

All Names Are Not Equal: Choice of Marital Surname and Equal Protection

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INTRODUCTION

What's in a name? That which we call a rose

By any other word would smell as sweet.

—William Shakespeare¹

With all respect to Mr. Shakespeare, names matter. One's name is closely associated with self-identity, and serves the practical function of identification by friends, family, businesses, and the government. People generally are closely tied to their names, shown in part by the great consideration many parents give in naming their children. Names are often changed to reflect different life events or statuses—such as a marrying woman adopting the last name of her new husband.

For a long time, marriage has signaled a joining of two (or more) people for the foreseeable future. The motivations to marry, the meanings behind it, and the roles of those involved have transformed over time.

It has long been the general practice in the United States for women to change their surnames upon marriage. Currently, women have the statutory right in all fifty states to change their last name upon marriage.² Such a right for marrying men exists in only eight states.³ In the remaining forty-two states, a husband who wishes to take his wife's last name or some other last name must obtain a court

1. WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act 2, sc. 2.

2. *Infra* note 43.

3. *Infra* note 40.

order, which can cost hundreds of dollars. Further, there is no guarantee that the court will permit the man to change his name. A marrying man not only has to consider the extra time and hassle it will take to change his last name, but also the stringent social pressures against this result. There well could be a lifetime of confusion, questions, and assaults on masculinity for the husband who takes his wife's last name. This is not really a choice at all.

The same can be said for women. Although women may keep their own last names or "choose" to take their husbands', the truth is that they, too, face generally accepted societal norms against doing anything but adopting their husbands' last names. This—compounded by the lack of a statutory right for men to change their names in most states—renders women's "choice" more like a forced result.

The fact that men do not have the same statutory right as women to change their surnames upon marriage is a Fourteenth Amendment equal protection violation. There is no compelling governmental interest in denying equal name-changing rights to men, making the lack of such statutes unconstitutional. Furthermore, the fact that men lack such statutory rights makes it more likely that they will not change their name upon marriage. If a married couple wishes to share a last name, then, the woman must change hers. Beyond its constitutional implications, this has the broader effect of decreasing women's agency in name choice.

The solution to men's equal protection problems is simple: every state should adopt statutes that present marrying men and women with truly equal opportunities to change their surnames. Not only will this provide men with an easier way to change their last names, but the existence of such statutes is a tacit endorsement by the states that such name change is a valid decision. Such statutes will encourage more couples to consider which—if either, or both—of the partners should change his or her last name. In so doing, the decision to change one's last name becomes more of a choice, and less of a forced result based on history and social coercion. Personal agency of this sort is especially important for women, who have historically been subsumed by their husbands' legal identities.

Part I of this Note recounts the history of women's lack of autonomy in marriage, the history of marital name-change, and the

establishment of intermediate scrutiny as the constitutional test under which gender-based equal protection issues are analyzed. Part II of this Note analyzes the lack of men's statutory right in most states to change their last names upon marriage through the lens of intermediate scrutiny and concludes that there is an equal protection violation. Part II further analyzes why a majority of marrying women adopt their husbands' surnames, and asserts that marrying men's relative inability to change their surnames has the negative effect of further restricting women's agency, in that the "choice" marrying women have in changing their surnames resembles more of a coerced decision. Part III of this Note reviews statutes of the eight states in which men possess a statutory right to change their last names upon marriage, and proposes that all states adopt similar statutes that not only grant marrying men and women the same processes for changing their last names, but also eliminate the discriminatory language found in existing statutes.

I. HISTORY

A. Women's Lack of Autonomy in Marriage and the Common Law

Under the common law, when a woman married a man⁴ she was deprived of independent legal existence; her legal identity merged with that of her husband.⁵ This was called coverture, and the wife was termed a *feme covert*, because the identity of the wife was "covered" by the husband.⁶ Essentially, husband and wife were regarded as one, and that one was the husband.⁷

Through marriage, a husband had a duty to support his wife financially and represent her in the legal system.⁸ The husband gained

4. This Note deals with name change in the context of marriage between a man and a woman. There is no consideration of similar issues for same-sex marriages or unions, although some of the arguments in this Note may apply to such arrangements. For further reference, see Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 783, 789–91 (2007).

5. See *id.* at 771; JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 367 (3d ed. 1993).

6. DUKEMINIER & KRIER, *supra* note 5, at 367.

7. *Id.*

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

rights to most property the wife brought into the marriage, and to her paid and unpaid labor.⁹ He could even be held liable for some of her crimes.¹⁰ The wife, by contrast, could neither contract, nor appear in court, nor have seisin of land except through her husband.¹¹ She was also required to serve and obey him.¹²

Clearly a gendered hierarchy in marriage existed at common law that held husbands above wives. This kind of discrimination based on sex has been perpetuated through judicial decision-making, statutes, and government regulations.¹³ In the marriage context, this hierarchy and discrimination has been manifested through courts and legislatures legally assigning a married woman her husband's surname, often citing common law as authority.¹⁴ These stereotypical notions of marital roles and relationships persist today first through social discrimination against wives who choose not to assume their husbands' last names, and second through legal and social discrimination against husbands who desire to take their wives' last names.¹⁵

B. Marital Name Change

Although Hawaii was the only state to explicitly require married women to "adopt the names of their husbands as a family name,"¹⁶

9. *Id.*

10. *Id.*

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

12. Siegel, *supra* note 8, at 983.

13. For example, a woman could not vote until 1920 and a woman did not win an equal protection lawsuit against a state until 1971. U.S. CONST. amend. XIX; *see* *United States v. Virginia*, 518 U.S. 515, 531–32 (1996) (citing cases).

14. *See, e.g.*, *Forbush v. Wallace*, 341 F. Supp. 217, 221 (M.D. Ala. 1971) (recognizing Alabama's adoption of a common law rule providing that the wife takes the husband's surname at marriage); *In re Kayaloff*, 9 F. Supp. 176, 176 (S.D.N.Y. 1934) (refusing to naturalize a woman under her birth surname); *Pay Role Signature—Married Women Employees*, 4 Comp. Gen. 165 (1924) (requiring married female federal government employees to use their husbands' surnames on the payroll); *Rago v. Lipsky*, 63 N.E.2d 642, 644 (Ill. App. Ct. 1945) (construing common law to require married women to use their husbands' surnames).

15. *See* discussion *infra* Parts I.C, II.

16. HAW. REV. STAT. § 574-1 (1968). Hawaii was the only state to ever statutorily require women to change their last names to their husbands' upon marriage. This was apparently for reasons of westernization, and the law has since been superseded. *See* HAW. REV. STAT. § 574-

women were effectively subject to a mandatory regime of name change at marriage until about thirty years ago.¹⁷ This is contrary to common law, where women and men were free to change their surnames through common usage.¹⁸ For married women, who were treated as *feme covert*s, bearing their husbands' surnames was a matter of custom and not legal command.

This custom transformed into law through the cumulative dicta of multiple cases in the late-nineteenth and early-twentieth century.¹⁹ Such cases²⁰ taken together declared that a married woman's right to participate in activities such as driving or voting depended upon her bearing her husband's surname.²¹ This situation persisted until the 1970s, when courts began holding that women had the right to retain their birth names after marriage.²²

1 (1993 & Supp. 2004) (allowing for choice in marital naming); Emens, *supra* note 4, at 772 n.31 (noting the "westernization" rationale).

17. See Emens, *supra* note 4, at 772 (noting that the mandatory name change regime "largely continued until the 1970s, when a series of cases established the right of women to continue to bear their birthnames after marriage").

