Administrative Convenience

Desiring administrative convenience would also not satisfy intermediate scrutiny. In *Reed v. Reed*, the Supreme Court made this clear when it stated, "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause"¹⁰⁵ In *Craig v. Boren*, the Supreme Court recognized that decisions following *Reed* have likewise "rejected administrative ease and convenience as sufficiently important objectives to justify gender based classifications."¹⁰⁶

The administrative convenience argument has been advanced and subsequently rejected in two name-change cases that are analogous to the name-change laws in question here.¹⁰⁷ In *O'Brien v. Tilson*, for example, the Eastern District of North Carolina stated that "[i]n 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 . . . to keep track of its new citizens."¹⁰⁸ Similarly, in *Jech v. Burch*, a Hawaii court rejected the state's argument that allowing nontraditional names would require altering the state's entire record-keeping system, and that it would thereby cause too much

103. Rosensaft, *supra* note 39, at 201.

104. Although there are no available studies on the marital naming choices of same-sex couples, Emens offers some data on couples who formed civil unions in the first year that the status was in effect in Vermont. Emens, *supra* note 8, at 789 (citing research from Esther Rothblum and Glen Elder). Of the 2,305 couples whose names are both known, 6 percent share some or all of their last names. Female same-sex couples were more likely to share last names than male same-sex couples (approximately 7 percent of female couples versus 4 percent of male couples).

105. 404 U.S. 71, 76 (1971).

106. 429 U.S. 190, 198 (1976); *see also* *Frontiero v. Richardson*, 411 U.S. 677, 689–90, (1973).

107. *O'Brien v. Tilson*, 523 F. Supp. 494, 496 (E.D.N.C. 1981); *Jech v. Burch*, 466 F. Supp. 714, 716 (D. Haw. 1979).

108. *O'Brien*, 523 F. Supp. at 497.

administrative inconvenience.¹⁰⁹ Although these holdings deal with the right to name children, they demonstrate that administrative burden is not substantial enough to justify discriminatory naming practices.

4. Fraud

Unlike the three previous justifications, the prevention of fraud and identity theft may be a compelling state interest,¹¹⁰ especially because creditors rely on the ability to correctly identify individuals to collect debts.¹¹¹ However, despite the clear importance of this state interest, current state laws cannot survive intermediate scrutiny, because the laws are not sufficiently narrowly tailored to the interest of fraud prevention.

The prevention of fraud, for instance, cannot justify some states' rule that women may take their husbands' surnames at marriage, but men may not take their wives' surnames. Women in all fifty states already have the ability to change their names to their husbands' at marriage.¹¹² If states allow and even encourage this behavior for women, it is not justifiable for them to argue that men should not have the same right to adopt a spouse's name at marriage because it may lead to more fraudulent behavior.

Although the fraud argument has more traction when focused on couples that choose entirely new names at marriage, existing statutes are much more extreme than necessary to achieve the state's goal. Currently, most states require an entirely separate and more difficult process for couples that want a completely new name at marriage. States could limit the requirement of obtaining a court order to people who are more likely to commit fraud, such as those who have declared bankruptcy or who have specific criminal backgrounds.

109. *Jech*, 466 F. Supp. at 718. In *Jech*, the court found that these justifications did not even satisfy rational basis review.

110. *Henne v. Wright*, 904 F.2d 1208, 1215 (8th Cir. 1990) (stating that a child's surname could fraudulently indicate paternity where none exists). The prevention of crime in general is also a legitimate government interest. See *Craig*, 429 U.S. at 199–200 (“Clearly, the protection of public health and safety represents an important function of state and local governments.”).

111. See Omi, *supra* note 29, at 263–64.

112. SOCIAL SECURITY ADMINISTRATION, *supra* note 39; see also Rosensaft, *supra* note 39, at 186 (citing MacDougall, *supra* note 39, at 96 n.9).

This sort of filter is already used by many states.¹¹³ In Tennessee, for example, the government does not allow people who have committed certain crimes to change their names as a general rule.¹¹⁴ It is notable, however, that in Tennessee people who have committed the specified crimes are allowed to change their names at marriage, even though they do not have this right at any other time.¹¹⁵

Finally, it should not be forgotten that states may also deter fraudulent name changes by punishing them as serious crimes. All fifty states have rules stating that a person cannot change his or her name for fraudulent purposes—at marriage or any other time.¹¹⁶ A state may deter fraudulent name changes by increasing possible punishments, or including information about the crime and possible sentences on the marriage license application.

