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STUDENT NOTES

DOMESTIC RELATIONS—THE RIGHT OF A MARRIED WOMAN TO RETAIN HER MAIDEN NAME

In light of the growing concern for women's rights in recent years, the historical aspects of some present-day legal and social assumptions and customs need to be re-examined to determine just exactly what those rights are and upon what foundation they rest. Such a re-examination should begin with an inquiry into the question of whether a woman must assume her husband's surname upon marriage. Since most women choose to assume their husbands' surnames, the significance of this issue may be overlooked; but, recognition of legislation controlling discriminatory practices in employment, female career-mindedness, and the proposed equal rights amendment¹ suggests the magnitude of the problem. An analysis of the historical roots of the practice of adopting marital surnames should indicate that such practice is no longer mandated by existing law.

I. SURNAMES GENERALLY

From before the eleventh century in England until about the time of the Norman Conquest, there was no such thing as a surname;² each person was identified only by his Christian name. With an increase in population, however, the adoption of surnames became an acceptable means of less-confused identification, although such practice was not prevalent until the middle of the fourteenth century.³ Since names were used primarily for identification, a man was generally known by the name of his estate or the place where he was born. Often, the occupation became the surname; for example, John the Smith became John Smith. Among other groups of people, a physical characteristic or some personal attribute gave rise to a surname; for example, Little, Moody, or Whitehair. A son was distinguished from his father by

¹ H.R.J. Res. 208, 92d Cong., 2d Sess. (1972).

² See *Ex parte Snook*, 2 Hilt. 566 (N.Y. Ct. C.P. 1859); Arnold, *Personal Names*, 15 YALE L.J. 227 (1905); Note, *The Right of a Married Woman to Use Her Birth-Given Surname for Voter Registration*, 32 MD. L. REV. 409 (1973).

³ *Ex parte Snook*, 2 Hilt. 566, 568 (N.Y. Ct. C.P. 1859).

adding "son" as a suffix to the father's Christian name; thus, Paul, Robert's son, was abridged to Paul Robertson. The Normans added "Fitz" to the father's name to designate the son; for example, Fitzsimon. The Celts of Ireland and Scotland distinguished the son with "Mac" and the grandson with "O" which resulted in such surnames as MacHenry and O'Henry.⁴

Although statutes were adopted in 1465 in England requiring the use of surnames, each member of the family group did not necessarily bear the same surname. Not until the reign of Henry VIII did the use of hereditary family names become widespread due to a requirement that full names, including surnames, be recorded at birth, marriage, and death.⁵ Still there was no law requiring that a certain surname be taken or that all family members adopt the same name. Nor was there a law prohibiting a man from adopting as many surnames during the course of his lifetime as he chose.⁶ Therefore, the custom of a woman taking her husband's name, and the husband's name thus becoming the family name, "was brought about without any positive provision of law."⁷ Responsibility for the emergence of this custom most probably rests with the common law fiction that since the husband and wife were one, and the one was the husband,⁸ then "a single name should designate this unit, the name of the husband."⁹

Today, most authorities are quick to point out that at common law a woman's change of name upon marriage was acquired by *repute*.¹⁰ Any name could be adopted as a legal name for any non-

⁴ *Dunn v. Palermo*, 522 S.W.2d 679, 681 (Tenn. 1975).

⁵ *Ex parte Snook*, 2 Hilt. 566, 571 (N.Y. Ct. C.P. 1859); E. SMITH, *THE STORY OF OUR NAMES* 39 (1970). See also W. BOWMAN, *THE STORY OF SURNAMING* (1973).

⁶ "It is universally recognized that a person may adopt any name he may choose so long as such change is not made for fraudulent purposes." *Pierce v. Brushart*, 153 Ohio St. 372, 380, 92 N.E.2d 4, 8 (1950). "If there is no statute to the contrary, a person may adopt any name by which he may become known, and by which he may transact business and execute contracts and sue or be sued." *Romans v. State*, 178 Md. 588, 597, 16 A.2d 642, 646 (1940). "Where a person is as well known by one name as by another, the use of either is sufficient." *Gillespie v. Rogers*, 146 Mass. 610, 16 N.E. 711 (1888).