18. See UNA STANNARD, MRS MAN 112, 115 (Germainbooks 1977) (recognizing that at common law, surnames did not require court approval for change, but had "original mutability"); Emens, *supra* note 4, at 770-71.

19. "The foundational dicta came from *Chapman v. Phoenix National Bank*, 85 N.Y. 437, 449 (1881), a case involving an overzealous wartime action to confiscate property." Emens, *supra* note 4, at 772 n.29. The court set aside the action to confiscate, finding that improper notice of forfeiture was given because it was in the married woman's birth name. *Id.* In so doing, the court noted that "[f]or several centuries, by the common law among all English speaking people, a woman, upon her marriage, takes her husband's surname." *Chapman*, 85 N.Y. at 449. Of course, this was incorrect; this supposed "common law" was merely custom. Emens, *supra* note 4, at 772 n.29.

20. Or statutes, in the case of Hawaii. See *supra* note 16 and accompanying text.

21. See, e.g., *Rago v. Lipsky*, 63 N.E.2d 642, 647 (Ill. App. Ct. 1945) (interpreting a state statute to mandate that a woman's voter registration in her birth name is automatically cancelled upon marriage, and that she must re-register in her married name in order to vote); *Bacon v. Boston Elevated Ry. Co.*, 152 N.E. 35, 36 (Mass. 1926) (invalidating registration of automobile in married woman's birth surname rather than husband's surname); *Appeal of Hanson*, 198 A. 113, 114 (Pa. 1938) (sanctioning refusal by Board of Law Examiners to admit married women to the Bar in their birth surname); STANNARD, *supra* note 18, at 239-61 (stating that in 1971, the United States Department of State officially decreed that "[t]he legal name of a married woman is her husband's surname," and refused to issue passports to married women in their birth surname).

22. See, e.g., *Dunn v. Palermo*, 522 S.W.2d 679, 688-89 (Tenn. 1975) (finding that neither custom nor law requires that a woman change her name to her husband's at marriage, and thus the plaintiff's name was wrongly purged from the voter rolls when she declined to re-register in her husband's name); *Kruzel v. Podell*, 226 N.W.2d 458, 463-66 (Wis. 1975) (holding that a woman's name does not change to her husband's on marriage if she consistently

Today, the vast majority of marrying women change their surnames to their husbands' even though this is not legally required.²³ The vast majority of marrying men do not change their surnames.²⁴ This can be attributed largely to social norms, pressures, and legal defaults.²⁵

In most states, the easiest legal course of action—the legal “default”—is for a woman to keep her birth name.²⁶ Despite this

used her maiden name); Emens, *supra* note 4, at 772 n.32; Claudia Goldin & Maria Shim, *Making a Name: Women's Surnames at Marriage and Beyond*, 18 J. ECON. PERSP. 143, 144–45 (2004) (discussing the legal changes in marital names in the 1970s).

23. The actual percentage of women changing their names upon marriage is difficult to determine. One poll indicates that only 10% of married women in the United States do not have their husbands' birth name as their married last name. Joan Brightman, *Why Hillary Chooses Rodham Clinton*, 16 AM. DEMOGRAPHICS 9, 9 (1994) (citing a poll conducted by NRF Research Inc. for American Demographics in 1993). A study by sociologists who have studied the phenomenon of name-changing for over twenty-five years reports that fewer than 5% of women over two generations did anything other than take their husbands' names at marriage, though the older sample excluded women who had divorced during a relevant twelve-year window. Laurie K. Scheuble & David R. Johnson, *Women's Marital Naming in Two Generations: A National Study*, 57 J. MARRIAGE & FAM. 724, 727 (1995). This suggests that the 5% figure may be lower than the general rate in the population. Emens, *supra* note 4, at 785 n.82. Yet another study asserts that the percentage of women college graduates in the United States keeping their own surnames upon marriage rose from 2 to 4% in 1975 to just below 20% in 2001. Goldin & Shim, *supra* note 22, at 144–45 n.32. The Goldin & Shim study compared Harvard alumnae records, Massachusetts birth records, and wedding announcements published in the *New York Times*. *Id.* at 143. Goldin & Shim concluded that graduation from an Ivy League or top-25 liberal arts college corresponded with an eleven percentage point increase in 1991 and a fourteen percentage point increase in 2001, which suggests that the 20% figure given for 2001 is too high for the general populace. *Id.* at 156. No matter which study one reads, marrying women who choose not to change their names upon marriage are in the minority. See Emens, *supra* note 4, at 785–89, for a more in-depth discussion of these and other studies and trends regarding women's marital name-change.

24. This can be inferred not only from common experience, but also from the Goldin & Shim and Scheuble & Johnson studies regarding marrying women changing their names. See *supra* notes 22–23 and accompanying text. Of course, if marrying women and marrying men both are changing their names upon marriage—perhaps by switching last names—then the studies of marrying women's name-change suggests nothing at all about men changing their name. Again, this possibility is largely refuted by everyday experience with married couples and their last names.

25. For a broad discussion on the motivations of women and men in changing their names upon marriage, see Emens, *supra* note 4.

26. Georgia, Iowa, Massachusetts, Minnesota, New York, and North Dakota invite parties to state their postmarital names on their marriage license application form, and thus compel a kind of forced choosing. See GA. CODE ANN. § 19-3-33.1 (1999); IOWA CODE ANN. § 595.5 (West 2001); MASS. ANN. LAWS ch. 46, § 1D (LexisNexis 1991); MINN. STAT. § 517.08 (2005); N.Y. DOMESTIC RELATIONS LAW § 15 (McKinney 2003); N.D. CENT. CODE § 14-03-

being the easiest legal position, very few women keep their birth names at marriage.²⁷ To *not* become “Mrs. His Name”²⁸ might mean fewer legal hurdles, but it also means stronger social opposition.²⁹ Departing from the convention of women changing their names might feel like the loss of something expected.³⁰ “Keeping” is also perceived as more of an active choice, because changing the husband’s name is rarely mentioned, and any children almost always take the husband’s name.³¹ Furthermore, women who choose to keep their own birth names may encounter confusion or prejudice about their decision.³² Despite keeping being the easiest option legally, the choice for marrying women that has the fewest costs both legally and socially is Mrs. His Name.³³

20.1 (1996). This means that the legal default in those states is not precisely a woman keeping her name. *See* Emens, *supra* note 4, at 812.

27. *See supra* text accompanying note 23.

28. “Mrs. His Name” has been used before. *See, e.g.*, Emens, *supra* note 4, at 764; Jean M. Twenge, “Mrs. His Name”: Women’s Preferences for Married Names, 21 *PSYCH. WOMEN Q.* 417, 425 (1997).

29. For example, an article by Peggy Noonan that celebrates the increasing numbers of women who take their husbands’ surnames implicitly rebukes women who do otherwise as not sufficiently dedicated to marital unity: “A bride [who] grew up in the Age of Divorce. . . may have fewer misconceptions than [her] parents about how important freedom and self-actualization are. [She] may think other things are more important, like constancy and commitment and loyalty.” Peggy Noonan, *Looking Forward*, *GOOD HOUSEKEEPING*, Oct. 1996, at 208; *see also* Emens, *supra* note 4, at 814 (recognizing that the legal default of “keeping” may not be the actual result for most women “in light of the strong social conventions in this area”).

30. Emens, *supra* note 4, at 813–14. In finding that women do not keep their own birth names upon marriage, Emens posits three potential causes: (1) women may experience loss aversion, making them reluctant to depart from the status quo; (2) women may want to avoid the effort of making a decision, either through laziness or through some desire not to be actively responsible for their decisions; and (3) women may interpret a default as a suggestion or recommendation from some better informed or authoritative entity. *Id.*

31. *Id.* at 814.