Given these alternative options, restricting marriage name changes to women is simply not narrowly tailored enough comport with equal protection.

5. Conclusion of Equal Protection Analysis

None of the above rationales sufficiently justify distinct name-change procedures for men and women. Custom and preservation of the family unit are unlikely to pass even rational basis review. Courts have also found that administrative convenience is not a strong enough state interest to satisfy the rational basis test; it would therefore clearly fail to pass muster under an elevated level of scrutiny. Although the state may have a compelling interest in preventing fraud, name-change regulations are not related to this goal closely enough to be constitutionally sound. State governments' unequal treatment of men and women therefore fails to promote any state interest sufficient to satisfy equal protection. This system cannot survive scrutiny under the Equal Protection Clause.

113. See, e.g., COLO. REV. STAT. § 13-15-101 (2012); DEL. CODE ANN. tit. 10, § 5901(c) (Supp. 2012); FLA. STAT. § 68.07(2)(c)–(d) (2009); IDAHO CODE ANN § 7-805 (2010) (sex offenders); 735 ILL. COMP. STAT. 5/21-101 (2010) (felons and people convicted of sexual crimes); IND. CODE ANN. § 34-28-2 (West 2011) (felony convictions in last 10 years); LA. REV. STAT. ANN. § 13:4751 (2012); MICH. COMP. LAWS ANN. § 711.1(3) (West 2012) (criminal record).

114. TENN. CODE ANN. § 29-8-101(b) (Supp. 2012).

115. *Id.*

116. See, e.g., *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, 860 (Ind. 1974) (stating that the only job of the Indiana courts with regard to name change is to make sure there is no attempt to fraudulently rename).

B. Due Process Clause

Current laws also violate the Due Process Clause by infringing on the right to choose one's own name, which meets the criteria for a fundamental right outlined by the Supreme Court. If courts recognize a person's fundamental right to choose his or her own name, they would apply an even stricter form of scrutiny than the intermediate level of scrutiny examined above.¹¹⁷

Additionally, restricting an individual's right to choose his or her own name violates the right to privacy—also a fundamental right—because naming is a highly personal choice that people have a right to make free from government interference. The choice of name is similar to other family-related privacy rights, and should likewise be recognized by the courts.

Because states' justifications for their current naming restrictions would not satisfy these high standards, current naming statutes are unconstitutional.

1. Fundamental Right to Choose One's Own Name

In *Washington v. Glucksberg*¹¹⁸ and *Lawrence v. Texas*,¹¹⁹ the Supreme Court laid out two seemingly divergent tests to determine whether or not a right is fundamental. The *Lawrence* court applied a broad understanding of the Due Process Clause, stating that "matters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."¹²⁰ The *Glucksberg* court applied a stricter standard, stating that the Due Process Clause specifically protects rights that are "deeply rooted in this Nation's history and tradition"¹²¹ and "implicit in the concept of ordered liberty."¹²² Together, according to the *Glucksberg* court, these prongs work to determine "whether a purported right is historically 'fundamental.'"¹²³ Although these approaches are starkly different, both tests lead to the conclusion that choosing a name is a fundamental right.

117. See *supra* Part III.A.

118. 521 U.S. 702 (1997).

119. 539 U.S. 558 (2003).

120. *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

121. *Glucksberg*, 521 U.S. at 703.

122. *Id.* at 721 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

123. Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 420 (2006).

The deeply personal choice of how to be recognized by others clearly satisfies the *Lawrence* test. As the California Name Equality Act states, one's name choice is a "profoundly personal reflection of one's individuality, equality, family, community, and beliefs."¹²⁴ A name represents a person's sense of self, while also acting as an identifier for that person's role in society. As attorney and feminist Margaret Eve Spencer has noted:

A name is a means of identification; it is a shorthand designation of everything that serves to make an individual identifiable and unique: appearance, background, personality, intelligence, and ideals. An individual realizes early in life this essential connection between a particular sound and the individual's self-image.¹²⁵

Given the central role that a person's name has in his or her life, interaction with others, and own sense of self, name choice fits squarely within *Lawrence's* definition of a fundamental right.