⁷ *Ex parte Snook*, 2 Hilt. 566, 571 (N.Y. Ct. C.P. 1859).

⁸ W. BLACKSTONE, *COMMENTARIES* *189 (B. Gavit ed. 1941).

⁹ Comment, *Married Woman's Right to Her Maiden Name: The Possibilities for Change*, 23 BUFF. L. REV. 243, 245 (1973).

¹⁰ "When a woman on her marriage assumes, as she usually does in England, the surname of her husband in substitution for her father's name, it may be said that she acquires a new name by *repute*. The change

fraudulent purpose provided that it actually identified the person using it.¹¹ Although the practice of a woman taking the husband's name became deeply embedded in custom and tradition, there was no English law requiring it. Indeed, there were numerous examples of a man taking his wife's surname, especially if an inheritance was through the wife's family. Nor was it uncommon for children to assume their mother's birth name if she were prominent.¹²

The custom of male predominance came to America along with many other English traditions, and consequently, women today generally assume their husbands' surnames upon marriage. Many jurisdictions, however, have erroneously interpreted the English tradition as a rule of law rather than as an optional custom.¹³

II. CASE LAW

The confusion surrounding married women's surnames stems primarily from the case of *Chapman v. Phoenix National Bank*¹⁴ in which the court stated:

of name is in fact, rather than in law, a consequence of the marriage. Having assumed her husband's name she retains it, notwithstanding the dissolution of the marriage by decree of divorce or nullity, unless she chooses thereupon to resume her maiden name or acquires another name by reputation. On her second marriage there is nothing in point of law to prevent her from retaining her first husband's name." 19 HALSBURY'S LAWS OF ENGLAND § 1350 at 829 (3rd ed. 1957). (Emphasis added.)

"In England, custom has long since ordained that a married woman takes her husband's name. This practice is not invariable; nor compellable by law. . . ." M. TURNER-SAMUELS, *THE LAW OF MARRIED WOMEN* 345 (1957).

"[A name] derives its whole significance from the fact that it is the mark or *indicia* by which [a person] is known." *Ex parte Snook*, 2 Hilt. 566, 568 (N.Y. Ct. C.P. 1859).

¹² Lamber, *A Married Woman's Surname: Is Custom Law?*, 1973 WASH. U.L.Q. 779, 781.

¹³ See note 19 *infra*.

¹⁴ 85 N.Y. 437 (1881). Verina Chapman, a married teacher from South Carolina, held eighty-four shares of stock in a New York bank which she had purchased under her maiden name. During the Civil War she was charged with being a rebel, a confederate officer, a judge, and a member of Congress of the Confederacy. An action was brought under the Confiscation Act of 1862 to confiscate her bank shares. Notice of the pending action was posted under her maiden name of Verina Moore. Because she failed to file an answer, confiscation was effected by default. The New York court held that no person named Verina Moore existed after the marriage, and therefore the court did not have jurisdiction over the action.

“For several centuries, by the common law among all English-speaking people, a woman upon her marriage takes her husband’s surname. That becomes her *legal* name, and she ceases to be known by her maiden name. By that name she must sue and be sued, make and take grants and execute all legal documents. *Her maiden surname is absolutely lost, and she ceases to be known thereby.*”¹⁵

Although this principle clearly produced a just result in the *Chapman* case, “it was plain error in respect to ‘centuries’ of common law.”¹⁶ *The King v. Inhabitants of St. Faith’s Newton*,¹⁷ an English case decided sixty years before *Chapman*, held that there is nothing to compel a woman to adopt her husband’s surname. Although in dicta, the court stated:

