

THE RIGHT TO CONTROL ONE'S NAME

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Is there a constitutionally protected right to choose one's name? This Comment seeks to answer this question and to evaluate current government control over the name choices of adults. It first discusses the conflicting interests in names as identification and communication tools, as an expressive medium, and as a component of identity. It then summarizes the current law of name changes. Next, the Comment explores potential First Amendment free speech challenges and potential Fourteenth Amendment substantive due process challenges to existing name law. Finally, it discusses several policy reasons for altering the existing statutory schemes and ways that states might do so.

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“Remember that a person’s name is to that person the sweetest and most important sound in any language.”¹

INTRODUCTION

In 2004, the New Mexico Court of Appeal permitted Snaphappy Fishsuit Mokiligon to change his name to Variable.² A few years later, Variable petitioned to have his name changed to Fuck Censorship!³ The trial court denied his petition, explaining that the desired name was “obscene, offensive and would not comport with common decency.”⁴ The appellate court affirmed.⁵ The California Court of Appeal reached a similar decision in 1992, when it denied a petitioner’s request to change his name to Misteri (pronounced Mister) Nigger.⁶ Although both petitioners argued that denying their requests violated their First Amendment rights, the courts concluded that the problems risked by permitting names that contain offensive content—

1. DALE CARNEGIE, *HOW TO WIN FRIENDS AND INFLUENCE PEOPLE* 133 (Simon & Schuster 1939) (1936). This is Principle Three in the section entitled “Six Ways to Make People Like You,” and is also discussed in the chapter entitled “If You Don’t Do This, You’re Headed for Trouble.” See *id.* at 103.

2. *In re Mokiligon*, 2005-NMCA-021, 106 P.3d 584 (N.M. Ct. App. 2004). The lower court had denied his petition on the grounds that Variable was offensive. *Id.* at 586. Presumably, the petitioner acquired the name Snaphappy Fishsuit Mokiligon by an earlier petition that was not recorded. As a side note, although this Comment raises important and serious questions, it is an inescapable fact that some of the names cited and the legal reasoning are funny. I have found that attempts to ignore this humor are both undesirable and futile. Thus, I have tried to balance the entertainment value of the subject with the importance of the questions addressed. I have also tried to acknowledge humor in a way that respects the choices of the individuals whose petitions are examined. I apologize for any unintended offense and hope it will be mitigated by my esteem and respect for those choices. For further discussion of interesting and amusing name changes, see Eugene Volokh, *Tahula Does the Hula From Hawaii: And Other Names So Weird That Judges Forbade Them*, SLATE, July 30, 2008, <http://www.slate.com/id/2196204>, and Eugene Volokh, *Fun Name Change Cases*, VOLOKH CONSPIRACY, July 30, 2008, <http://volokh.com/posts/1217433440.shtml>. My favorite name changes are two permitted in England: one nineteen-year-old changed his name from George Garratt to Captain Fantastic Faster Than Superman Spiderman Batman Wolverine The Hulk And The Flash Combined; another man changed his name from John Desmond to Tarquin Fin-tim-lin-bin-whin-bim-lim-bus-stop-F’tang-F’tang-Olé-Biscuitbarrel. See *Teenager’s Name Change Is Fantastic*, BBC NEWS, November 3, 2008, http://news.bbc.co.uk/2/hi/uk_news/england/somerset/7707098.stm (reporting on the former); The Legal Deed Poll Service, *How Do I Change by Deed Pole*, <http://www.thelegaldeedpollservice.org.uk/page2.htm#2> (last visited Mar. 14, 2009) (noting the latter).

3. *In re Variable*, 2008-NMCA-105, 190 P.3d 354 (N.M. Ct. App. 2008).

4. *Id.* at 355–56 (quoting the opinion of the lower court).

5. *Id.*

6. *Lee v. Superior Court*, 11 Cal. Rptr. 2d 763 (Ct. App. 1992). Mr. Lee hoped that the use of the new name would help diminish the negative importance of the epithet. *Id.* at 764.

for example those that might incite violence or be considered fighting words—warranted denial.⁷

This particular concern doesn't really apply to other desired names, for example those with nonalphabetical characters or otherwise unusual characteristics, though State courts have denied these petitions as well: The California Court of Appeal found no abuse of discretion after the lower court denied Thomas Boyd Ritchie III's request to change his name to III.⁸ The supreme courts in Minnesota and North Dakota refused to change Michael Herbert Dengler's name to 1069.⁹ In 1976, a New York court refused to allow a feminist to change her last name from "Cooperman" to "Cooperperson."¹⁰

In contrast, other state courts have granted petitions for unusual name changes. The journalist Jennifer Lee successfully changed her name to Jennifer 8. Lee.¹¹ In 2006, the California Court of Appeal found that a lower court did abuse its discretion in refusing to allow Darren Lloyd Bean to change his name to Darren QX Bean!¹²

At times, courts have reached conflicting conclusions in cases in which petitioners have sought to change their names to single words, even though the courts were in the same state.¹³ Such conflicting conclusions highlight

7. See *Variable*, 190 P.3d at 356; *Lee*, 11 Cal. Rptr. 2d at 767.

8. *In re Ritchie*, 206 Cal. Rptr. 239, 240 (Ct. App. 1984).

9. See *In re Dengler*, 287 N.W.2d 637 (Minn. 1979), cert. denied, 446 U.S. 949 (1980); *In re Dengler*, 246 N.W.2d 758 (N.D. 1976). However, the Minnesota court acknowledged that a phonetic spelling of 1069 might generate a different result. See *Dengler*, 287 N.W.2d at 639–40.

10. See *In re Cooperman*, reprinted in N.Y.L.J., Oct. 8, 1976, at 16. This case isn't one of unusual typographical characters, but still a named denied because it was unusual, or in the court's opinion, ridiculous. See *id.* In this and other cases, courts have initially denied a petition and subsequently granted it on appeal. See, e.g., *id.*; *In re Wurgler*, 136 Ohio Misc. 2d 1, 2005-Ohio-7139, 844 N.E.2d 919, 920–22 (Ohio Com. Pl. 2005) (granting petitioner's request to change his first name to Sacco, after a famous anarchist, and his surname to Vandal, after, in the words of the magistrate judge who initially denied the application, "a Germanic tribe known for the destruction and sacking of Rome"). In contrast, it appears that the court allowed Karin Robertson to change her name to GoVeg.com when she first petitioned in 2003. See *Bean v. Superior Court*, No. D048645, 2006 WL 3425000, at *3 (Cal. Ct. App. Nov. 28, 2006).

11. See Jennifer 8. Lee, *Yes, 8 Is My Middle Name*, BOSTON GLOBE, Aug. 8, 1996. At least one court accepted a change of name to an equivalent of R0b3rt. Email From Eugene Volokh to [Anonymous] (July 31, 2008, 16:08:22 PST) (on file with author). The individual in this case has requested to remain anonymous. I have therefore provided a fictional name that is equivalent (in terms of the use of numbers as vowels) to the individual's actual name.