Even under *Glucksberg's* more narrow approach, name choice would still be protected as a fundamental right. As described in Part I, men and women had a recognized right to change their names at will under English common law since the beginning of the eleventh century,¹²⁶ as long as they were not doing so for fraudulent purposes.¹²⁷ This system was inherited by the United States, creating the foundation for the naming laws that exist today. The common law right to change one's name still exists in most states, and formed the foundation for today's statutory process. Although modern statutory laws restrict the right to choose one's own name, such

124. CAL. CIV. PROC. CODE § 1279.6 (West 2013). Although the Act ultimately limited the naming options for couples at marriage, its language reflects a deep concern for protecting a person's right to choose his or her own name.

125. Spencer, *supra* note 87, at 686. Spencer made this argument in the 1970s, in opposition to the legal structure that forced women to take their husbands' names at marriage. Although the purpose of her argument has since been fulfilled, the argument itself continues to be pertinent: because a person's name plays such a central role in his or her overall development, people should enjoy the right to choose the name that they use rather than having the government choose the name for them.

126. See *supra* Part I.A.

127. 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 39, at 103 ("[T]he common law recognizes the right of all persons to use and be known for legal and social purposes by the surname(s) they choose as long as they do not do so for a fraudulent purpose.").

laws are quite recent when compared to the common law tradition.¹²⁸

Because the right to choose one's own name is a fundamental right under either test, naming statutes should be subject to strict scrutiny under a due process analysis.¹²⁹ The Supreme Court has defined this level of scrutiny by stating that the Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."¹³⁰ As the prior section explains, the only possibly compelling governmental interest in restricting the name-change process is combating fraud. Even if the court accepted fraud prevention as a compelling interest, however, most state statutes are much broader than necessary to achieve that purpose. Therefore, the statutes are unconstitutional under the Due Process Clause.

2. Privacy

The right to choose one's own name is also protected by a person's fundamental right to privacy under the Due Process Clause. The Supreme Court has held that the right to marry, the right to use contraception, and other such privacy rights could be grouped together and described as "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children."¹³¹ The right to choose one's own name falls into this category, as it is a highly personal decision that should be made free from government interference.

128. Based on the statutory annotations, most statutory naming laws appear to have been enacted in the mid-to-late nineteenth century or early twentieth century. Julia Shear Kushner, *The Right to Control One's Name*, 57 UCLA L. REV. 313, 328 (2009) (citing ARIZ. REV. STAT. §§ 442-443 (1901)); see also CAL. CIV. PROC. CODE § 1275 (1872); COLO. GEN. LAWS § 1851 (1877); 1860 HAW. SESS. LAWS 32; 1877 LA. ACTS 106; MASS. GEN. LAWS ch. 256, § 1 (1851); N.Y. CODE CIV. PROC. § 2262 (1895); 1919 PA. LAWS 822.

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

130. *Reno v. Flores*, 507 U.S. 292, 301 (1993).

131. *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (holding that a Georgia statute which restricted abortions was unconstitutional); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."); *Zablocki v. Redhail*, 434 U.S. 374, 383-88 (1978) (finding a fundamental privacy right to marry).

At least one court has validated the privacy argument in the context of naming. In *O'Brien v. Tilson*, the Eastern District of North Carolina explicitly recognized a person's right to privacy as it relates to naming choices when it invalidated a state law that favored men over women in the process of naming children.¹³² Quoting *Jech v. Burch*, the court said that the statute in question clearly invaded the rights to privacy and personal expression:

The common experience of mankind, whether parents, agonizing over a name for their newborn child, or grandparents trying to participate in the naming process, or grown children living with the names their parents gave them, points up the universal importance to each individual of his own very personal label.¹³³

The reasoning of the court in *O'Brien* is similar to Judge Arnold's dissent in *Henne v. Wright*, which specifically addresses the right of people to choose their own names: "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."¹³⁴ Likewise, proponents of California's Name Equality Act argued that the "people, not the government, should decide basic issues like whose name to take."¹³⁵

Because the right to privacy in name choice is likely a fundamental right under the Due Process Clause, the same strict scrutiny analysis offered in the previous subsection should apply under this theory as well.¹³⁶ As discussed above, current state naming statutes are not narrowly tailored to fit a compelling state interest and, therefore, are unconstitutional.