“It has been asserted in argument, that a married woman cannot legally bear any other name than that which she has acquired in wedlock; but the fact is not so; a married woman may legally bear a different name from her husband, and very many living instances might be quoted in proof of the fact.”¹⁸

Interestingly enough, virtually all of the cases holding that a woman automatically changes her name upon marriage cite *Chapman* as supporting authority,¹⁹ yet the *Chapman* principle itself is not derived from any authority.²⁰ As a result, in jurisdictions now recognizing mandatory name change upon marriage, the precedent relied upon is a single case, decided nearly a century ago, which misinterpreted the common law.²¹

¹⁵ *Id.* at 449 (Emphasis added.) The court cited no authority for this proposition.

¹⁶ *Kruzel v. Podell*, 67 Wis. 2d 138, 144, 226 N.W.2d 458, 461 (1975). See note 11 *supra*.

¹⁷ 3 Dowling & Ryland’s Reports 348 (1823). Reported in 16 Eng. Common Law Rep. 171 (1830).

¹⁸ *Kruzel v. Podell*, 67 Wis. 2d 138, 144, 226 N.W.2d 458, 461 (1975), quoting 3 Dowling & Ryland’s Reports 348, 352 (1823).

¹⁹ *In re Kayaloff*, 9 F. Supp. 176 (S.D.N.Y. 1934); *People ex rel. Rago v. Lipsky*, 327 Ill. App. 63, 63 N.E.2d 642 (1945); *Bacon v. Boston Elevated Ry. Co.*, 256 Mass. 30, 152 N.E. 35 (1926).

²⁰ See note 15 *supra*; cf. 57 AM. JUR. 2D *Names* § 9 (1971).

²¹ It should be noted that *Chapman* no longer has precedential value in New York in light of Application of Halligan, 46 App. Div. 2d 170, 361 N.Y.S.2d 458 (1974). Without reference to *Chapman*, a unanimous court held that a married woman had a right to be known by her maiden name and by no other name, despite the marriage. “Under common law the change [upon marriage] is accomplished by usage or habit.” *Id.* at 459.

The next case after *Chapman* to confront squarely the issue of whether the common law operates to change a woman's name was *People ex rel. Rago v. Lipsky*.²² Ms. Rago, a woman who had not changed her name upon marriage, brought a writ of mandamus to force the Chicago Board of Election Commissioners to reinstate her voter's registration under her maiden name. An Illinois statute provided that a "registered voter who changes his or her name by marriage or otherwise, shall be required to register anew and authorize the cancellation of the previous registration. . . ."²³ The court referred to the "long-established custom, policy and rule of common law . . . whereby a woman's name is changed by marriage and her husband's surname becomes as a matter of law her surname."²⁴ It is doubtful that *Lipsky* will be followed in the future as it has been criticized on several grounds.²⁵ First, the cases cited in support of the proposition that a woman must assume her husband's surname do not rely upon any authority in stating that it is a mandatory requirement; rather they recognize the practice as immemorial custom and tradition, but not one compellable by law.²⁶ Second, the Illinois statute which required re-registration presumed that a woman would change her name upon marriage. Such a presumption is rebuttable, and if so rebutted, the purpose of the statute would be carried out by allowing a married woman to maintain her maiden name on the registration rolls since, in fact, there would have been no change of name.²⁷ Third, the court allowed Ms. Rago to continue using her maiden name professionally which emphasizes the fallaciousness of the court's holding. Thus, in an attempt to discourage confusion and fraud, the court actually encouraged it by allowing continued use of a maiden name for some purposes but not for others.²⁸

The major case cited in opposition to *Chapman* and *Lipsky* is *State ex rel. Krupa v. Green*.²⁹ Pursuant to an antenuptial agreement with her husband, a woman retained her maiden name after

²² 327 Ill. App. 63, 63 N.E.2d 642 (1945).