12. *Bean*, 2006 WL 3425000, at *1. Mr. Bean! originally tried to change his name to Darryl QX [pronounced "Lloyd"] Bean!. *Id.* The Court was reluctant to include the pronunciation clause, and Bean willingly removed it. *Id.*

13. See, e.g., *In re Miller*, 617 N.Y.S.2d 1024 (City Civ. Ct. 1994) (denying a petitioner's request to change her name to "Sena" because a single name would cause confusion); *In re Cortes*, 858 N.Y.S.2d 500 (Sup. Ct. 2008) (reversing a denial of a name change request to "Zea"). Mary Ravitch was unable to change her last name to R. for similar reasons of confusion. See *In re Ravitch*, 754 A.2d 1287 (Pa. Super. Ct. 2000). In a short work of parody, one commentator implies that this petitioner's desired

a number of uncertainties: May states place a restriction on characters used in names or number of names based on practical necessity? Or do the opinions of courts in these cases rely on custom and conventional naming practices to deny petitions that ought to be allowed? How much evidence should be required of the impracticability of a name before it can be rejected? Is it proper for the court to define what a name is?

Courts will deny petitions in which evidence exists that the petitioner desires the name for fraudulent purposes or to interfere with the rights of others.¹⁴ Courts similarly exhibit concern for members of the public in cases in which the names requested have the potential to confuse or mislead, even in the absence of nefarious intent.¹⁵ For example, in *In re Thompson*,¹⁶ the New York Superior Court denied a man's petition to change his name to Chief Piankhi Akinbaloye.¹⁷ The court reasoned that permitting the petitioner to change his name to Chief could lead people to believe the government had bestowed a title on him in violation of the Constitution and could cause confusion.¹⁸ Little confusion or uproar seems to arise, however, when parents bestow their children with names such as Princess, Prince, Earl, or Duke,¹⁹ rendering the decision in *Thompson* somewhat questionable. Two courts reached opposite results from one another on the issue of public confusion in cases in which petitioners sought to change their names to Santa Claus.²⁰ Where should courts

name change might actually make Ravitch and other petitioners choosing unconventional names more identifiable because their names would be unlikely to be repeated. See Robert Raines, *When You Wish to Be an R*, 4 GREENBAG 333 (2001).

14. For an example of a case in which a name change petition was rejected on grounds of fraud, see *In re Weingand*, 231 Cal. App. 2d 289 (Ct. App. 1964). The California Court of Appeal denied Eugene Weingand's petition to change his name to Peter Lorie, Jr. Weingand desired the change in order to aid his attempts to pass himself off as the son of the film actor Peter Lorre. *Id.* The restriction based on interference with the rights of others is mentioned often in cases reciting the common law, but little in actual application. It appears to refer to the procedure whereby other persons may object to a petitioner's name change for interference with their rights, for example, duplication of a trademarked or corporate name. See, e.g., *In re Serpentfoot*, 646 S.E.2d 267 (Ga. Ct. App. 2007).

15. Courts also cite confusion as a justification for denying changes to names with unconventional characteristics. See *supra* note 13.

16. 369 N.Y.S.2d 278 (Civ. Ct. 1975).

17. See *id.*

18. *Id.* at 279. The court referred to Article 1, Section 9 of the Constitution, which prohibits the government grant of titles.

19. Or consider a famous literary example: Major Major Major Major in Joseph Heller's *Catch-22*. See JOSEPH HELLER, *CATCH-22 passim* (Simon & Schuster Classics 1999) (1961). Thanks to Eric Lindberg for insisting that Heller be cited here.

20. Compare *In re Handley*, 736 N.E.2d 125 (Ohio Prob. Ct. 2000) (denying petitioner's request because he failed to establish sufficient reason for the change and because the change would violate public policy and mislead children), with *In re Porter*, 31 P.3d 519 (Utah 2001) (reversing a denial of a petition and noting that the change would not result in confusion or misunderstanding). In another case, a man was acquitted of carrying false identification for possessing a nondriver identification card

draw the line between protection against hypothetical future harms to others, and protection of the interests of petitioners to choose their names? Which of these decisions are based on legitimate or reasonable concerns?

Sometimes courts have used the potential for public confusion or general policy arguments as justifications for decisions that seem to be based more on either personal or greater social values. Often, these values seem to future generations to be at best outdated and at worst small minded and discriminatory. For example, in Connecticut in 1936, the court denied Herman Cohen's petition to change his name to Albert Connelly.²¹ Mr. Cohen had been using the Irish-sounding name because it enabled him to secure more work.²² The court explained that Mr. Cohen "would lose the respect of Gentile and Jew alike by such a move Each race has its virtues and faults and men consider these in their relations with one another. The applicant would be travelling under false color, so to speak, if his request were granted"²³ In the 1960s, a court denounced as un-American, in light of the atrocities committed by Germans during the Holocaust, one petitioner's request to change his name to reflect his German heritage.²⁴ More recently courts have struggled with the public policy implications of allowing transgender petitioners to change their names, and of allowing same-sex couples to change their surnames to match one another's.²⁵ Should we worry that decisions similar to *In re Cohen*²⁶ and the many cases like it may still occur today; that is, that grounds for denial that seem reasonable by current standards will be viewed by future generations as unreasonable, outmoded, and oppressive? Does appellate review of name-change denials adequately protect petitioners' rights?

These examples illustrate many of the difficult questions that arise in name-change cases. In order to begin to address these questions, this Comment

issued by the state of Ohio identifying him as Santa Claus, in addition to a driver's license bearing the name Hayes, presumably his given name. See *State v. Hayes*, 119 Ohio Misc. 2d 124, 2002-Ohio-4228, 774 N.E.2d 807 (Warren Mun. Ct. 2002).

21. *In re Cohen*, 4 Conn. Supp. 342 (Super. Ct. 1936). Similar denials were issued in New York and other states as late as 1963. See, e.g., *In re Filoramo*, 243 N.Y.S.2d 339 (N.Y. City Civ. Ct. 1963).

22. *Cohen*, 4 Conn. Supp. at 342.

23. *Id.* at 343.

24. *In re Jama*, 272 N.Y.S.2d 677 (Civ. Ct. 1966). The petitioner wanted to add "von" before Jama, because his father had told him that von Jama was their family name. *Id.* at 677. The court also noted that it chose to deny the petition because many Germans with "von" in their name were nobles (though the decision does not say that "von" was in fact a title). *Id.* at 678. This opinion is worth reading for the intensity of the language used by the court with respect to the desire of the plaintiff to identify as German, in light of the actions by Germans during the Holocaust. For further discussion of this case see *infra* note 125.

25. See, e.g., *In re Golden*, 867 N.Y.S.2d 767 (App. Div. 2008) (reversing a decision denying a name change request by a transgender person).

26. 4 Conn. Supp. 342.

attempts to determine whether control of one's name is constitutionally protected by the First Amendment right to free speech and as a fundamental privacy right under the Fourteenth Amendment.

Part I of this Comment discusses the different uses of names and the problems that arise because of the multipurpose nature of naming. One scholar describes this problem as the intersection of public and private, because names are used by the person to whom the name refers for the individual's own purposes, but are also used by others and thus serve public functions.²⁷ I divide these interests further. Two uses that are public, in the sense that they matter primarily to the state and to people other than the named or those who choose that name (such as the person's parents or guardian), are identification and communication. Identification refers to the state's ability to track records, allocate benefits, attribute blame or credit, grant rights, and impose responsibilities.²⁸ Communication refers to fostering interactions among individuals, organizations, and institutions.²⁹ The two private interests in naming, or those that our tradition recognizes as important to individuality and autonomy, are self-expression and identity-formation.³⁰ Self-expression refers to a name's role as a speech act. Identity refers to a name's function in describing and symbolizing an individual. As Part I attempts to demonstrate, the four purposes of names may conflict with one another, so that a name that is perfect for one or more functions is inappropriate for another function, making regulation difficult.