C. Need to Respond to a Changing Society

In addition to constitutional concerns, the need for reform is bolstered by the fact that nontraditional approaches to naming may gain traction in the near future. One study found that 70 percent of

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

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

134. *Henne v. Wright*, 904 F.2d 1208, 1217 (8th Cir. 1990) (Arnold, J., concurring in part and dissenting in part).

135. Kolesnikov, *supra* note 86, at 442 (citations omitted).

136. See *supra* Part III.B.1.

male college students and almost 85 percent of female college students believe a man “should” take his wife’s last name in some circumstances.¹³⁷ This indicates that a substantial percentage of men may be open to choosing a nontraditional name. Further, studies have consistently shown that more educated women,¹³⁸ racial minorities,¹³⁹ and women who marry at later ages¹⁴⁰ are more likely to choose some form of nontraditional name than women who do not fall into these categories. Because the population is becoming increasingly educated,¹⁴¹ is marrying later in life,¹⁴² and is becoming more diverse,¹⁴³ it is likely that nontraditional names will become more widely accepted and will increase in popularity. This prediction is supported by a 2000 study, which found that brides married between 1990 and 1996 were about 12 times more likely to choose a nonconventional name than brides married between 1966 and 1971.¹⁴⁴

A series of other trends may also indicate a strong future for non-traditional naming. A 2011 study found that women who had non-religious civil ceremonies were more likely to keep their names than women with religious ceremonies, with 55.9 percent doing so.¹⁴⁵ Given that the number of nonreligious Americans is on the rise,¹⁴⁶ it is likely that nontraditional names will become more popular in the coming years. The rapidly increasing support of same-sex

137. David R. Johnson & Laurie Scheuble, *Marital Name Change: Plans and Attitudes of College Students*, 55 J. MARRIAGE & FAM. 747, 750 (1993).

138. Claudia Goldin & Maria Shim, *Making a Name: Women’s Surnames at Marriage and Beyond*, 18 J. ECON. PERSP. 143, 144–45 (2004).

139. See generally Jean M. Twenge, “Mrs. His Name”: Women’s Preferences for Married Names, 21 PSYCHOL. WOMEN Q. 417, 417–29 (1997).

140. Goldin & Shim, *supra* note 138. See generally Ernest L. Abel & Michael L. Kruger, *Taking Thy Husband’s Name: The Role of Religious Affiliation*, 59 NAMES 12 (2011); David R. Johnson & Laure K. Scheuble, *Women’s Marital Naming in Two Generations: A National Study*, 57 J. MARRIAGE & FAM. 724 (1995).

141. Hope Yen, *Census: Women Top Men in Advanced Degrees*, NBC NEWS (Apr. 26, 2011, 3:30 PM), http://www.msnbc.msn.com/id/42767867/ns/us_news-life/t/census-women-top-men-advanced-degrees/#.ULLMbIc0WSo.

142. Enjoli Francis, *Marriage Rate Falls to Record Low in U.S., Pew Says*, ABC NEWS (Dec. 14, 2011, 2:02 PM), <http://abcnews.go.com/blogs/headlines/2011/12/marriage-rate-falls-to-record-low-in-u-s-pew-says/>.

143. See Susan Saulny, *Census Data Presents Rise in Multiracial Population of Youths*, N.Y. TIMES, Mar. 25, 2011, at A3, available at <http://www.nytimes.com/2011/03/25/us/25race.html>.

144. See generally Laurie K. Scheuble et al., *Trends in Women’s Marital Name Choices: 1966–1996*, 48 NAMES 105 (2000).

145. See generally Abel & Kruger, *supra* note 140.

146. Jeff Stone, *Number of Nonreligious Americans Continues to Increase: One-Fifth Are Agnostic, Atheist, or Believe in Nothing*, INT’L BUS. TIMES (July 21, 2012, 10:33 AM), <http://www.ibtimes.com/number-nonreligious-americans-continues-increase-one-fifth-are-agnostic-atheist-or-believe-nothing>.

marriage¹⁴⁷ may also lead to more acceptance and use of nontraditional naming. As the public begins to recognize that people should have the right to marry whom they want, they may also begin to recognize that people should be able to choose their own names, whether or not this has been the traditional practice. Finally, foreign-born women and women of color favor nontraditional surnames more than native-born and white women, respectively.¹⁴⁸ As the population becomes more multiracial¹⁴⁹ and the foreign-born population in the U.S. increases,¹⁵⁰ the acceptance of nontraditional names may likewise increase.