²³ ILL. ANN. STAT. ch. 46, § 6-54 (Smith-Hurd 1965). West Virginia has a similar statute: W. VA. CODE ANN. § 3-2-28 (1966).

²⁴ 327 Ill. App. at 70, 63 N.E.2d at 645.

²⁵ Lamber, *A Married Woman's Surname: Is Custom Law?*, 1973 WASH. U.L.Q. 779, 791-92.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ 114 Ohio App. 497, 177 N.E.2d 616 (1961).

marriage and placed that name on a ballot for the office of municipal court judge. She had used her maiden name for all public purposes³⁰ and had voted for three years subsequent to the marriage under that name. The Ohio court allowed the use of the woman's maiden surname for her candidacy, recognizing that the state of Ohio follows the *custom* of a woman adopting her husband's surname upon marriage, but stating that "there exists no law compelling it."³¹

Two recent cases directly on point seem to have settled the question in Wisconsin and Tennessee and also indicate a trend away from *Chapman*. In these two cases, *Kruzel v. Podell*³² and *Dunn v. Palermo*,³³ both courts disregarded the American perversion of the English common law holding that "a woman upon marriage adopts the surname of her husband by thereafter custom-

³⁰ This article does not deal with the legal problems that might arise should a married woman, who had assumed and used her husband's surname, seek to change that married name and resume her maiden name. It deals only with the original retention of a maiden name upon marriage where the woman in no way adopts her husband's surname, nor relinquishes the right to use her own.

³¹ 114 Ohio App. at 501, 177 N.E.2d at 619; *accord*, *Custer v. Bonadies*, 30 Conn. Supp. 385, 318 A.2d 639 (1974); *Stuart v. Board of Supervisors of Elections*, 266 Md. 440, 295 A.2d 223 (1972), *noted in* 32 Md. L. Rev. 409 (1973).

³² 67 Wis. 2d 138, 226 N.W.2d 458 (1975). Rose Kruzel, a married woman who had consistently and exclusively used her maiden name, petitioned the court to legally change her name back to her maiden name so she would be eligible for group insurance through the Milwaukee School Board under that name. Although no one testified in opposition to the name change, the trial judge rejected the petition on the ground that such a change would not be in the best interest of any children that might be born to the marriage. However, on appeal the court held that the common law does not require a woman's surname to change when she marries unless she acquiesces in such change and there is actual user. A well-reasoned dissent by Justice Hansen disapproved of the majority's new "habitual user" test stating that it replaced the "either-or" test approved in *Lane v. Duchac*, 73 Wis. 646, 41 N.W. 962 (1889). The "either-or" test allowed a married woman to use either her maiden name, or her married name, or both, whereas the holding in *Kruzel* forces her to use one or the other exclusively. Justice Hansen also objected to the effect the majority holding might have upon the stability of the family unit. 67 Wis. 2d at 158, 226 N.W.2d at 468 (dissenting opinion).

³³ 522 S.W.2d 679 (Tenn. 1975). Rosary Palermo, a Nashville lawyer, married in 1973 but continued to use her maiden name professionally and socially. Due to Tennessee's compulsory registration law, she notified the registrar of her marriage and was advised that she must re-register under the surname of her husband or her name would be removed from the registration records. The court held that "a woman, upon marriage, has a freedom of choice. She may elect to retain her own surname or she may adopt the surname of her husband. The choice is hers." *Id.* at 688.

arily using that name, but no law requires that she do so. If she continues to use her antenuptial surname, her name is unchanged by the fact that marriage has occurred."³⁴ After an exhaustive discussion of English common law and relevant state statutes, both courts concluded that the confusion in this area is due to a misstatement of precedent which has transformed a custom into a mandatory requirement in other jurisdictions.³⁵ After admitting that there is currently a division of authority among the fifty states as to a married woman's right to retain her maiden name, the *Dunn* court declared that even if the common law effected an automatic name change upon marriage, there is nothing to prevent a departure from the rigid rule where "the reason for the common law rule does not exist."³⁶ In light of the rapidly expanding field of human liberties, this may well be a prediction of what other courts will do when faced with this issue.