32. It is difficult to discern whether and to what degree women who keep their own surnames upon marriage encounter confusion or prejudice. Recent studies indicate that women who keep their birth names are thought by others to be more assertive, more feminist, and more oriented toward their careers than their families. *See id.* at 779 n.56 (listing studies). Whether these labels are positive or negative does not matter so much as the fact that they may not be true; such assumptions often prove unwarranted and unappreciated. In times past, the “label commonly affixed to women who have chosen to retain their own names upon marriage is that of mentally unstable or insane.” Omi Morgenstern Leissner, *The Problem that Has No Name*, 4 *CARDOZO WOMEN’S L.J.* 321, 397 (1998).

33. Emens, *supra* note 4, at 817.

Even though becoming Mrs. His Name is the “easiest” option for women socially, it is not a simple task. A marrying woman who wants to assume her husband’s surname must complete forms and send a copy of the marriage license to the Social Security Administration, the state department of vehicles, the state voter registration bureau, and the United States Passport Agency.³⁴ This is only the beginning, as credit cards, mailing addresses, bank accounts, insurance policies, leases, and titles to property may need to be altered as well.³⁵

For men, keeping their birth names at marriage is the easiest legally and socially. Keeping for men is the social norm; it is expected.³⁶ Unlike wives, however, the vast majority of husbands actually keep their names.³⁷ If a man wanted to become Mr. Her Name, the process would be far more daunting both socially and legally than for a woman wishing to become Mrs. His Name. Socially, men face intense questioning and taunting.³⁸ Legally, men

34. See KitBiz, Official New Bride Name Change Kit, <http://www.kitbiz.com> (reporting that no changes need to be made with tax entities, as the Social Security notification suffices). Also sold on this website is a name-change kit for the bride and groom who each want to take both surnames. *Id.* For example, Woman A and Man B could become Woman A B and Man A B.

35. See Karen Jansen, *Play the Name-Change Game*, WYOMING TRIBUNE-EAGLE, June 4, 2000 (listing some of the factors to consider when changing one’s name upon marriage, including the multiple entities that must be informed of the change).

36. A man grows up “knowing from a young age that his name is his to keep. . . . For him to do anything other than keep his own name . . . is likely to meet even harsher and more uniform criticism.” Emens, *supra* note 4, at 778–81.

37. See *id.* at 785. Evidence for this statement includes common experience, but also the studies of women’s name change, which show that the majority of marrying women adopt their husbands’ last names. See *supra* note 23 and accompanying text.

38. See, e.g., Steve Friess, *Post-Wedding Names Get New Look*, WZZM 13 NEWS, Mar. 21, 2007, http://www.wzzm13.com/news/news_article.aspx?storyid=72829. Sam Van Hallgren, co-host of the movie-review podcast Filmspotting, was formerly Sam Hallgren until he married Carrie Van Deest. *Id.* They combined their last names to create “Van Hallgren.” *Id.* Sam received a note from a listener instructing Sam to “turn in [his] man card,” and asked what “sissy juice” the host was drinking. *Id.* The note was not a lone instance of social backlash; Sam had to explain himself to the rest of his listeners and even his co-host. *Id.* Similarly, Mike Salinger—birth name Mike Davis—took his wife’s last name upon marriage. *Id.* The guests at their own wedding were confused and disbelieving, and his college roommate still chides him months later. *Id.* As Sharon Naylor, an author of wedding-themed books, notes, if a groom is considering hyphenating or changing his name, there exists an omnipresent concern of “What will the people think at the office? What will my father think?” *Id.* See also Jodi Rudoren, *Meet Our New Name*, N.Y. TIMES, Feb. 5, 2006, § 9, at 3 (recounting comments to her husband after they merged their last names, including, “It appears that married life has literally taken the man

have the statutory right to change their names upon marriage in only eight states.³⁹ In the remaining states, men must obtain a court order to change their names for any reason, including marriage.⁴⁰ Such a court order generally requires going to court, paying court fees that can be hundreds of dollars, and putting an advertisement in the local paper.⁴¹ This does not guarantee that a marrying man will be able to change his name, however, as the decision is then left to the discretion of a judge.⁴² A woman, on the other hand, has the right either to take her husband's surname or retain her birth name upon marriage in all fifty states.⁴³

The statutes enabling a man to change his name upon marriage in California, Georgia, Hawaii, Iowa, Louisiana, Massachusetts, New

out of you"); Jeanne Phillips, *Dear Abby: Man Takes Wife's Name Despite His Mother's Threat*, CHARLESTON DAILY MAIL, Sept. 5, 2005, at 2D (asking when and how to tell the husband's mother that he took his wife's name, in light of his mother's threat to disown him if he did so); Lou Gonzales, *Man Finds Resistance to Name Change*, FLA. TIMES-UNION, Feb. 10, 2000, at D2 (describing the reaction of the person in charge of name changes in military records as "[n]o dice . . . 'You're the man. You're the man of the house'").

39. Those states are California, Georgia, Hawaii, Iowa, Louisiana, Massachusetts, New York, and North Dakota. See *infra* note 44 and accompanying text.

40. See, e.g., 735 ILL. COMP. STAT. 5/21-101 (2008) (providing the guidelines for petitioning to have a name change).

41. See, e.g., CAL. CIV. PRO. CODE §§ 1277-1278 (2006), which no longer apply to marrying men due to the recent Name Equality Act of 2007, Cal. Assemb. B. 102 (Oct. 12, 2007). Under the old statutory regime, an individual who sought a name change had to file a petition with a court, publish notice of the application in a newspaper of general circulation, and appear in court to obtain approval. Court fees required for this process were in excess of \$300. See, e.g., California Political Desk, *Governor Signs Landmark Name Change Legislation*, CAL. CHRON., Oct. 12, 2007, <http://www.californiachronicle.com/articles/viewArticle.asp?articleID=40179>. Illinois charges a man wishing to take his wife's surname \$246 for a petition and another \$150 to publish the change in a newspaper; Connecticut charges \$150 for a court petition. Michael Rittner, *Man Fights to Take Wife's Name in Marriage*, L.A. INDEP. MEDIA CENTER, Jan. 13, 2007, <http://la.indymedia.org/news/2007/01/191537.php>. California recently changed its marriage name-change statute to permit an equal name-change process for marrying men, women, and domestic partners. Name Equality Act of 2007, Cal. Assemb. B. 102 (Oct. 12, 2007).

42. Michael Rosensaft, Comment, *The Right of Men to Change Their Names upon Marriage*, 5 U. PA. J. CONST. L. 186, 193-94 (2002). Rosensaft notes that six states give total discretion to their courts to decide whether to grant a name change, using phrases like "what a court shall deem right and proper." *Id.* at 193 n.39. An additional eleven states give almost total discretion to their courts, applying vague standards such as "if not against the public interest" or "for good reasons shown." *Id.* at 194 n.41.

43. See, e.g., Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 LAW & INEQ. 91, 96 n.9 (1985).

York, and North Dakota are basically uniform in that they allow marrying men to change their names like marrying women.⁴⁴ Most of

44. Excerpts of the name-change statutes of those states follow in pertinent part. Large portions of many of the statutes have been cut for simplicity and efficiency.

California:

Section 306.5 is added to the Family Code to read:

(a) Parties to a marriage shall not be required to have the same name. Neither party shall be required to change his or her name. A person's name shall not change upon marriage unless that person elects to change his or her name pursuant to subdivision (b).