Despite these signs of potential progress, only 10 percent of women currently choose not to take their husbands' names at marriage.¹⁵¹ If alternative options become as accessible as traditional ones, however, nontraditional options may gain popularity. For example, the trend of merging names is becoming a well-recognized option in England¹⁵² and is a viable alternative for couples seeking a more egalitarian family name in the United States. The presence of alternative names in the U.S. has gained increased attention in the past several years.¹⁵³ Although there is no evidence that the number

147. CNN Poll: Americans' Attitudes Toward Gay Community Changing, CNN POLITICAL TICKER (June 6, 2012, 5:00 AM), <http://politicalticker.blogs.cnn.com/2012/06/06/cnn-poll-americans-attitudes-toward-gay-community-changing/>.

148. Twenge, *supra* note 139.

149. See Saulny, *supra* note 143.

150. See ELIZABETH M. GRIECO, ET AL., AMERICAN COMMUNITY SURVEY REPORTS, U.S. CENSUS BUREAU, ACS-19, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010 10 (2012), available at <http://www.census.gov/prod/2012pubs/acs-19.pdf>.

151. See *supra* note 63.

152. In England, this practice is known as "meshing." See, e.g., Stephen Adams, *Couples Meshing Surnames*, TELEGRAPH (Dec. 6, 2009, 2:01 PM), <http://www.telegraph.co.uk/news/uknews/6743306/Couples-meshing-surnames.html>; Sarfraz Manzoor, *The Clanzoors? Never!*, GUARDIAN (May 27, 2011), <http://www.theguardian.com/lifeandstyle/2011/may/28/sarfraz-manzoor-wife-surname>.

153. Because there are no national or state statistics on the number of women choosing nontraditional names, see *supra* note 63, anecdotal evidence provides the best support for this trend. See, e.g., Maya Blackmun, *By Whatever Name, Bride Still Herself*, OREGONIAN, Jan. 17, 2002, Southwest Zoner Lake Oswego, at 6; Maureen Dowd, Op-Ed., *A Tale of Two Rachels*, N.Y. TIMES, July 8, 2006, at A13, available at <http://www.nytimes.com/2006/07/08/opinion/08dowd.html>; Gonzales, *supra* note 53; Jane Greig, *Prince or Pauper, Fish or Fowl, Creek or Canyon Have at Least One. Some Are Dropped; Others, Taken in Vain Shakespeare is Not the Only One to Have Wondered What's in a Name*, AUSTIN AMERICAN STATESMAN, Mar. 25, 2000, at D1 (giving advice to newlyweds who choose alternative surname schema); *Husband Takes Wife's Name*, DAYTON DAILY NEWS, Jan. 8, 2001, at 2B; 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; Steve Friess, *More Men Taking Wives' Last Names*, USA TODAY (Mar. 21, 2007, 12:16 PM) http://www.usatoday.com/news/nation/2007-03-20-names-marriage_N.htm; Joanna Goddard, *This Couple Got Married and Made Up a New Last Name! Here It Is . . .*, GLAMOUR (Aug. 27, 2009, 12:30 PM), <http://www.glamour.com/weddings/blogs/save-the-date/2009/08/this-couple-got-married-and-ma.html>; Jodi Rudoren, *Meet Our New Name*, N.Y. TIMES (Feb. 5,

of nontraditional names would further increase if couples were given the compromise that this Note proposes, making more options available and adding legitimacy to those options would at least likely lead couples to consider the aspects of a name about which they care most.

IV. SUGGESTED REFORM

Couples should have the freedom to choose the surname they want at marriage without being penalized with longer and more expensive procedures. This Note recommends a national naming system similar to those already used in Iowa, Minnesota, and Massachusetts.¹⁵⁴ These systems allow people to change their surnames when they get married without undergoing the expensive, time-consuming, and invasive process of obtaining a court order. By allowing couples to change their names at marriage, states would give legitimacy to nontraditional naming practices, a first step toward negating the stigmatization of such options. Allowing couples to choose any name would be a better response to these problems than simply extending women's naming rights to men. This Part outlines a suggested reform, including a series of supplemental changes that would help make the reform more effective.