Part II describes the law of name changes in the Anglo-American legal tradition. Most states continue to recognize a person's right at common law to change names through use and passage of time, without resort to judicial procedure.³¹ I assert, as do most others who write on the topic, that this right includes the right to change one's name with legal affect without resort to state assistance or approval. However, given the proof-of-identity requirements to obtain government identification, and the practical necessity of such identification, regardless of the contours of the common law right, I argue that government recognition of name changes no longer occurs outside of the statutory process.

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

28. See discussion *infra* Part I.

29. See discussion *infra* Part I.

30. Ellen Jean Dannin recognizes only self-expression as the individual interest involved. See Ellen Jean Dannin, Note, *Proposal for a Model Name Act*, 10 U. MICH. J.L. REFORM 153 (1976).

31. However, there is a question what precisely this right ensures. See discussion *infra* Part II.A for support for the argument that the common law right refers to the right to change one's name with legal effect, not simply the right to use an alias.

In addition to recognizing the common law right, some states have also instituted statutorily prescribed procedures for effecting a name change.³² A common feature of most statutes, and the focus of this Comment, is the broad grant of discretion to judges reviewing the petitions, and a general absence of statutory guidelines as to what types of name changes should be granted or rejected. In the absence of such guidelines, courts have developed their own standards of review; these standards closely resemble one another across states. Part II argues that, despite the general uniformity of judicially developed standards, judges retain broad discretion to grant or deny name-change petitions. This discretion results in rejections of petitions that are undesirable for policy reasons and may in fact violate a denied petitioner's First and Fourteenth Amendment rights. In practice, denials often appear to be influenced by personal opinion or governing social values.

Part III explores potential constitutional challenges to the statutory name-change process. Little has been written on the extent to which restrictions on names are constitutionally permissible as a general matter.³³ I first discuss potential First Amendment protections for name choice. I conclude that existing name law does not impose direct restrictions on speech. However, state regulation of naming may be viewed as giving a speech-related benefit. Applying cases that discuss government subsidy of speech,³⁴ I argue that denial of name-change petitions may be challenged as impermissible viewpoint discrimination in deciding to whom to grant a government subsidy/benefit for speech—but that this argument has limitations. Finally, I argue that denying a name change may result in a constitutionally impermissible speech compulsion. The impermissible speech compulsion results because, in order to fulfill civic

32. Some states have abrogated the common law right altogether. See *infra* note 79 and accompanying text.

33. One scholar raises, but does not answer, the question whether names are a fundamental right. See Ralph Slovenko, *On Naming*, 34 AM. J. PSYCHOTHERAPY 208, 210 (1980). Other articles on naming focus on narrow categories of cases or constitutional questions different from those addressed in this Comment, or do not address constitutional issues. See, e.g., Omi, *The Name of the Maiden*, 12 WIS. WOMEN'S L.J. 253 (1997) (comparing the constitutional fights of married women for control of their surnames to the fights over parents' rights to name their children); Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 LAW & INEQ. 91 (1985) (focusing on the right of women to control the names of their children); Dannin, *supra* note 30, at 154–59 (criticizing the current statutory naming process without discussing the potential constitutional issues with the state laws); Michael Rosensaft, Comment, *The Right of Men to Change Their Names Upon Marriage*, 5 U. PA. J. CONST. L. 186 (2002) (arguing that courts should find a fundamental right to change one's name at marriage, and that current treatment of husbands wishing to change their names violates substantive due process and equal protection).

34. These include *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), and *Sons of Confederate Veterans v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002), both discussed *infra* Part III.A.

obligations and exercise civic rights, a denied petitioner must use and allow herself to be called by the undesired name.

Second, I argue that control over one's names should be protected as a fundamental privacy right. I argue that considering control over one's name as a privacy right satisfies both the liberal and conservative fundamental rights tests set forth by the U.S. Supreme Court, and fits well in the existing privacy rights framework, because the proposed right shares important similarities with other well-established privacy rights.³⁵

Part III also analyzes the burdens imposed on the right by existing statutory schemes. I argue that these burdens are substantial, because denied petitioners must use the name recognized by the state not only to function in society, but also because a person must acknowledge and use that name in order to exercise other fundamental rights, like voting, and perform responsibilities, such as paying taxes. This burden arises from the practical necessity of obtaining government identification, the near impossibility of gaining official recognition of new names outside of the statutory name-change process, and the broad discretion bestowed on judges to grant or deny name-change petitions. Part III concludes by examining the state's interests in regulating naming, and the extent to which the existing statutory regime is narrowly tailored to further those interests. I conclude that, although states have many compelling interests in regulating naming, the current statutory procedures are not narrowly tailored to ensure that names that do not interfere with those interests are permitted. The broad grant of judicial discretion without guidelines leaves open the possibility that many names that interfere with compelling state interests are permitted and others that do not are denied. Case by case adjudication can satisfy the strict scrutiny narrow-tailoring requirement, so long as courts only deny petitions for which there is evidence of interference with a compelling state interest that outweighs the individual interest in choice of name. However, as evidenced by the cases discussed, courts have not shown such restraint in practice. Given the costs of litigation and the requirements for mounting an appeal, most petitioners will find themselves practically without remedy.

Finally, in Part IV, I argue for the reform of existing name-change law, regardless of whether constitutional challenges succeed, or would produce different outcomes in many cases. I briefly discuss proposed improvements to name-change processes, and the benefits and limitations to these improvements.

35. See *infra* Part III.B.1 discussing the tests set forth in such cases as *Planned Parenthood v. Casey* (on the liberal end) and *Washington v. Glucksberg* (on the conservative end).

I. THE CONFLICTING USES OF NAMES

Regulation of names presents unique problems as compared with regulation of other methods of identification and self-expression because names serve both public and private functions.³⁶ Unlike other methods of identification, naming serves important private purposes. Few people are likely to object to the particular combination of numerals in their social security numbers, because these numbers are randomly generated by the state and are not considered by most to contain substantive information about the identity of their owners.³⁷ Likewise, other elements of self-expression, such as clothing, tattoos, or other personal affects, are not necessary for public communication. The content of a name may thus be as important to the individual as it is to the rest of society, which must use that name. Name-change processes must therefore balance fiercely competing public and private interests in the use of names.

To provide a framework for the analysis to follow, I divide the uses of names further into four different categories.³⁸ These are: identification, communication, expression, and identity. Expression and identity are private uses of naming, and serve as the bases for potential First Amendment and Fourteenth Amendment substantive due process claims, discussed later.³⁹ Identification and communication may be seen as public functions and provide the state with compelling interests in regulating names. Problems arise because some names that would be ideal for one or more uses are undesirable, inconvenient, or even unacceptable for others.

36. "[T]he name exists at the intersection of the 'public' and the 'private'; it is considered 'private,' and yet is subject to 'public' regulation." Gross, *supra* note 27, at 269; *see also* Slovenko, *supra* note 33, at 208 ("A name serves many functions. It identifies, it distinguishes, it provides control, it alleviates anxiety, and it is a means of self-expression."); Dannin *supra* note 30, at 160 (noting "several different characteristics of names: names as a means of self-expression, names as a type of property, and names as a means by which society, in general, and the state, in particular, can keep track of its individual members"). Another scholar notes that a name is considered to belong to the person to whom it refers, yet is given by and used more by others. *See* Gross, *supra* note 27, at 269.