(b)(1) One party or both parties to a marriage may elect to change the middle or last names by which that party wishes to be known after solemnization of the marriage by entering the new name in the spaces provided on the marriage license application without intent to defraud.

(2) A person may adopt any of the following middle or last names pursuant to paragraph (1):

(A) The current last name of the other spouse.

(B) The last name of either spouse given at birth.

(C) A name combining into a single last name all or a segment of the current last name or the last name of either spouse given at birth.

(D) A hyphenated combination of last names.

(3) (A) An election by a person to change his or her name pursuant to paragraph (1) shall serve as a record of the name change. A certified copy of a marriage certificate containing the new name, or retaining the former name, shall constitute proof that the use of the new name or retention of the former name is lawful.

Name Equality Act of 2007, Cal. Assemb. B. 102, sec. 7 (codified at CAL. FAM. CODE § 306.5 (2009)).

Georgia:

A spouse may use as a legal surname his or her: (1) Given surname or, in the event the given surname has been changed as provided in Chapter 12 of this title, the surname so changed; (2) Surname from a previous marriage ; (3) Spouse's surname; or (4) Surname as provided in paragraph (1) or (2) of this subsection in conjunction with the surname of the other spouse.

GA. CODE ANN. § 19-3-33.1 (1999).

Hawaii:

Upon marriage each of the parties to a marriage shall declare the middle and last names each will use as a married person. The last name or names chosen may be any middle or last name legally used at any time, past or present, by either spouse, or any combination of such names, which may, but need not, be separated by a hyphen.

HAW. REV. STAT. ANN. § 574-1 (LexisNexis 1993).

Iowa:

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.

IOWA CODE ANN. § 595.5 (West 2001).

Louisiana:

“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.” LA. CIV. CODE ANN. art. 100 (2002).

Massachusetts:

“[A] party to a marriage may adopt any surname, including but not limited to the present or birth-given surname of either party, may retain or resume use of a present or birth-given surname, or may adopt any hyphenated combination thereof.” GEN. LAWS ANN. ch. 46, § 1D (West 2008).

New York:

(b) Every application for a marriage license shall contain a statement to the following effect:

NOTICE TO APPLICANTS

(1) Every person has the right to adopt any name by which he or she wishes to be known simply by using that name consistently and without intent to defraud.

(2) A person’s last name (surname) does not automatically change upon marriage, and neither party to the marriage must change his or her last name. Parties to a marriage need not have the same last name.

(3) One or both parties to a marriage may elect to change the surname . . . after the solemnization of the marriage by entering a new name in the space below. Such entry shall consist of one of the following surnames:

(i) the surname of the other spouse; or

(ii) any former surname of either spouse; or

(iii) a name combining into a single surname all or a segment of the premarriage surname or any former surname of each spouse; or

(iv) a combination name separated by a hyphen, provided that each part of such combination surname is the premarriage surname, or any former surname, of each spouse.

(4) The use of this option will have the effect of providing a record of the change of name. The marriage certificate, containing the new name, if any, constitutes proof that the use of the new name, or the retention of the former name, is lawful.

N.Y. DOM. REL. LAW § 15 (McKinney 2003).

the statutes allow husbands and wives to keep their own surnames, adopt the last names of their spouses, or hyphenate their last names.⁴⁵ California also allows domestic partners to adopt each others' last names.⁴⁶

North Dakota:

1. Every person has the right to adopt any surname by which that person wishes to be known by using that surname consistently and without intent to defraud.
2. A person's surname does not automatically change upon marriage. Neither party to the marriage must change the party's surname. Parties to a marriage need not have the same surname.
3. One party or both parties to the marriage may elect to change the surname by which that party wishes to be known after the solemnization of the marriage by entering the new surname on the space provided on the marriage license application. The entry on the application must consist of one of the following surnames:
 - a. The surname of the other spouse;
 - b. Any former surname of either spouse;
 - c. A name combining into a single surname all or a segment of the premarriage surname or any former surname of either spouse; or
 - d. A combination name separated by a hyphen, provided that each part of the combination surname is the premarriage surname or former surname of either spouse.
4. Use of the option under subsection 3 has the effect of providing a record of the surname change. The marriage certificate containing the new surname, if any, constitutes proof that the use of the new surname, or the retention of the former surname, is lawful.

N.D. CENT. CODE § 14-03-20.1 (1996).

45. As Emens points out, however, the fact that the statutes give equal name-changing prerogative to men and women does not in fact mean that the statutes are written in a gender-neutral way. *See* Emens, *supra* note 4, at 854–61. Georgia's marriage forms, for example, still have a space for a woman's "maiden name," but no similar space for a man's birth name, which suggests a state norm of women being the parties who change their names upon marriage. *See* THEODORE R. SMITH, APPLICATION FOR MARRIAGE LICENSE, 5 GA. PLEADING, PRACTICE & LEGAL FORMS § 19-3-33 Form 1 (3d ed. 2007).

The choice of the word "maiden" versus "birth name" may itself implicate gender-specific expectations and norms, but the lack of a space for a man's birth name, regardless of what it should be called, suggests a state norm of women changing their names.

46. *See* Name Equality Act of 2007, Cal. Assemb. B. 102 (Oct. 12, 2007). As amended, section 298(d) of the Family Code provides in part that "[t]he Declaration of Domestic Partnership form shall contain an optional section for either party or both parties to indicate a change in name pursuant to Section 298.6." Name Equality Act of 2007, Cal. Assemb. B. 102, § 4 (codified at CAL. FAM. CODE § 298.6 (2009)). Section 298.6 provides a name change option upon registration as domestic partners identical to that for marrying couples, substituting the words "domestic partners" where necessary. *Id.*

*C. Gender Discrimination and Equal Protection Under the
Constitution*

Three constitutional principles are implicated when dealing with the right of a man to change his name upon marriage: (1) equal protection under the Fourteenth Amendment;⁴⁷ (2) freedom of expression under the First Amendment;⁴⁸ and (3) privacy rights implicit in the First, Fourth, Fifth, and Ninth Amendments.⁴⁹ This Note assesses whether it is unconstitutional, on equal protection grounds, to allow a marrying woman to change her surname without allowing a marrying man to change his surname through the same process.

Gender discrimination cases challenged on equal protection grounds are analyzed through the lens of intermediate scrutiny.⁵⁰ To satisfy intermediate scrutiny, “classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”⁵¹ Sex-based classification resulting in “differential treatment or denial of opportunity for which relief is sought” can be supported only by an “exceedingly persuasive” justification.⁵² Regardless of whether women or men are disadvantaged, any gender classification must meet the intermediate scrutiny standard.⁵³ This standard applies both to facially

47. U.S. CONST. amend. XIV, § 1.

48. U.S. CONST. amend. I.

49. U.S. CONST. amends. I, IV, V, and IX; *see* *Roe v. Wade* 410 U.S. 113, 152–53 (1973) (finding that a right to personal privacy is not explicitly found in the Constitution, but roots of that right can be found in the First, Fourth, Fifth and Ninth amendments in varying contexts). All three potential constitutional issues are noted by Rosensaft, *supra* note 42, at 186, 195, 207, 211. *See* *Henne v. Wright*, 904 F.2d 1208, 1216 (8th Cir. 1990) (Arnold, J., concurring) (“The question could well be analyzed as a First Amendment issue. What I call myself or my child is an aspect of speech. When the State says I cannot call my child what I want to call her, my freedom of expression, both oral and written, is lessened.”); Margaret Eve Spencer, *A Woman’s Right to Her Name*, 21 UCLA L. REV. 665, 684 (1973) (arguing that a married woman who wishes to keep her birth name is generally making a statement that she rejects certain aspects of the traditional female role or stereotype).