A. Extending Women's Rights to Men is Not Enough

Several academics have argued that extending to men the rights currently held by women would be an adequate solution to the problems outlined in Part III. However, several constitutional and social factors favor allowing couples to choose an altogether-new

2006), <http://www.nytimes.com/2006/02/05/fashion/sundaystyles/05NAME.html>; *The Last Name Project*, FROM TWO TO ONE, <http://www.fromtwooone.com/p/the-last-name-project.html> (last visited Aug. 18, 2013); Rachel Buell, *Changing Your Name After Marriage: Yours, Mine, and Ours: Perspectives on the Name Change Debate*, HUFFPOST WEDDINGS (June 19, 2012 11:53 AM), http://www.huffingtonpost.com/2012/06/18/changing-your-name-after-marriage_n_1607488.html; see also Diana Altman, *A Married Name Without the Hyphen*, FORBES (Oct. 19, 2009, 3:00 PM), <http://www.forbes.com/2009/10/19/maiden-married-hyphenated-names-forbes-woman-time-license.html>; Judy Berman, *Take Your Husband's Name . . . or Face Jail Time?*, SALON (Aug. 12, 2009, 1:13 PM EDT), http://www.salon.com/2009/08/12/name_change/; Katherine Rosman, *Katie Rosman Was My Name. And Still Is*, WALL ST. J. (July 17, 2011), <http://online.wsj.com/article/SB10001424052702304203304576450404031765520.html>; Anat Shenker-Orsorio, *I Do, Unfortunately, He Doesn't: Name Changing and Egalitarian Marriage*, HUFFPOST BUSINESS (Mar. 25, 2010, 3:09 PM), http://www.huffingtonpost.com/anat-shenkerosorio/i-do-unfortunately-he-doe_b_513436.html.

154. See *supra* notes 59–60 and accompanying text.

name rather than limiting their name choices to those already held by either spouse.

1. Constitutional Arguments

Although state governments would resolve the equal protection issues described above if they extended women's naming rights to men, due process issues would still exist. If men were universally permitted to take their spouses' names at marriage, then couples would have three options—keeping separate names, taking the woman's, or taking the man's—rather than the two options normally available. The naming choices would still be almost as restricted as they are now, with the only difference being that men could also change their surnames to one of these highly restricted options. In such a system, the government would still be punishing couples interested in nontraditional names by making them undergo a more extensive name-change process. The slightly expanded options for name choice would not tailor the restriction narrowly enough to satisfy strict scrutiny.

2. Social Arguments

Given the longstanding history and widespread use of the current naming tradition, merely offering men the option of taking their wives' names—as has been advocated by Professor Deborah Anthony,¹⁵⁵ Michael Frandina,¹⁵⁶ and Michael Rosensaft¹⁵⁷—would likely do little to change naming behavior in practice. The current system represents patriarchal values that have been present in the United States since the country's beginning, and most men would be hesitant to completely forfeit their own names for those of their wives.¹⁵⁸ The choice of something as important as a name should not be based on assumptions, social pressures, or procedural shortcuts, but instead on men and women's own feelings about how they want to identify themselves.

When a man changes his surname at marriage, he is arguably sacrificing more than if he were a woman, because he would be

155. See Anthony, *supra* note 55, at 214–15.

156. See Frandina, *supra* note 94, at 167–68.

157. See Rosensaft, *supra* note 39, at 195–97.

158. One study found that only 12 percent of male college students think that a man should take his wife's name at marriage if she wants him to. Johnson & Scheuble, *supra* note 140, at 150.

doing so against the grain of social norms. Deborah Anthony argues that this longstanding custom of women taking their husband's names is the reason that women continue to do so, even though they are not legally required to:

[I]t would be virtually unthinkable in law and policy for a man to want to be "owned" in that way by his wife. Our language and naming continues to instantiate women as objects, which is why it is so difficult to conceive of something so objectively simple as a man taking his wife's name: women do not, and never have, owned men.¹⁵⁹

Given these strong negative responses toward men who forfeit their names for those of their wives, a reform that only modifies the current naming statutes by allowing both men and women to adopt their spouses' names would do little to change the status quo.