37. Social security numbers are given by the state to identify citizens, authenticate citizenship status, and aid in the distribution of benefits. The right to control a number created and provided as a benefit by the state does not have much support. Moreover, unlike names, social security numbers are not viewed as having descriptive or expressive characteristics. The assignment of identification numbers is generally far more random than the giving of names. *See* Rosensaft, *supra* note 33, at 189 ("Parents agonize over what to name their children—as well they should. No one calls such a parent's agony trivial, because it is deemed very important by society.").

38. This Comment's focus on four uses of names is not to suggest that these are exclusive. Rather, the uses discussed in this Comment are those that produce the public versus private conflict at stake in determining permissible restrictions on the individual right to control one's name.

39. *See infra* Part III.

In this analysis, the “identification use” of names is their use by governments and others to distinguish one person from another, for keeping track of individuals record keeping, promoting public safety, and assigning rights and responsibilities.⁴⁰ A person “cannot assert any personal right in any society governed by law rather than force, except by first asserting and establishing his identity.”⁴¹ Identification, like communication, falls into what Gross calls “public” uses of names, or uses of one’s name by others.⁴² However, although names can be used as true identifiers in smaller communities and groups, that many names refer to more than one individual renders them no longer useful for this purpose on a larger scale.⁴³ In fact, names alone cannot be effectively used for governmental identification purposes, and are probably no longer necessary, except by virtue of the practical problems involved in changing the system to omit them from identification documents. Additionally, many people might react with distaste to the notion of being referred to by numbers, because they feel it is dehumanizing. However, if the state stopped using names, we might in fact be more human, because we would have greater freedom and autonomy to choose and change our names.⁴⁴

40. Slovenko writes that the “primary function of the legal name is to spot a particular individual.” Slovenko, *supra* note 33, at 217. For an in-depth exploration of names as a method of identification throughout Anglo-American history, see James C. Scott, John Tehranean & Jeremy Mathias, *The Production of Legal Identities Proper to States: The Case of the Permanent Family Surname*, 44 COMP. STUD. SOC’Y & HIST. 4 (2002), available at <http://www.jstor.org/pss/3879399?cookieSet=1>.

41. Priscilla L. Rider, *Legal Protection of the Manifestations of Individual Personality—The Identity-Indicia*, 33 S. CAL. L. REV. 31, 32 (1959). Identification is necessary to solve the individual’s “problem of how to obtain his permitted benefits, and how to determine his personal obligations.” *Id.*

42. See Gross, *supra* note 27, at 269.

43. See *id.* at 38 (“Estimates, based on records made by the electronic brain in Social Security’s Baltimore office, indicate that there are 404,040 Americans named Allen. When one considers the rather limited number of Christian names in common use, it is evident that there is a tremendous duplication of full names.”). Whitepages.com listed sixty-six Mary Smiths and sixty-three John Smiths in Los Angeles on December 29, 2008. States now use combinations of identification numbers, photographs, fingerprints, and even DNA for greater accuracy in identification. See Scott et al., *supra* note 40, at 35–36. I learned through my own experience that the Internal Revenue Service (IRS) verifies a taxpayer’s identity using the first four letters of the person’s last name and her social security number. The IRS had problems verifying my identity because they ran their check using KUSH rather than SHEA, which caused a five-month delay in my tax refund.

44. In *Dengler*, the trial court rejected the petitioner’s desired name, “1069,” as dehumanizing; however, the court’s rejection decreased Dengler’s (humanizing) autonomy. See *In re Dengler*, 287 N.W.2d 637, 638 (Minn. 1979) (noting that the trial court rejected Dengler’s petition because “the designation of a person by a number was an ‘abject dehumanization and totalitarian deprivation of dignified human privacy’” (citing the lower court)); Slovenko, *supra* note 33, at 217–18. Dengler felt that the only way to truly express his identity was through the number 1069; each numeral had a particular meaning for him. See *In re Dengler*, 246 N.W.2d 758, 759–60 (N.D. 1976). Slovenko writes:

The court there also refused, saying it would be “an offense to basic human dignity To allow the use of a number instead of a name would only provide additional nourishment upon which the illness of dehumanization is able to feed and grow to the point where it is

Names are also used by others to facilitate communication, particularly verbal communication between individuals. Part of the communication function of naming is to differentiate individuals for purposes of conversation.⁴⁵ However, names also facilitate relationships between individuals and between individuals and organizations by making interactions feel more human and personal.⁴⁶ Although names could be replaced in much correspondence with numbers and addresses,⁴⁷ and numbers and addresses would allow for unique identifiers that would make the system more efficient, names remain in use.

In contrast, expression refers to a person's use of names as expressive speech. Expression is therefore a private function of naming.⁴⁸ Names may be used as speech to express to the public who a person is; such use is related to the identity function of names. However, names may also be used as an additional speech act beyond expressing self-description.⁴⁹ Examples of names intended to be used as speech acts include Variable's attempt to change his name to Fuck Censorship!, Lee's attempt to change his name to Misteri Nigger, as well as Karin Robert's permitted name change to GoVeg.com.

Last, and arguably most importantly, names serve as a part of or as a particular manifestation of personal identity.⁵⁰ Sigmund Freud wrote, "A man's name is a principal component of his personality, perhaps even a portion of

totally incurable." In prison, numbers are used to identify and they dehumanize the inmates. In daily life, we rebel against the use of a number instead of a name, when social security and credit card numbers are required as identification. We reach people by a telephone number, but we do not introduce ourselves by those numbers. Yet, while many people complain of being turned into ciphers, Dengler undertook a legal battle to replace his name with a number We seem to be at a crossroads. Registrars balk at long names, which are not dehumanizing, and courts balk at numbers, which are, they say.

Slovenko, *supra* note 33, at 218.

45. See Kif Augustine-Adams, *The Beginning of Wisdom Is to Call Things by Their Right Names*, 7 S. CAL. REV. L. & WOMEN'S STUD. 1, 32 (1997) (discussing the problems that arise in day-to-day communication when people from cultures with different naming traditions interact, as well as solutions to those problems).

46. This use of names to foster intimate personal interaction may go too far in some contexts. For example, an article in *Nursing Standard* advises nurses to be careful about using patients' first names because for some patients, this may be too intimate a form of address. Stephen Wright, *First Name Terms*, 21 NURSING STANDARD 24, 25 (2007).

47. The government could assign each citizen a unique identifier, for example Citizen #85546, and use this identifier in written correspondence. This type of identifier would obviate the risk of sending correspondence for that citizen to another citizen who shared the same name. It would also prevent the state and other members of the public from being forced to use a person's name, if the name was undesirable, because they would have the number as an alternative.

48. See Dannin, *supra* note 30, at 161 ("[N]ames are a well-recognized means of self-expression . . .").

49. See the examples *supra* note 10 and accompanying text.

50. For discussion and support of this function of names see *infra* pp. 346–50 and accompanying notes.

his soul.”⁵¹ Names are more than identifiers; they are descriptive and can communicate much about a person including gender, ethnic or national background, social status, religion, and familial ties.⁵² The meanings of our names not only tell others about us, but can inform our own sense of who we are.⁵³ The identity function of naming is thus distinct from self-expression. The “expression function” means using one’s name to communicate something about oneself to others; the “identity function” means using one’s name to define one’s own self-concept.⁵⁴ Both functions render names intensely personal.