50. *Craig v. Boren*, 429 U.S. 190, 210 (1976) (Powell, J., concurring). The Supreme Court established this standard in *Craig v. Boren*. *Id.* at 210 (finding an Oklahoma statute that permitted women to purchase beer at a younger age than men to be unconstitutional under the equal protection clause).

51. *Id.* at 197.

52. *United States v. Virginia*, 518 U.S. 515, 532–33 (1996).

53. *Craig v. Boren* itself was a challenge involving a statute discriminating against men.

discriminatory statutes and statutes that are facially neutral but discriminatory in effect.⁵⁴ Statutes regarding marital name-change classify affected parties according to sex, resulting in differential treatment; they are facially discriminatory, as they apply only to marrying women, and thus intermediate scrutiny is appropriate.⁵⁵ At the very least, the statutes are effectively discriminatory because women are the only ones permitted to change their names pursuant to them.⁵⁶

What would constitute an “important governmental interest,” as required by intermediate scrutiny? Only one federal case in California has dealt directly with denial of a man’s equal protection right in changing his name upon marriage.⁵⁷ This case was settled without a decision on the merits.⁵⁸ Other analogous cases illuminate the right of women to retain their names upon marriage, the right of

429 U.S. at 210. Although Justice Rehnquist found this troubling in his dissent, later cases reaffirmed the principle that discrimination against men or women must meet the intermediate scrutiny standard of review. *Id.* at 219 (Rehnquist, J., dissenting) (“Most obviously unavailable to support any kind of special scrutiny in this case, is a history or pattern of past discrimination [against men]. . . .”); *cf.* Michael M. v. Sonoma County Super. Ct., 450 U.S. 464, 468 (1981) (using intermediate scrutiny to analyze a statute making men alone criminally liable for statutory rape); Califano v. Goldfarb, 430 U.S. 199, 210–11 (1977) (applying intermediate scrutiny to a statute that automatically paid survivor benefits to widows, but paid them to a widower only if he had been receiving at least half of his support from his wife).

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

55. Rosensaft, agreeing that intermediate scrutiny applies, also notes that statutes covering name change upon divorce are facially discriminatory. Rosensaft, *supra* note 42, at 196–97.

56. This is the position adopted by Rosensaft. *Id.* at 195.

57. Buday v. California, No. 2:06-CV-08008, 2007 DOCK-CA-CDCT WL (C.D. Cal. filed Dec. 15, 2006). Plaintiff Buday is a man who was denied the right to change his surname to that of his wife upon marriage. *Id.* Buday asserted unlawful discrimination on the basis of sex and a denial of equal protection under the Fourteenth Amendment, as well as denial of his fundamental right to personal identity and autonomy under 42 U.S.C. § 1983 (2007). *Id.*; *see also infra* notes 58, 108.

58. Plaintiff Michael Buday and his wife, Diana Bijon, reached a settlement with the California Department of Motor Vehicles and Department of Health Services to allow Buday to take his wife’s last name, officially becoming Michael Bijon. Press Release, ACLU of Southern California, 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/releases/view/102870>; *see also supra* note 39 and *infra* note 108.

parents to name their children, and the right of children to bear a surname different from their fathers.⁵⁹ In such cases, the government has or could have asserted the following interests: custom, preservation of the family unit, administrative convenience, prevention of fraud, or de minimis injury.⁶⁰ These potential governmental interests (de minimis injury being more of a potential argument than an interest) must also be “substantially related” to the state’s objectives in not providing equal name-change rights to marrying men and women.⁶¹

II. ANALYSIS

A. Equal Protection Under the Constitution

The potential governmental interests involved in not permitting husbands to change their names statutorily like wives include custom, preservation of the family unit, administrative convenience, prevention of fraud, and de minimis injury.⁶²

The argument for custom as a sufficiently important governmental interest is that because men historically have not changed their surnames upon marriage, there has never been a need for a statute permitting such a name-change, and thus there is no reason to change the status quo.⁶³ Custom itself does not present a compelling argument because “[t]o subject different groups to disparate treatment because society historically has done so undermines the very purpose of equal protection.”⁶⁴ If custom controlled equal protection issues,

59. See *O’Brien v. Tilson*, 523 F. Supp. 494, 496 (E.D.N.C. 1981) (striking down a statute forcing a child to bear his father’s surname as an unlawful “classification based on gender”); *Forbush v. Wallace*, 341 F. Supp. 217, 222–23 (M.D. Ala. 1971) (rejecting an equal protection challenge to a statute that required a wife to take her husband’s surname upon marriage); *Jech v. Burch*, 466 F. Supp. 714, 719 (D.C. 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.”).

60. Rosensaft analyzes all of these arguments in depth. See Rosensaft, *supra* note 42, at 201–09.

61. *Id.* at 200–01.

62. See *supra* note 42 and accompanying text.

63. For a discussion of the custom of marital name change, see Emens, *supra* note 4, at 770–71.

64. Omi Morgenstern Leissner, *The Name of the Maiden*, 12 WIS. WOMEN’S L.J. 253, 263

then interracial marriage statutes—and a host of other discriminatory laws—would never have been stricken down.⁶⁵

Perhaps, then, preservation of the family unit would be a sufficient justification under intermediate scrutiny for disallowing men to change their names upon marriage. This argument is based upon the idea of the inherent value of name continuity within families.⁶⁶ This argument fails for two reasons. First, marrying men and women do not have to have the same last name according to law.⁶⁷ Second, even if one thinks that a mother, father, and child should have the same last name, this fails to explain why that family should not be able to choose the mother's birth surname as its family name. Here, the custom argument intersects; the only way to conclude that the father's last name is somehow the "correct" one is to assert that traditionally the father's last name has become the family's last name. This too would fail under an equal protection analysis because no law requires that (1) a family have the same last name; (2) the family's name be that of the father; or (3) women take their husbands' last name.⁶⁸ Additionally, married men have the opportunity to change their surnames through a court proceeding.⁶⁹ While this is certainly more arduous and provides no guarantees, the

(1997).

65. See *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that Virginia's anti-miscegenation statutes violated the Fourteenth Amendment).

66. See Rosensaft, *supra* note 42, at 201–02.

67. Leissner and Rosensaft also assert that the preservation of family unit justification was based on the concern that children with different names than their mothers would be considered illegitimate and carry that stigma with them. Leissner, *supra* note 64, at 285; Rosensaft, *supra* note 42, at 201. First, this stigma would not attach if husbands were permitted to take their wives' last names, because both parents would have the same last name. Rosensaft, *supra* note 42, at 201. Second, in contemporary society, it is not uncommon for women and their children to have different last names due to divorce, multiple marriages, or independent choice of the mothers. *Id.* at 201–02. Any stigma that might attach to such a difference today would seem to be less than that of the past. *Id.* at 202.

68. There are interesting state statutes related to naming children. Jessica R. Powers, Note, *An Illegitimate Use of Legislative Power: Mississippi's Inappropriate Child Surname Law in Paternity Proceedings*, 8 U.C. DAVIS J. JUV. L. & POL'Y 153 (2004) (criticizing a statute that sets a default practice of changing a nonmarital child's surname to the father's surname following establishment of paternity). Some commentators suggest that name-change standards and laws for children continue to reflect paternal bias. See generally Merle H. Weiner, "We Are Family": Valuing Associationalism in Disputes over Children's Surnames, 75 N.C. L. REV. 1625, 1735–60 (1997).