III. THE ROLE OF STATUTES

Much of the litigation that arises when a married woman chooses to retain her maiden name is due to state statutes and regulations which deprive her of certain rights or privileges if she fails to adopt her husband's surname. "Women who continue to use their maiden names after marriage may encounter resistance from the Internal Revenue Service, voting registrars, motor vehicles departments, or any number of non-governmental sources."³⁷ Much of this resistance is due to legislation or administrative regulations requiring a woman to procure a driver's license in her married name,³⁸ to register her vehicle under her married name,³⁹ or to register to vote under that name.⁴⁰ Several jurisdictions have re-examined these statutes to determine their constitutionality,⁴¹ al-

³⁴ 226 N.W.2d 458, 459; 522 S.W.2d 679, 687.

³⁵ 226 N.W.2d at 461-62; 522 S.W.2d at 687-88.

³⁶ 522 S.W.2d at 688, quoting *Brown v. Selby*, 206 Tenn. 71, 78, 332 S.W.2d 166, 169 (1960).

³⁷ Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 940 (1971).

³⁸ MD. ANN. CODE art. 66½ § 6-116 (1970); WIS. STAT. ANN. § 343.22 (1971); *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972).

³⁹ *Bacon v. Boston Elevated Ry. Co.*, 256 Mass. 30, 152 N.E. 35 (1926).

⁴⁰ W. VA. CODE ANN. § 3-2-28 (1971 Replacement Volume); *People ex rel. Rago v. Lipsky*, 327 Ill. App. 63, 63 N.E.2d 642 (1945). See text accompanying notes 22 to 28 *supra*.

⁴¹ See text accompanying notes 53 to 70 *infra*.

though most courts have resolved any conflicts involved in the litigation without reaching the constitutional issues.⁴²

Although state statutes vary considerably, a few will be mentioned to illustrate the various ways in which state legislatures have attempted to deal with problems concerning retention of maiden names.⁴³ It should be noted that the only jurisdiction in the United States that had enacted a statute requiring a change of name upon marriage was Hawaii. However, in 1976, Hawaii amended that statute to allow each spouse to chose the surname he or she will use as a married person.⁴⁴ The other fifty jurisdictions⁴⁵ continue to rely upon English common law which enables a woman by *custom* to assume her husband's surname as her own without formal court proceedings.⁴⁶ Also, every state has some statutory procedure for effecting a change of name.⁴⁷ One state requires the use of the prefix "Miss" or "Mrs." at elections.⁴⁸ Finally, at least thirty-five states allow the wife, under certain conditions, to resume use of her maiden name after divorce.⁴⁹ If any conditions at all are imposed, they generally prohibit name change where children are born to the marriage⁵⁰ or where the wife receives alimony.⁵¹

Because the case law and the statutory law in some jurisdictions support the idea that a woman *must* adopt her husband's surname thus taking away the common law option and making such assumption mandatory, the constitutionality of such a practice warrants discussion.

⁴² *E.g.*, *Dunn v. Palermo*, 522 S.W.2d 679 (Tenn. 1975).

⁴³ See generally Lamber, *A Married Woman's Surname: Is Custom Law?*, 1973 WASH. U.L.Q. 779, 809-19, for a compilation of relevant state statutes touching on the topic of name change.

⁴⁴ HAWAII REV. STAT. § 574-1 (Supp. 1975), amending HAWAII REV. STAT. § 574-1 (1968).

⁴⁵ The fifty-one jurisdictions described in this analysis include the fifty American states plus the District of Columbia.

⁴⁶ See *Smith v. United States Cas. Co.*, 197 N.Y. 420, 90 N.E. 947 (1910).

⁴⁷ A few state statutes exclusively provide that a formal court action is the only way to effect a name change. MINN. STAT. ANN. § 259.10 (Cum. Supp. 1976); PA. STAT. ANN. tit. 54, §§ 1-6 (1964).