Problems arise when people choose names for themselves or for their children that, to them, are either important expressive speech acts, or are the sole way they conceive of themselves, but are extremely difficult or undesirable for use as identifiers or modes of address.⁵⁵ These conflicts between competing private and public interests give rise to the constitutional arguments detailed in Part III of this Comment.⁵⁶ However, before delving into that discussion, it is important to look at the current legal regime governing names.

II. NAME LAW AS IT RELATES PRIMARILY TO ADULTS

A. The Common Law Right to Change One’s Name

Historically, Anglo-American naming practices were far less formal and less regulated than they are today. Surnames did not become necessary until the

51. SIGMUND FREUD, TOTEM AND TABOO: SOME POINTS OF AGREEMENT BETWEEN THE MENTAL LIVES OF SAVAGES AND NEUROTICS 112 (James Strachey trans., Routledge & Kegan Paul 2d ed. 1960) (1913).

52. See Augustine-Adams, *supra* note 45, at 2 (explaining the different attributes that names given to children can communicate to the community). Certain messages can be very different across cultures. For example, in the Anglo-American tradition, shared surnames communicate familial ties and marital status. In contrast, in the other cultural traditions, such as in Korea, a surname shared between spouses communicates blood relations, and, as a result, incest. See *id.* at 24–26. For further discussion of the different messages conveyed by names, see generally *id.*

53. See Rider, *supra* note 41, at 31 (asserting that one’s name is a manifestation of personality and identity; personality is both “the totality of the real person as he is, and as he thinks himself to be” as well as “the various aspects of his inner self that he has succeeded in projecting to others”).

54. For further discussion of the use of names to define self-concept, see *infra* notes 168–177 and accompanying text.

55. This conflict is well-illustrated in the cases of the petitioners who wished to change their names to 1069 and Fuck Censorship!. See *supra* text accompanying notes 3 and 9. Dengler included with his petition to change his name to 1069 an in-depth explanation of the significance of each numeral. *In re Dengler*, 246 N.W.2d 758, 759–60 (N.D. 1976). However, because of the numbers, exclamation point, and offensive language, both of these names are potentially unusable by state agencies, individuals, and private and public organizations.

56. See *infra* Part III.

14th century,⁵⁷ when they started to be

picked and applied at random—a man's physical, mental or moral characteristics, his occupation or his place of residence, even his real or fancied resemblance to an animal, supplied a myriad surnames which still exist. These were at first merely temporary, not always lasting as long as the lives of the persons so named, and were not transferred to descendants.⁵⁸

By the reign of Elizabeth I, beginning in 1558, surnames had become static and hereditary in England. However, naming practices remained flexible.⁵⁹

Historical flexibility in naming practices is reflected in the establishment early on of a common law right to change names without petition to the state. In theory, although not, as I will later discuss, in practice, at common law even today, a person may change names without state assistance.⁶⁰ After sufficient time and consistent use by the named person and others, the new name becomes the person's legal name.⁶¹ In the United States this right continues to be recognized by many courts today, although all states have also enacted statutory processes for changing names.⁶² When enacted, such statutes were offered as an additional aid to changing one's name, rather than as a restriction on the common law tradition, and were intended to help the

57. See, e.g., Slovenko, *supra* note 33, at 211. Slovenko explains that “[b]efore the Norman conquest, new names were invented for every child.” However, “[t]he Normans adopted the Catholic system of a couple of hundred saints' names as constituting the entire acceptable repertoire of names”; thus surnames had to be developed because there were not enough saints' names to go around. *Id.* at 210–11. Other articles recount this history similarly. See, e.g., Scott et al., *supra* note 40, at 12–13.

58. G.S. Arnold, *Personal Names*, 15 YALE L.J. 227, 227 (1905) (footnotes omitted).

59. *Id.* at 227–28. Scott and his coauthors assert that fixed hereditary surnames developed to “help[] enforce private property rights, advance primogeniture regimes, and secure the ability of the state to make its subjects legible to its gaze.” Scott et al., *supra* note 40, at 12.

60. See, e.g., *Smith v. U.S. Casualty Co.*, 90 N.E. 947, 948–50 (N.Y. 1910). The court noted:

The elementary writers are uniform in laying down the rule that at common law a man may change his name at will. Mr. Throckmorton, in his article on Names in the *Cyclopedia of Law and Procedure*, says: “It is a custom for persons to bear the surnames of their parents, but it is not obligatory. A man may lawfully change his name without resort to legal proceedings, and for all purposes the name thus assumed will constitute his legal name just as much as if he had borne it from birth.” 29 *Cyc.* 271. So a writer in the *American & English Encyclopædia of Law* says: “At common law a man may lawfully change his name, or by general usage or habit acquire another name than that originally borne by him, and this without the intervention of either the sovereign, the courts, or Parliament; and the common law, unless changed by statute, of course, obtains in the United States.” 21 *Am. & Eng. Encyc. of Law* (2d Ed.) 311. “One may legally name himself or change his name or acquire a name by reputation, general usage, and habit.” 2 *Fiero Sp. Pro.* (2d Ed.) 847.

Id. at 950.

61. See *id.*

62. See *infra* Part II for a discussion of the statutory name change process and the case law that has developed from it.

government better keep records of citizen's names.⁶³ Only a few states have explicitly abrogated the common law right.⁶⁴

The precise contours of the common law right to change one's name may be, however, subject to some debate. For substantive due process analysis, these contours determine how much the right is restricted or burdened by the statutory scheme. If the common law right is limited to the informal use of an alias or an additional name, imposing an exclusive statutory process for obtaining government recognition of a changed name restricts nothing. However, if the right to change one's name is, as I argue, the right to assume a new name independent of government sanction with as much effect as though one had used the statutory process, then the current burden on the right is much greater.

The idea that the common law right extends only to assumption of a name *in addition* to one's legally recognized name enjoys some support in scholarship and in courts.⁶⁵ However, the far greater weight of case law and scholarship support a right to change one's officially recognized name, not merely to assume an alias.⁶⁶ Moreover, if the right were to be read to include only the adoption of an alias, explicit abrogation would convey legislative intent to prevent use of stage names, pen names, and possibly even informal nicknames. Such intent on the part of abrogating states would make little sense, and seems unlikely.⁶⁷ It seems unclear, unless one considers the common law

63. See, e.g., *Smith*, 90 N.E. at 950 ("As was said by the Supreme Court of Pennsylvania of a similar statute in that state, this legislation is simply in affirmance and aid of the common law It does not repeal the common law by implication or otherwise, but gives an additional method of effecting a change of name.") (citing *Laflin & Rand Powder Co. v. Steytler*, 23 A. 215 (Pa. 1892)).

64. See *infra* note 79 (listing states that have explicitly abrogated the common law right); see also *infra* note 80 (providing examples of states which have explicitly preserved the common law right in addition to providing a statutory process).

65. See *Dannin*, *supra* note 30, at 160.

66. See, e.g., *Miss. State Bd. of Dental Exam'rs v. Mandell*, 21 So. 2d 405, 410 (Miss. 1945).

The court wrote:

Appellant seems to think that the only way a man can legally have a different name than his baptismal name is by formal legal proceedings of some sort, and that a change in the form of a name would make it a fictitious or an assumed name, an alias. This is not the law.

The name by which a person is generally known, although not his original name, but used by him in all of his business affairs becomes his legal name and is not a fictitious name.