69. See *supra* Part I.

existence of such an option shows that the government's interest in preservation of a family unit is not sufficiently related to the lack of statutory provision permitting marrying men to change their last names.

Prevention of fraud, in contrast, does seem like a legitimate state interest.⁷⁰ In fact, a lack of fraudulent intent is required for a general name change petition in all states.⁷¹ However, prevention of fraud is not "substantially related" to the state's objective as required by intermediate scrutiny. The most obvious argument to the contrary is that women already are permitted to change their names upon marriage. It is unlikely that men will get married solely to change their names and hide their identities.⁷²

Administrative convenience also fails under an intermediate scrutiny analysis. This argument has been asserted in child naming cases like *O'Brien v. Tilson*,⁷³ where a federal district court struck down a North Carolina statute requiring a child to bear the father's last name as an illegal "classification based on gender."⁷⁴ The government argued that permitting a child to have a different last name would complicate record-keeping of newborns and pose difficulties in maintaining accurate health records.⁷⁵ To this the court responded: "In this age of electronic data processing, the Court cannot conclude that permitting plaintiffs to do as they wish would render it impossible or even minimally more costly or difficult for the State . . . to keep track of its new citizens."⁷⁶

70. Prevention of fraud has been found to be a legitimate state interest. *Henne v. Wright*, 904 F.2d 1208, 1215 (8th Cir. 1990) (describing prevention of parents' "creation of a false implication of paternity" as a legitimate state interest).

71. See, e.g., the marital name-change statutes of California, Name Equality Act of 2007, Cal. Assemb. B. 102 (Oct. 12, 2007); New York, N.Y. DOM. REL. LAW § 15 (McKinney 2003); North Dakota, N.D. CENT. CODE § 14-03-20.1 (1996).

72. Rosensaft, *supra* note 42, at 204.

73. 523 F. Supp. 494 (E.D.N.C. 1981).

74. *Id.* at 496. The parents in this case wanted to follow the Swedish custom of combining the father's last name with the suffix "son." *Id.* at 495. In this case, the father's last name was "Arne," and the parents wanted their son's last name to be "Arneson." *Id.*

75. *Id.* at 496. The court never articulated the standard of review, because "even under the most relaxed of standards . . . the statute proves to be patently defective." *Id.*

76. *Id.* at 497.

In another case, *Jech v. Burch*,⁷⁷ a mother and father had different last names and wanted their child's last name to be a combination of portions of each parent's surname.⁷⁸ The statute in question required a child to have either the father's last name, the mother's last name, or a hyphenated combination of both, and the state argued that the parents' plan would require the state to change its entire record-keeping system, which would "involve[] the expenditure of substantial public funds."⁷⁹ The court struck down the statute, holding that the state's purported interest in administrative convenience failed to survive even rational basis review.⁸⁰ As Michael Rosensaft notes, "[I]n today's technological age, this argument loses even more weight, as computerized records can easily be changed and modified without significant effort."⁸¹ Ultimately the only conclusion to draw from *O'Brien* and *Jech* is that administrative convenience in the maintenance of name and health records is not a government interest that withstands intermediate scrutiny.

The government could also assert that the harm suffered by marrying men in not having a statutory right equal to that of marrying women to change their last names is *de minimis*. Rosensaft sees three potential ways this argument can be advanced: (1) there is in fact no injury in not statutorily allowing a husband to take his wife's last name; (2) the common law permits a husband to change his last name to that of his wife; and (3) general name-change statutes permit a husband to change his last name to match his wife's.⁸²

First, names are important in our society, and denying marrying men the right to change their names in a way identical to marrying women is more than a *de minimis* injury. As Rosensaft puts it, "[A] name is a symbol for one's self that carries with it personal identity,

77. 466 F. Supp. 714 (D. Haw. 1979).

78. *Id.* at 715. The mother's last name was Jech, the father's was Befurt; the desired last name for their child was Jebef. *Id.*

79. *Id.* at 715, 720.

80. *Id.* at 714. The court said the state's argument that it would be too difficult to keep records was "ludicrous," because "[f]or reasons which have still not been explained satisfactorily to [this court], the department is completely defeated by the problem of indexing a child's surname . . . which does not belong to either of the parents." *Id.* at 718, 720.

81. See Rosensaft, *supra* note 42, at 203.

82. See *id.* at 205.

familial ties, and ethnic history.”⁸³ Parents spend significant portions of time carefully choosing names for children. Feminist activists have long fought against requirements forcing a married woman to change her last name.⁸⁴ Nazi Germany forced Jewish persons to take specific middle names if their original names were not “Jewish enough” so that the Jews were readily identifiable.⁸⁵ The power to name matters. The denial of the right to control one’s name is not de minimis.⁸⁶

Second, although most states do recognize a common law right to change one’s name through usage, the common law right to use that name is practically useless in modern society unless the couple hopes to avoid taxes or intends to live without valid driver licenses or credit cards.⁸⁷ The common law right does not provide the kind of official documentation of name-change required for modern activities.⁸⁸ The potential to change one’s name through common law is so

83. *Id.*

84. “I guarantee you that the first generation of women who grow up without scribbling ‘Mrs. Paul Newman’ all over their notebooks ‘just to see what it looks like’ is going to think [the feminists who fought against mandatory name change for women] were mad. It is a very odd and radical idea indeed that a woman would nominally disappear just because she got married.” Emens, *supra* note 4, at 767.

85. Robert M. Rennick, *The Nazi Name Decrees of the Nineteen Thirties*, 18 NAMES 65, 76, 80 (1970) (noting that Jewish males were required to take the middle name “Israel” and Jewish women to take the middle name “Sarah”).

86. The first known American woman to retain her birth name after marriage was Lucy Stone (1818–1893), an American suffragist and anti-slavery advocate who campaigned for equality and name choice freedom. Lucy Stone League, <http://www.lucystoneleague.org/lucy.html> (last visited Mar. 30, 2009). In her honor, the Lucy Stone League was formed in the 1920s, dedicated toward equal naming rights and more general feminist aims. Lucy Stone League, *Who Are We?*, <http://www.lucystoneleague.org/> (last visited Mar. 30, 2009). The Lucy Stone league was the predecessor to the modern-day National Organization for Women (“NOW”). Leissner, *supra* note 32, at 389.

87. Oklahoma made statutory name change procedures exclusive in *Sneed v. Sneed*, 585 P.2d 1363, 1365 (Okla. 1978). For this state, the “common law name-change being useless” argument is not applicable. For all the states, however, “[t]he realities of contemporary society requires [sic] a state-sponsored corroboration to establish our identity.” Rosensaft, *supra* note 42, at 206. For example, “[b]anks and any other financial institutions must have some concrete evidence of name change.” *Id.* at 206 n.111.

88. Rosensaft, *supra* note 42, at 206. As the California Attorney General put it,

the inability to establish one’s name for purposes of life’s daily transactions, although perhaps only occasionally resulting when sole reliance is placed on the common law method, can be a substantial inconvenience when it occurs. Such are the circumstances in which one may be led to question the “validity” of a common law change of a name.

83 Op. Cal. Att’y Gen. 00-205, 3 (2000).

impractical that the injury suffered by men lacking a statutory right is not de minimis.⁸⁹

Third, whereas it is a woman's statutory right to change her last name upon marriage, a man must go through a court proceeding in order to achieve the same result.⁹⁰ Such a proceeding is more costly, time-consuming, and does not even guarantee results, as judges have large discretion in determining if such a name-change is granted.⁹¹ It can cost hundreds of dollars to go to court to change one's name, including court and attorney fees.⁹² Furthermore, many states give the judge full discretion to decide whether to permit a name change.⁹³ It is entirely possible that a particular judge might think it improper for a husband to adopt his wife's surname. Marrying women, on the other hand, do not go through any of this. Such added expense and uncertainty is more than de minimis injury for marrying men.