⁴⁸ ARK. CONST. amend. 51 § 6(a)(1) (Cum. Supp. 1975).

⁴⁹ See generally Lamber, *A Married Woman's Surname: Is Custom Law?*, 1973 WASH. U.L.Q. 779, 809-19.

⁵⁰ ARK. STAT. ANN. § 34-1216 (1962); W. VA. CODE ANN. § 48-2-23 (1966); WIS. STAT. ANN. § 247.20 (Cum. Supp. 1975).

⁵¹ WIS. STAT. ANN. § 247.20 (Cum. Supp. 1975).

IV. CONSTITUTIONAL CONSIDERATIONS

The constitutionality of a mandatory change of name by operation of law was first raised in *Forbush v. Wallace*.⁵² In that case, a married woman brought a class action challenging an unwritten regulation of the Alabama Department of Public Safety which required that a married woman acquire a driver's license in her husband's surname. The court was forced to reach the constitutional issue because the woman stipulated that Alabama's common law required the wife to adopt the surname of her husband. In deciding that the regulation did not violate the equal protection clause of the fourteenth amendment, the court found a rational basis for the regulation claiming that it was necessary for administrative convenience.⁵³ In explanation, the court stated: "The existing law in Alabama which requires a woman to assume her husband's surname upon marriage has a rational basis and seeks to control an area where the state has a legitimate interest."⁵⁴ The court also noted that "administrative convenience, if not a necessity, is an important consideration."⁵⁵

It is easy to see that the state has a legitimate interest in preventing fraud in motor vehicle registration and, through its police powers, an interest in preventing individuals from fraudulently misrepresenting themselves. The question thus becomes whether these interests are served by requiring that married women adopt their husbands' surnames. Arguably, the answer is "no." Logically, the administrative convenience rationale would support women keeping, rather than abandoning, their birth-given names for all purposes unless their names were changed by judicial action. This method would be less confusing as there would be less administrative paperwork. Further, the chances for fraud would be reduced as each married woman would have only one name on file throughout her life. Although the *Forbush* court, a three-judge panel, was convinced that a rational basis existed, later courts have developed higher standards for determining whether there is a rational basis and have done away with the administrative convenience test.⁵⁶

⁵² 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972).

⁵³ *Id.*

⁵⁴ *Id.* at 222-23.

⁵⁵ *Id.* at 222.

⁵⁶ *Reed v. Reed*, 404 U.S. 71 (1971).

The major line of constitutional attack upon a mandatory change of name is that it amounts to discrimination based on sex since a woman is required to change her name upon marriage and a man is not.⁵⁷ "Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest."⁵⁸ Applying this test, sex-based classifications were consistently upheld⁵⁹ since the presumption was in favor of the validity of the statute or classification, and any challenge to that validity had to establish arbitrariness. The standard of review urged by opponents of mandatory name change is the "compelling state interest" test.⁶⁰ Under this test, if a statute creates a classification that is "suspect" or interferes with a "fundamental" right, it will not be upheld absent a showing of a compelling state interest.⁶¹ However, rather than abandoning the rational basis test, the United States Supreme Court in *Reed v. Reed*,⁶² adopted a stricter standard of review than rational basis, but falling short of a compelling state interest. It emerged as the "fair and substantial" test.⁶³ "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . ."⁶⁴ It appears that under this standard, the statutory classification is presumed to be invalid with the burden on the state to prove the statute's validity.

Finally, in 1973, the United States Supreme Court in a plurality opinion declared that "classifications based on sex, like classifi-

⁵⁷ *Custer v. Bonadies*, 30 Conn. Supp. 385, 318 A.2d 639 (1974).

⁵⁸ *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973), citing *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

⁵⁹ *E.g.*, *Goesaert v. Cleary*, 335 U.S. 464 (1948). "The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes The Constitution does not require legislatures to reflect sociological insight, or shifting social standards" *Id.* at 466.