Id. (citing *Ray v. Am. Photo Player Co.*, 46 Cal. App. 311 (Ct. App. 1920)); see also *Smith*, 90 N.E. at 949-50 ("A name assumed by the voluntary act of a young man at his outset into life, adopted by all who knew him and by which he is constantly called, becomes for all purposes that occur to my mind as much and effectually his name as if he had obtained an act of Parliament to confer it upon him." (quoting *Luscombe v. Yates*, (1822) 5 Barn & Ald. 544 (K.B.))).

67. Although there is not an accurate way to research whether or not the state intended to ban the use of aliases, presumably movie advertisements, music recordings, books, and other media by artists with assumed names are permitted without special indications to mark the artists' legal names.

right to allow change *with* legal effect, what the states that abrogated the common law right intended to abrogate (as I've found no evidence that these states have placed bans on the informal uses of aliases). In contrast, the Maine Supreme Court noted the freedom to use additional names informally in an opinion in which it also declared the common law right "superseded."⁶⁸ The court stated:

We recognize that a person may informally adopt a stage name, a *nom de plume*, or a business name or one for social purposes which is not his true name and, while using such a name, may obligate himself legally and, under certain conditions, enter into agreements which are binding upon other parties. On the other hand, there are situations in which the public interest entitles the State to demand that a person identify himself by his true, legal name in connection with his performance of certain activities.⁶⁹

Thus it appears that the common law right to change one's name is as it sounds: it protects the right to make a legally recognized change.⁷⁰

Regardless of the contours of the right, however, changing one's name with any real effect today requires the assistance of the state.⁷¹ For example, although passport regulations permit issuance of a passport under a person's name changed by common use, the regulations also require three public documents bearing the new name. One document must be a form of government-issued photo identification.⁷² In new procedures instituted after September 11, 2001, the New York Department of Motor Vehicles requires four to six points (each form of identification is awarded a value of 1–2 points) of identification information, such as other identification cards, credit cards, social security cards, and so on, in order to receive state identification. The New York State DMV requires that the name on all of these documents match exactly.⁷³ It

That is, I've not found indication that these states have made special provisions for common public uses of aliases such as by performers and other public figures that use stage names or *noms de plume*.

68. *In re Reben*, 342 A.2d 688, 695 (Me. 1975).

69. *Id.* at 694 (citations omitted).

70. Establishing the parameters of the right to control one's name is important to the later discussion of the extent to which the state has burdened the right. See *infra* Part III, notes 206–208 and accompanying text.

71. See *infra* notes 206–208 and accompanying text for a discussion of the burden placed by the state on an individual seeking to change names.

72. See 22 C.F.R. § 51.25(5) (2008).

73. See New York State Department of Motor Vehicles, ID-44 General Requirements for Proof of Identity (2008), available at <http://www.nydmv.state.ny.us/forms/id44.pdf>. When I attempted to obtain an identification card after my wallet was stolen in New York, my six points of identification were refused (including a birth certificate, credit card, and social security card) because some bore the surname "Shear Kushner" while others bore only "Kushner." Given this kind of rigidity, it seems dubious, as Margaret Jasper notes, that state agencies will issue documents based on a statement that

seems unlikely with these standards that a person could acquire identification with a name other than that on already issued government documents. Obtaining an identification card in California under a name different from that on one's birth certificate or legal presence document requires verification with one of the following state-issued documents: adoption documents, name-change document, marriage certificate, domestic partnership certificate, divorce document, or medical information authorization form in conjunction with a gender change.⁷⁴ According to their case law, both New York and California retain the common law name-change right.⁷⁵ Yet, it seems unlikely that either state would issue identification materials with a name changed at common law, given their application requirements.

B. The Statutory Process for Changing Names

Forty-nine states⁷⁶ and the District of Columbia have statutory name-change procedures that provide for judicial review of name-change petitions.⁷⁷ From the statutory annotations, most appear to have been enacted in the mid-to-late nineteenth century or early twentieth century.⁷⁸ Only a few states have explicitly abrogated the common law right.⁷⁹ Instead, many state courts

a person has changed names at common law. See MARGARET C. JASPER, HOW TO CHANGE YOUR NAME 5 (2005). Moreover, in light of concerns about identity theft, it seems unlikely that an individual could acquire the compliance of private institutions such as credit card companies, banks, and airlines, without proof of identification issued by the state.

74. California Department of Motor Vehicles, Driver License and Identification (ID) Card Information, True Full Name, http://dmv.ca.gov/dl/dl_info.htm#truenam (last visited Mar. 14, 2005).

75. See *infra* note 80 and accompanying text.

76. Hawaii vests power to hear petitions in the lieutenant governor. See HAW. REV. STAT. § 574-5(a) (2005).

77. See, e.g., ALA. CODE § 12-13-1(10) (2005); CAL. CIV. PROC. CODE § 1275 (West 2008); D.C. CODE § 16-2501 (2008); 735 ILL. COMP. STAT. §§ 5/21-101 to 5/21-104 (2003); LA. REV. STAT. ANN. § 13:4751 (2006); N.Y. CIV. RIGHTS LAW § 60 (McKinney 1992); TEX. FAM. CODE ANN. §§ 45.001–45.103 (Vernon 2008).

78. See, e.g., ARIZ. REV. STAT. §§ 442–443 (1901); CAL. CIV. PROC. CODE § 1275 (1872); COLO. GEN. LAWS § 1851 (1877); 1860 HAW. SESS. LAWS 32; 1877 LA. ACTS 106; MASS. GEN. LAWS ch. 256, § 1 (1851); N.Y. CODE CIV. PROC. § 2262 (1895); 1919 PA. LAWS 822. The statutory annotations for all but sixteen state statutes referred back to this time period.

79. These are Hawaii, HAW. REV. STAT. § 574-5(a); Louisiana, La. Op. Att'y Gen. 963 (1942); Maine, *In re Reben*, 342 A.2d 688, 694–95 (Me. 1975) (“[O]ur own original statute was intended to bring the ancient principles into consonance with modern needs . . . The common law method which would serve no further purpose was superseded.”); and Oklahoma, OKLA. STAT. tit. 12, § 1637 (1993) (stating that “no natural person in this state may change his or her name except as provided in” the various portions of the state code that provide for judicial name change and for name changes at conventional times, such as marriage and divorce). In 1874, the Supreme Court of Alabama held that “a party may not change his name, without a proper proceeding in court; but he may adopt as many other names as he pleases, and he may express these names by a single letter, or by as many

have held that the statutes are not intended to interfere with the common law right. For example, the Delaware Court of Chancery stated, "Such statutes are universally held not to affect the common law right. They are regarded as merely providing a procedure to establish a court record of the change."⁸⁰

Some statutes are concise and sparse as to the procedure and standards for granting petitions,⁸¹ while others are lengthy and detailed.⁸² However, the procedures for petitioning and the substantive standards of review applied to evaluate petitions are generally similar across states. Petitioners are often required to give notice, usually through a local newspaper.⁸³ Many states provide an opportunity for other interested parties to object at a hearing.⁸⁴ Petitions usually must contain information about the petitioner's current name, criminal history, financial history, and outstanding legal obligations.⁸⁵ Some states require adults to provide fingerprints, which are checked against law enforcement records.⁸⁶ Nearly all states provide alternate procedures for minors⁸⁷ and for persons with criminal histories.⁸⁸

more as suits his taste or fancy." *Comer v. Jackson*, 50 Ala. 384, 387 (1874) (citation omitted). I was unable to find a later opinion to verify whether Alabama's position has changed.