B. Why a Majority of Marrying Women Adopt the Last Names of Their Husbands

People's proffered reasons for changing or keeping their last names vary widely. While there are often multiple reasons for such a decision,⁹⁴ there seem to be three general explanations for why most marrying women change their surnames: (1) name change is the

89. Rosensaft, *supra* note 42, at 206.

90. *Id.* at 207–08.

91. *Id.*

92. *See, e.g.*, CAL. CIV. PRO. §§ 1277–78 (2006), previously requiring court fees in excess of \$300 for a name change petition. Currently in Nueces County, Texas, the court costs for an adult name change are \$226. Court Cost Fees Effective Jan. 1, 2008, at 2, http://www.co.nueces.tx.us/districtclerk/pdf/civil_filing_fees.pdf (last visited Mar. 30, 2009). Sometimes the additional cost of a newspaper advertisement must be included. *See* Rosensaft, *supra* note 42, at 208. In Colorado, for example, a person changing his or her name must give notice in a local newspaper “at least three times . . . within twenty days after the court orders publication.” COLO. REV. STAT. § 13-15-102 (2008).

93. Rosensaft, *supra* note 42, at 208. In Washington, for example, a court has full discretion in deciding whether to accept a name change. WASH. REV. CODE § 4.24.130 (2007).

94. For example, a religiously oriented Christian website cites three reasons for which a bride should take a groom's last name: (1) protection of family and wealth; (2) designation of a new life direction; and (3) acknowledgement of God's presence and endorsement of marriage. Laura Dawn Lewis, *Why Brides Change Last Names*, Oct. 3, 2005, <http://www.couplescompany.com/Features/ChangeName.htm>. It is unclear why these should explain a woman's choice to change her name, but not a man's.

assumption when women do not question their options; (2) social pressures; and (3) bureaucratic pressures. All three are interrelated, and also could explain why marrying men keep their surnames.

First, the assumption explanation relates to the fact that women grow up with the expectation of changing their names upon marriage, and men do not.⁹⁵ Girls are generally raised with the assumption that they will grow up, marry, and become “Mrs. His Name,” instead of keeping their birth names.⁹⁶ This is likely reinforced through the media, by parents, and through everyday experiences with adults.⁹⁷ Additionally, if a question such as “Are you changing your name?” is ever asked of a betrothed person, the question is inevitably directed toward the woman.⁹⁸ Doubtless this is because it is so widely

95. See Emens, *supra* note 4, at 775–80. “Imagine two people. One grew up knowing from a young age that his name is his to keep, and that it won’t change by virtue of his relationships. . . . The second person grew up knowing from a young age that her name would disappear and be replaced by another name, if and only if she were lucky enough to be loved enough to be given a new name.” *Id.* at 778.

96. See *id.* at 776–78. “With new boys she met, she scribbled out her new name and dreamily imagined herself as Mrs. Somebody Else.” *Id.* at 778.

97. Common experience tells us that many children have parents and encounter other married adults with the same last name, the woman having changed hers. Only 10% of married women in the U.S. have as their last names their own birthnames or any name other than their husbands’ birthnames. See Brightman, *supra* note 23 and accompanying text. It is difficult to say how reliable these numbers are—another study shows that fewer than 5% of women over two generations did anything other than take their husbands’ name at marriage, though that study excluded women who divorced during that time frame. See Scheuble & Johnson, *supra* note 23, at 727. Given the general agreement of these studies that the vast majority of marrying women take their husbands’ last names, it is reasonable to conclude that most girls grow up with mothers who took the girls’ father’s (or some other man’s) last name, and that other adult married women they encounter generally have their husbands’ last names.

98. See Emens, *supra* note 4, at 775. Note also the *New York Times* wedding pages’ traditional practice of notice, as the marked answer to an implied question, “the bride will be keeping her name.” *Id.* Answers depend upon the question asked, but the question is rarely asked of men. Performing a simple Google Scholar search for studies of name change upon marriage reveals that the vast majority of such studies deal with women’s choices, not men’s. See, e.g., Penelope Wasson Dralle & Kathelynn Mackiewicz, *Psychological Impact of Women’s Name Change at Marriage: Literature Review and Implications for Further Study*, AM. J. FAM. THERAPY, Fall 1981, at 50–55, available at <http://www.informaworld.com/smpp/content~content=a779557148~db=all>. Performing a second Google search trying to find articles discussing whether people should change their name upon marriage similarly reveals that nearly all such articles are directed toward women. See, e.g., Sheri and Bob Stritof, *Changing Your Name After Marriage*, ABOUT.COM, <http://marriage.about.com/cs/namechange/a/namechange.htm> (dealing ostensibly in a gender-neutral way with marital name change, but referring only to females: “It is not unusual today for a woman to keep her maiden name professionally, and to

accepted that marrying men keep their surnames and marrying women may not. The assumptions with which girls grow up and the way that questions about name-change are asked mean that a woman may never question whether she will change her last name upon marriage, making her name change a foregone conclusion. And if she does question her options, the second factor—social pressure—may nonetheless intervene.

Social pressure is closely intertwined with the “default” reason. The two explain each other: marrying women may not ask themselves whether they wish to change their surname largely because of the social norm not to change their surnames; this social norm is supported by history; and social pressures abound to reinforce the norm. At the same time, the social pressures for women to keep their names upon marriage exist because women do not question the deeply-ingrained norm.

There are many kinds of social pressures urging women to change their surnames upon marriage, including history, tradition, and religion.⁹⁹ Additionally, women are concerned about the continuity of family name, both over generations and within the family.¹⁰⁰ Moreover, there are social judgments and pressures to simply comply in with the norm.¹⁰¹

As for tradition, doing something simply because it is how it has been done in the past does not mean that it is the best way—or constitutional.¹⁰² People and times evolve, and following tradition for

use her married name socially. Whether or not to change names is one of the first decisions a couple needs to make.”)

99. For an example of religious pressure, see *supra* note 94 and accompanying text.

100. Emens discusses continuity as a factor to consider in contemplating marital name changes and in determining whether a new system of “biphenation” could help solve the continuity issue. See generally Emens, *supra* note 4.

101. “Social meanings act to induce actions in accordance with social norms, and thereby impose costs on efforts to transform social norms.” Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 998 (1995). For a study of judgments made against those who are outside of a social category, see Penelope Oaks & John C. Turner, *Distinctiveness and the Salience of Social Category Memberships: Is There an Automatic Perceptual Bias Towards Novelty?*, 16 EUR. J. SOC. PSYCHOL. 325 (1986).

102. Similarly, “a history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional.” *Hernandez v. Robles*, 855 N.E.2d 1, 33 (N.Y. 2006).

tradition's sake is unavailing in light of modern conceptions of equality, the importance of names, and personal autonomy.

Continuity of a family's last name over time and within the family is a concern because many people want to be connected to their family histories and share a name with their relatives and immediate family members.¹⁰³ Of course, this fails to answer the question of why the inherited name should be the man's. Women have as much family history as men, and consistently choosing the man's last name respects only half of the family tree.