⁶⁰ *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

⁶¹ See note 60 *supra*.

⁶² 404 U.S. 71 (1971).

⁶³ *Id.* at 76.

⁶⁴ *Id.*

cations based upon race, alienage, or national origin, are inherently suspect and must therefore be subjected to strict judicial scrutiny."⁶⁵ In *Frontiero v. Richardson*,⁶⁶ a married female Air Force officer challenged a statute which allowed male members of the Air Force to declare their spouses as dependents for purposes of obtaining increased medical and housing allowances, but disallowed female members the same privilege unless their spouses were dependent upon the income of their wives for over one-half of their support. The Court rejected the administrative convenience test stating that "the Constitution recognizes higher values than speed and efficiency,"⁶⁷ and went on to declare that sex is a suspect category. Because *Frontiero* was a plurality opinion, and because courts tend to judge each sex-classification case on its facts, the status of a woman's right to retain her maiden name is still in doubt.

V. THE EFFECT OF THE EQUAL RIGHTS AMENDMENT

The equal rights amendment,⁶⁸ if ratified, may provide the answer for a woman wishing to keep her maiden surname. The amendment reads in part: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."⁶⁹ Although the exact effect of this new provision is only speculative until it is adopted and interpreted by the courts, several writers have argued that the amendment will make sex a suspect classification per se,⁷⁰ thus giving rise to a compelling state interest test. This would place the burden of justifying the sex-based classification upon the state at the outset. As one such writer stated:

⁶⁵ *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973); *accord*, *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 18, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340 (1971). The California Supreme Court in holding sex to be a suspect class stated: "Sex . . . is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society."

⁶⁶ 411 U.S. 677 (1973).

⁶⁷ *Id.* at 690, quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

⁶⁸ H.R.J. Res. 208, 92d Cong., 2d Sess. (1972).

⁶⁹ *Id.*

⁷⁰ *E.g.*, Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 940 (1971).

"The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage. In a case where a married woman wishes to retain or regain her maiden name or take some new name, a court would have to permit her to do so if it would permit a man in a similar situation to keep the name he had before marriage or change to a new name. Thus, common law and statutory rules requiring name change for the married woman would become legal nullities."⁷¹

Another writer has suggested that where the governmental interest in identification requires spouses to assume the same last name for any purpose, the surname would be elected mutually without a requirement that the woman necessarily relinquish *her* maiden name. In the event that children are born to the marriage, the surnames would be selected by the parents, allowing the use of the mother's surname, the father's surname, a combination of the two, or a third name agreeable to both.⁷²

On the other hand, passage of the equal rights amendment may have no effect on a married woman's right to her name, depending upon judicial interpretation. "Courts could obviate the problem by declaring that there is no legally protected right to a name."⁷³

VI. CONCLUSION

The past decade has seen many developments in the area of human liberties, and many women have asserted that one such liberty is the right to keep their maiden names upon marriage. Historically, names were changed due to custom and choice rather than through mandatory requirements. Similarly, today, women who wish to adopt their husbands' surnames should continue to do so under the informal common law procedure. Women wishing to retain their birth-given names, however, should not be forced to undergo the traditional marital name change.

The simplest way to remedy any misreading of the common law would be by legislative enactment. The resulting legislation should prescribe some procedure whereby a woman may indicate

⁷¹ *Id.* at 940.

⁷² Comment, *Married Woman's Right to her Maiden Name: The Possibilities for Change*, 23 *BUFF. L. REV.* 243, 260-61 (1973).

⁷³ *Id.* at 261.

her choice of name upon marriage. The interests of the state in efficient administration and prevention of fraud would be protected by a requirement that any change of name at any time be duly recorded. At present, however, no legislative action is necessary in those states where judicial interpretation of the common law has not required that a woman change her name upon marriage.

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