Instead, reforming the law to allow spouses to choose other non-traditional naming options would provide couples with alternatives that may be seen as less emasculating for men and more empowering for women. Nontraditional options such as hyphenating names, choosing a new name, or creating a merged name are compromises between taking either spouse's name, because both spouses have equal ownership in the new name.¹⁶⁰ This new name would help represent the family as what it is: a new entity run by two partners.

B. Proposed Reform

As the previous sections demonstrate, the current naming system should be reformed to prevent the perpetuation of outdated gender norms, to allow each sex equal naming rights, and to give people the freedom to choose their own names. This Section outlines a proposal for how to best achieve these goals.

Some scholars have suggested that the judiciary be the leader of name-change reform,¹⁶¹ as was the case when women gained the right to keep their birth names in the 1970s. However, because these problems have existed for years with minimal judicial action, this Note proposes that state legislatures proactively change their laws. Though relying on states would be difficult because it would

159. See Anthony, *supra* note 55, at 211.

160. This was the main reason my parents decided to take an altogether-new name at marriage. See *supra* note 57.

161. Suarez, *supra* note 46, at 241.

involve state-by-state adoption, it is also the most feasible route, given that states already choose their own naming laws.

This Note's suggested reform would allow both men and women to change their surnames to whatever name they want, excluding certain categories of names that have been consistently denied by courts.¹⁶² The model statute below reflects one example of how states could amend their naming laws to allow for more egalitarian surnames at marriage. This model would allow couples to choose almost any name at marriage while also protecting against fraudulent uses of a name change and other valid reasons that courts have denied name changes.

1. Model Statute

- 1) A party may indicate on the application for a marriage license the adoption of a name change. The surnames used on the marriage license shall become the legal names of the parties to the marriage. The parties may choose any surname, excluding those outlined in Part (3). Naming options include, but are not limited to, the surname held by either spouse before entering this marriage, a combination of those names, or an altogether-new name. The marriage license shall contain a statement that, when a name change is requested and affixed to the marriage license, the new name is the legal name of the requesting party.
- 2) An individual shall have only one legal name at any one time.
- 3) Part (1) of this statute will not apply if:
 - a) There is substantial reason to believe that the party is requesting the name change for fraudulent purposes.
 - b) The requested name is:
 - i) a website;
 - ii) a number;
 - iii) obscene or derogatory;
 - iv) more than three words in length;
 - v) the name of a cultural icon or other public figure;
 - vi) a reference to an illegal substance or criminal act;
 - vii) a reference to a government agency; or
 - viii) a foreign word that, when translated into English, violates any of the aforementioned restrictions.

162. See generally Jane M. Draper, Annotation, *Circumstances Justifying Grant or Denial of Petition to Change Adult's Name*, 79 A.L.R.3d 562 (1977).

- c) The party requesting a name change has been convicted of a felony or has declared bankruptcy in the past 20 years.
- d) The party requesting a name change is a registered sex offender.
- 4) If Part (3) applies, the name change will not take effect. Parties in this case must obtain a court order in order to proceed with the intended name changes.

2. Explanation of the Proposed Statutory Scheme

Under this system, marriage applications would have a space for couples to write in the names that they would use after marriage. This system is currently used by Iowa, Minnesota, and Massachusetts,¹⁶³ and the first section of the model statute is modeled after the statute currently in effect in Iowa.¹⁶⁴ Instead of favoring any single naming choice, this statute lists the options in a non-preferential way, so that a couple's naming choice is based on their personal preferences.

The model statute includes additional provisions to reduce the need for judicial approval and likelihood of fraud. By prohibiting specific kinds of name choices, section 3(a) removes the subjectivity from the current name-change procedure. Several state courts have stated that judges should approve a name change unless there is reason to believe the name change is being used for fraudulent purposes.¹⁶⁵ Because this encourages a "rubber stamp" system to approve name changes, there is no reason to require a judicial appearance, which costs money for both the applicant and the state entity. By implementing a clear set of guidelines for what kinds of names are permitted, states could avoid these costs while also making the process fairer for those applying for nontraditional name changes. The restrictions set forth in section 3(b) have been used

163. See *supra* notes 59–60 and accompanying text. Although Iowa and Minnesota allow people to change their full names through this process, this Note is only advocating for the right for people to choose new surnames.