Beyond family history, additional forces inform name choice—or lack thereof. Peer judgment and pressures are very real concerns. By and large, people want to be “normal,” and do not want the hassle of explaining something out of the norm.¹⁰⁴ If most women change their names upon marriage, it can create an uncomfortable social situation for those who do not. Of course, it is not only marrying women who are affected by community judgment; women who already have been married may advocate this norm to others so that they themselves are not judged for being “behind the times” or unenlightened.¹⁰⁵

Finally, there are great bureaucratic pressures for women to change their names upon marriage. First, in most states, it is easier for women to change their last names than for men to do so.¹⁰⁶ Most laws are designed for women to alter their surnames, and not vice versa.¹⁰⁷ Again, this is closely intertwined with the other two explanations: the legal framework informs the social atmosphere and contributes to the assumptions that a woman will change her last name upon marriage, and vice versa.

103. See generally Emens, *supra* note 4.

104. See Lessig, *supra* note 101, at 998; Oaks & Turner, *supra* note 101, at 325–44.

105. Many people have strong feelings about marrying women changing their names. For example, “I’m afraid that women who change their names are blindly promoting women as second-class persons, though I suspect that they themselves don’t think they are doing this. . . . To me the difference is whether the woman thought about the choice—just blindly doing anything is not acceptable.” Tammy Jo Eckhart, *The Choice and Power of Surnames*, *SISTER*, 1996–97, <http://www.columbia.edu/cu/sister/Surnames.html>. During a talk on her article, *Changing Name Changing*, Emens was asked “Do you judge women who make some naming choices rather than others?” Emens, *supra* note 4, at 766. This exchange shows that at least some women harbor concerns over being judged for changing their names.

106. See Emens, *supra* note 4, at 809–23 (describing the legal defaults for men and women, and the processes for women and men to change their names upon marriage).

107. *Id.*

C. The Effect of a Lack of Statutory Authority for Marrying Men to Change Their Surnames and Its Effects on Marrying Women's "Choice" of Surname

The assumptions, social pressures, and bureaucratic pressures that influence women and men regarding their marital surnames are not independent. The lack of statutory authority for marrying men to change their surnames necessarily affects marrying women's "choice" of surnames. For a couple that has decided that, despite the contrary social pressures and assumptions, the husband will change his name upon marriage, the fact that the laws are structured to discourage such a result can have the ultimate effect of preventing a man's name change.¹⁰⁸ Even if a marrying man wants to change his last name despite the hurdles, such a result is not assured when his only recourse is a court order that lies within the discretion of a judge.¹⁰⁹ If a marrying couple wishes to share a last name, or wishes to share a last name with any potential children, the relative simplicity of a woman changing her last name will be more attractive and thus the more likely outcome.

Because women have the ability to either keep their last names or statutorily change them upon marriage, it is easy to say that they have a choice in the matter. However, the combination of social pressures, assumptions, and bureaucratic pressures make this "choice" more like a foregone conclusion. The fact that men are denied equal protection by not having a statutory right to change their name is one of many factors diminishing women's choice and personal agency in determining their last names upon marriage. The same could be said for men and their "choice" in surname.

This matters because the choice of something as important as a name should be based on rational, individual goals and reasons,

108. Even for the stout of heart, obtaining a name change can be costly. Consider Michael Buday of California, who wanted to take his wife's last name. *See* First Amended Complaint for Injunctive and Declaratory Relief, ¶ 16, *Buday v. California*, No. 2:06-CV-08008, 2007 DOCK-CA-CDCT WL (C.D. Cal. Dec. 15, 2006). The couple tried to fill out paperwork that a marrying woman would fill out to effect a name change, but the state government would not permit it. *Id.* ¶¶ 15–27. Refusing to go through the process and expense of a court order, Buday brought suit, alleging that differently worded forms constituted systematic sex-based classification in derogation of equal protection. *Id.* ¶¶ 28–31.

109. *See supra* note 42 and accompanying text.

instead of social norms, assumptions, and bureaucratic barriers. Such choice is especially important for women because of the historical context: upon marriage, wives' identities were originally completely eclipsed by their husbands', and women have historically been placed in positions subservient to men.¹¹⁰ While the underlying attitudes have undergone great change, giving women a true choice in their selection of surnames recognizes them as fully independent, equal persons.

III. PROPOSAL

Attaining truly equal treatment of men and women as independent and equal persons is not simple. A start would be to recognize men's equal protection rights under the Fourteenth Amendment by giving them the statutory right to change their last name upon marriage in all fifty states.

Men have such statutory rights in eight states,¹¹¹ and the text from those statutes, especially those of New York and California, is a helpful template for other states.¹¹² For example, New York Domestic Relations Law § 15 requires marriage license application forms to inform prospective spouses "that neither of them must change their names, that either can, and that there are a range of naming options available to them."¹¹³

There are minor ways that the statute could be improved. As Professor Emens suggests, the "information about the bride and groom, and their parents, should be asked in ways that do not subtly assert inegalitarian social conventions."¹¹⁴ For example, instead of requesting the "father's name" and the "mother's maiden name," the form should ask for each parent's "name" and "birth name (if different)."¹¹⁵ Such a change in forms would undoubtedly have an impact on the social assumptions and pressures faced by marrying

110. *See supra* INTRODUCTION.

111. Those states are California, Georgia, Hawaii, Iowa, Louisiana, Massachusetts, New York, and North Dakota. *See supra* note 44 and accompanying text.

112. *See supra* note 44 and accompanying text.

113. Emens, *supra* note 4, at 856; *see supra* note 44 and accompanying text.

114. Emens, *supra* note 4, at 857.

115. *Id.*

men and women regarding name change.¹¹⁶ Small-scale changes such as this would ease the transition to a more equal society by removing one bureaucratic obstacle; however, the existence of a statutory right for men to change their last names upon marriage in all states is a necessary precondition, and one mandated by the Constitution. In enacting such legislation, the remaining forty-two states should pay careful attention to the word choice and framing of the statute so as to maximize equality among all citizens.¹¹⁷

CONCLUSION

Men are denied equal protection under the laws by not being granted a statutory right to change their last names upon marriage. Marrying men possess such a right in only eight states; in the remaining forty-two, men must obtain a court order to change their surnames and pay potentially hundreds of dollars in court costs and attorney's fees. The increased difficulty marrying men face in adopting a different surname, combined with the pervasive social customs of husbands keeping their surnames and wives changing theirs, and the desire of many married couples to share a last name, has two main effects: fewer men change their names upon marriage, and fewer women keep their surnames upon marriage. This makes name change less of a "choice" for both men and women and more of a forced decision. Adoption of statutes granting truly equal opportunities for men and women to change their last names upon marriage would result in greater personal agency in the choice of a name.

The ability to choose one's name is an important indicator of individual independence and self-identity. This is especially important for women in light of historical discrimination and coverture. Women have been considered subservient to the desires and will of men in the past, and it is important to recognize women's independent desires and personhoods. This is not to say that a wife taking her husband's last name indicates that the wife is somehow

116. *See id.* at 854–59 (addressing the impact of social and legal defaults, including framing, forced choosing, and desk-clerk law on a person's choice of last name upon marriage).

117. *Id.*

less of a person. Rather, such a choice should truly be a choice and not a product of legislative and social constraints based on an antiquated conception of women as second-class citizens. Such legislative and social constraints are a form of institutional sexism, negatively affecting the individual personhood of both men and women.

Changing state statutes will not create immediate equality between men and women. But laws affect society, and if name changing statutes are altered to present equal opportunities for husbands and wives, the general population may begin to embrace that ideal. Giving marrying men the right to change their last names is but a small and justified step toward respecting women and men as equals.