In the 1940s an attorney general opinion in Louisiana asserted that the state did not recognize a common law right to change one's name. See La. Op. Att'y Gen. 963 (1942). Louisiana law is derived from the French civil law tradition, rather than the British common law tradition; this likely accounts for the difference between Louisiana's approach to abrogation and that of other states.

80. *Degerberg v. McCormick*, 184 A.2d 468, 469 (Del. Ch. 1962); see also, e.g., *Clinton v. Morrow*, 247 S.W.2d 1015, 1018 (Ark. 1952) (name change "statutes merely affirm, and are in aid of, the common-law rule. They do not repeal the common law by implication or otherwise, but afford an additional method of effecting a change of name" (quoting 38 AM. JUR. *Names* § 28)); *In re Ross*, 67 P.2d 94, 95 (Cal. 1937) ("The common law recognizes the right to change one's personal name without the necessity of legal proceedings, and the purpose of the statutory procedure is simply to have, wherever possible, a record of the change."); 54 PA. CONS. STAT. § 701(b) (Supp. 2009) states that "[n]otwithstanding subsection (a), a person may at any time adopt and use any name if such name is used consistently, nonfraudulently and exclusively." At least eighteen other states have similar holdings.

81. See, e.g., ALA. CODE § 12-13-1(10); CONN. GEN. STAT. § 52-11 (2005).

82. See, e.g., COLO. REV. STAT. § 13-15-101 (2008); 735 ILL. COMP. STAT. §§ 5/21-101 to 5/21-104 (2003).

83. See, e.g., CAL. CIV. PROC. CODE § 1277 (West 2008). Many states provide for exceptions from notice in certain circumstances, such as for victims of domestic abuse who are seeking to evade their abusers. See, e.g., *id.*

84. See, e.g., CAL. CIV. PROC. CODE § 1278 (West 2008).

85. See, e.g., N.Y. CIV. RIGHTS LAW § 61 (McKinney 1992).

86. See, e.g., MICH. COMP. LAWS § 711.1(2) (2002).

87. See, e.g., ARIZ. REV. STAT. ANN. § 12-601(B) (2003) ("The parent, guardian ad litem or next friend of a minor may file an application for change of the name of the minor in the county of the minor's residence. The court shall consider the best interests of the minor and the criteria that apply to the minor under subsection C of this section in determining whether to enter judgment that the name of the minor be changed.")

88. See, e.g., MICH. COMP. LAWS § 711.1(1) ("If the individual who petitions for a name change has a criminal record, the individual is presumed to be seeking a name change with a fraudulent

Nearly all states grant broad discretion to courts hearing the petitions and do not limit the types of names courts must deny or grant. In fact, most statutes do not provide any real guidelines at all.⁸⁹ Some states require petitioners to provide a good or sufficient reason for the petition to be granted.⁹⁰ Other states require the court to grant the petition unless a sufficient reason exists to deny it.⁹¹ Other statutes are still less clear, permitting courts to grant the petition, for example, “if such judge is satisfied that the desired change would be proper and not detrimental to the interests of any other person.”⁹² Still other

intent. The burden of proof is on a petitioner who has a criminal record to rebut the presumption. The court shall set a time and place for hearing and, except as provided in section 3 of this chapter, order publication as provided by supreme court rule.”). Some states expressly forbid name changes for persons with certain types of criminal histories. See, e.g., COLO. REV. STAT. § 13-15-101(2)(b) (2008) (“The court shall not grant a petition for a name change if the court finds the petitioner was previously convicted of a felony or adjudicated a juvenile delinquent for an offense that would constitute a felony if committed by an adult in this state or any other state or under federal law.”). In fact, the majority of published name change case law deals with requests by inmates and ex-convicts, and with petitions on behalf of minor children that are challenged by one parent. See, e.g., *In re Arnett*, 56 Cal. Rptr. 3d 1 (Ct. App. 2007). This Comment will not focus on these types of cases, because they address different issues than the main concerns here. The criminal cases balance the diminished civil rights interests of inmates and ex-convicts with heightened public safety interests on the part of the state. The cases involving minors do not require balancing individual and state interests at all. Instead, these cases balance the competing rights of each parent over the minor child and the best interests of the child.

89. See Slovenko, *supra* note 33, at 214 (“The judges generally have no clear standard in reaching a decision but are vested with great discretion whether or not to allow the proposed change.”); Rosensaft, *supra* note 30, at 194 (“[T]here exists virtually unfettered judicial discretion with respect to name changes in a total of seventeen states. Even in the remaining thirty-three states, most courts have gone beyond the restrictions listed in the statutes and rejected name change applications due to public policy or just their own whim.”).

90. See, e.g., ALASKA STAT. § 09.55.010 (2008) (“A change of a name of a person may not be made unless the court finds sufficient reasons for the change and also finds it consistent with the public interest.”); ARK. CODE ANN. § 9-2-101 (2008); D.C. CODE § 16-2503 (2008) (“On proof of the notice prescribed by section 16-2502, and upon a showing that the court deems satisfactory, the court may change the name of the applicant according to the prayer of the application.”); KAN. STAT. ANN. § 60-1402(c) (2005) (“If upon hearing the judge is satisfied as to the truth of the allegations of the petition, and that there is reasonable cause for changing the name of the petitioner the judge shall so order.”); NEB. REV. STAT. § 25-21,271(1) (2008) (“It shall be the duty of the district court [to determine] . . . that there exists proper and reasonable cause for changing the name of the petitioner . . .”).

91. See, e.g., DEL. CODE ANN. tit. 10, § 5904 (1999) (“Upon presentation of a petition for change of name under this chapter . . . and there appearing no reason for not granting the petition, the prayer of the petition may be granted.”); 735 ILL. COMP. STAT. § 5/21-101 (2003) (“If it appears to the court that . . . there is no reason why the prayer should not be granted, the court . . . may direct and provide that the name of that person be changed . . .”); N.Y. CIV. RIGHTS LAW § 63 (McKinney 1992) (“If the court to which the petition is presented is satisfied thereby . . . that there is no reasonable objection to the change of name proposed . . . the court shall make an order authorizing the petitioner to assume the name proposed . . .”).

92. MO. REV. STAT. § 527.270 (2002).

statutes grant courts jurisdiction to hear petitions without providing any guidance at all.⁹³

There are some interesting exceptions to the general procedural and substantive rules. Oklahoma and Indiana permit denial of petitions only with indication of fraudulent or illegal purpose.⁹⁴ Similarly, the Minnesota statute permits denial only if the court finds “an intent to defraud or mislead.”⁹⁵ However, the Minnesota Supreme Court has ruled that the statute implicitly allows consideration of other factors so long as “they are likely to have an undesirable impact on those other than the applicant.”⁹⁶ These statutes permit individuals broader freedom to change names; however, they also fail to account for certain legitimate concerns of the state and of other individuals that names be usable for identification and communication. The Arizona statute sets forth criteria that the court “shall consider,” but does not indicate whether or not the list is exhaustive.⁹⁷ Louisiana requires that the district attorney of the relevant parish be notified so that he or she can represent the state interest.⁹⁸ Iowa allows a person to change names only once, unless just cause is shown for an additional change.⁹⁹

93. See, e.g., ALA. CODE § 12-13-1(10) (2005); CAL. CIV. PROC. CODE §§ 1275–1276 (West 2008); CONN. GEN. STAT. § 52-11 (2005); HAW. REV. STAT. § 574-5 (2005); LA. REV. STAT. ANN. § 13:4753 (2006) (“The judge to whom the application is made, either in open court or in chambers, may proceed to hear and determine the case and render such judgment as the nature of the relief and the law and the evidence shall justify.”).