164. See *supra* notes 59–60 and accompanying text.

165. See, e.g., *In re Knight*, 537 P.2d 1085, 1086 (Colo. App. 1975); *Shockley v. Okeke*, 856 A.2d 1054, 1060 (Conn. Super. Ct. 2004), *reargument denied*, No. FA020188208S, 2004 WL 2546793 (Conn. Super. Ct., Oct. 5, 2004), *aff'd in part, rev'd in part*, 882 A.2d 1244 (Conn. App. Ct. 2005), *cert. granted in part*, 895 A.2d 797 (Conn. 2006), *appeal dismissed*, 912 A.2d 991 (Conn. 2007) (stating that courts should grant applications for name change unless it appears that the applicant's use of the new name will result in injury to some other person with respect to his legal rights).

by courts in the past,¹⁶⁶ and are modeled after restrictions currently used by states for personalized license plates.¹⁶⁷ If a person's name-change request is denied because of any of the restrictions in the statute, that person would then have the opportunity to persuade a judge that their request should be granted through the court order process.

Sections 3(b) and 3(c) also reduce the likelihood of fraud by requiring that the people more likely to commit fraud undergo the court order process. As mentioned previously, many states already have additional restrictions for people who have been convicted of felonies or declared bankruptcy in the past.¹⁶⁸ Because the court order process would be reserved for these specific circumstances, the majority of name-change applicants would not have to spend unnecessary time and money to change their names.

States that pass the reform outlined above should also take action to make sure that other institutions accept marriage certificates as proof of a name change, so that pressure from banks or other institutions does not replace the current pressure in place by many states' laws. Firmer laws in this area would give couples, especially men, an authority to cite if their name change is denied by a bank or other institution. If states do not enact such supplementary changes, pressure from such institutions may deter people from selecting nontraditional names at marriage, again taking away the independent choice that a name change represented under common law.

166. See, e.g., *In re Forchion*, 130 Cal. Rptr. 3d 690, 692 (Cal. Ct. App. 2011) (upholding denial of name change to NJweedman.com); *Lee v. Superior Court*, 11 Cal. Rptr. 2d 763, 765–66 (Cal. Ct. App. 1992) (upholding trial judge's denial of a name change, when the name contained a racial epithet universally considered offensive and conducive to violence); *Ritchie v. Superior Court* (*In re Ritchie*), 206 Cal. Rptr. 239, 240–41 (Cal. Ct. App. 1984) (upholding denial of name change to Roman numeral III); *In re Knight*, 537 P.2d at 1086 ("[A court] should not deny the application for a change of name as being improper unless special circumstances or facts are found to exist. Included in these would be unworthy motive, the possibility of fraud on the public, or the choice of a name that is bizarre, unduly lengthy, ridiculous or offensive to common decency and good taste.") (internal quotation marks omitted); *In re Dengler*, 287 N.W.2d 637, 639–40 (Minn. 1979) (upholding denial of name change to 1069); *Variable v. Nash*, 190 P.3d 354, 355–56 (N.M. Ct. App. 2008) (upholding denial of name change to "Fuck Censorship!"); *In re Handley*, 736 N.E.2d 125, 126–27 (Ohio Prob. Ct. 2000) (denying name change to "Santa Robert Claus").

167. See, e.g., *Personalized License Plate*, IOWA DEPARTMENT OF TRANSP., <http://www.iowadot.gov/mvd/ovs/plates/personal.htm> (last visited Aug. 18, 2013).

168. See *supra* note 113 and accompanying text.

CONCLUSION

Current naming laws insert the government into a deeply personal decision and perpetuate the notion that women are subordinate to men. State statutes should be reformed to eliminate the stereotypes embedded in the current system and to reflect changes in American households and in society as a whole. This Note recommends allowing parties to write new surnames onto their wedding certificates, subject to limited restrictions, which would take legal effect without a court order. That this system is already well established in three states is evidence that it can be implemented successfully. This change is not only constitutionally necessary, but would also alleviate the burden on courts and couples alike. If states change their laws to make alternative naming more feasible, couples will more heavily consider what they want in a name and may begin questioning why the man's name is the default.



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