94. See *In re Hauptly*, 312 N.E.2d 857, 860 (Ind. 1974) (“The only duty of the trial court upon the filing of such a petition is to determine that there is no fraudulent intent involved. Once having so found, we hold that it is an abuse of judicial discretion to deny any application for a change of name under the statute.”); OKLA. STAT. tit. 12, § 1634 (1993) (“[T]he prayer of the petition shall be granted unless the court or judge finds that the change is sought for an illegal or fraudulent purpose, or that a material allegation in the petition is false.”). As noted *supra* note 79, Oklahoma also abrogated the right to change one’s name by usage.

95. See *In re Dengler*, 287 N.W.2d 637, 638 (Minn. 1979) (internal quotation marks omitted).

96. *Id.* at 638–39.

97. ARIZ. REV. STAT. ANN. § 12-601 (2003). The court is to consider whether the petitioner has been “convicted of a felony”; whether “felony charges are pending”; whether “the person is knowingly changing the person’s name to that of another individual for the purpose of committing or furthering the commission of any offense under title 13, chapter 18, 20, 21, 22, 23 or 27 or any other offense involving false statements”; whether “[t]he person is making the application solely for the best interest of the person”; and whether “[t]he person acknowledges that the change of name will not release the person from any obligations incurred or harm any rights of property or actions in the original name.” *Id.*

98. LA. REV. STAT. ANN. § 13:4752 (2006). This procedure has a theoretical advantage. It permits the court to adjudicate between two competing interests rather than performing a more ministerial role. The court is thus not required to generate potential objections to name changes, and, as a result, may be better able to evaluate the claim.

99. IOWA CODE § 674.13 (1998).

C. The Law Developed by Courts

In the absence of clear statutory guidelines, courts have developed their own standards for evaluating name-change petitions.¹⁰⁰ Few decisions are published, or are in fact recorded at all. In fact, states appear to frequently borrow standards of review and precedent from other states. Thus, although a few variations exist, the standards used are fairly uniform between states. Those most commonly cited are that “some substantial reason must exist for [the denial],”¹⁰¹ and “denial is limited to a showing of an ‘unworthy motive, the possibility of fraud on the public, or the choice of a name that is bizarre, unduly lengthy, ridiculous or offensive to common decency and good taste.’”¹⁰² Some courts have held that the denial must be based on actual evidence and not speculation, but these opinions are few.¹⁰³ A few courts have used other, similar standards.¹⁰⁴ However, these standards do not lead to materially different trends in case law. Notably an outlier, the Indiana Supreme Court held in *In re Hauptly* that: “The only duty of the trial court upon the filing of such a petition is to determine that there is no fraudulent intent involved. Once having so found, we hold that it is an abuse of judicial discretion to deny any application for a change of name under the statute.”¹⁰⁵ In states with statutes

100. See Slovenko, *supra* note 33, at 214 (“The judges generally have no clear standard in reaching a decision but are vested with great discretion whether or not to allow the proposed change.”).

101. *In re Knight*, 537 P.2d 1085, 1086 (Colo. App. 1975).

102. *In re Mokiligon*, 106 P.3d 584, 586 (N.M. 2004) (quoting *Knight*, 537 P.2d at 1086). *Knight* appears to be the most commonly cited case for both standards, along with *In re Cruchelow*, 926 P.2d 833 (Utah 1996), and *Moskowitz v. Moskowitz*, 385 A.2d 120 (N.H. 1978). *Knight* itself cites to *In re Ross*, 67 P.2d 94, 96 (Cal. 1937), for the “substantial reason” standard. *Knight*, 537 P.2d at 1086. The *Ross* court does not cite precedent for the standard. *Knight* cites to *In re M.*, 219 A.2d 906, 907 (Mercer County Ct. Law Div. 1966) for the second standard. *Knight*, 537 P.2d at 1086. *In re M* does not cite to precedent.

103. See, e.g., *Cruchelow*, 926 P.2d at 834 (“[T]he trial record must contain factual support for the trial court’s denial of a petition for a name change.”).

104. See, e.g., *In re Lawrence*, 319 A.2d 793, 795 (Bergen County Ct. 1974) (“It has been held that names should not be changed for trivial, capricious, or vainglorious reasons, that a change of name will be refused if the court entertains a serious doubt as to the propriety of granting it.” (quoting 65 C.J.S. *Names* § 11 (2000)); *In re Wurgler*, 844 N.E.2d 919, 921 (Ohio Ct. Com. Pl. 2005) (“A court should deny a change of name if the change would involve a potential for fraud, if it would interfere with the rights of others, if the change would permit the applicant to avoid a legal duty, or if the change was in some way contrary to the strong public policy of the state.”); *In re Miller*, 824 A.2d 1207, 1208 (Pa. Super. Ct. 2003) (“We are guided by our Supreme Court’s admonition that, in matters involving a name change, a court’s discretion must be exercised ‘in such a way as to comport with good sense, common decency and fairness to all concerned and to the public.’” (citing *In re Falcucci*, 50 A.2d 200, 202 (Pa. 1947))).

105. *In re Hauptly*, 312 N.E.2d 857, 860 (Ind. 1974). Minnesota and Oklahoma codified similar standards in their name change statutes. See MINN. STAT. § 259.11 (2007) (“[T]he court shall grant the application unless . . . it finds that there is an intent to defraud or mislead . . .”); OKLA. STAT. tit. 12, § 1634 (1993) (“[T]he prayer of the petition shall be granted unless the court or judge

that require petitioners to show proper cause, lower courts have denied petitions for failing to provide sufficient reasons.¹⁰⁶ However, appellate courts reviewing these decisions have cited the “substantial reason” standard.¹⁰⁷

On appeal, decisions by lower courts are examined under an “abuse of discretion” standard.¹⁰⁸ Courts have explained that “[t]he term ‘abuse of discretion’ implies that the court’s decision is unreasonable, arbitrary, or unconscionable,”¹⁰⁹ and that “if there is any basis upon which the action can be sustained, the ruling of the trial court must be upheld on appeal.”¹¹⁰ However, recent reversals exhibit decreased deference to lower courts.¹¹¹ Two appellate courts in particular have held that “although a trial court normally has wide discretion in matters of this type, the court must show some substantial reason before it is justified in denying a petition for a name change.”¹¹² Appellate courts increasingly reverse denials by lower courts for failing to provide evidence

finds that the change is sought for an illegal or fraudulent purpose, or that a material allegation in the petition is false.”). The Minnesota Supreme Court has held, however, that judges have implicit discretion to consider other reasons. *In re Dengler*, 287 N.W.2d 637, 638–39 (Minn. 1979). There are no published opinions in Oklahoma applying the statute, and no notable issues regarding names in Oklahoma. Presumably, therefore, Oklahoma’s freedom with respect to name changes has not caused too many problems for the state. In any event, the three states that have embraced the denial-except-for-fraud standard are outliers.

106. See, e.g., NEB. REV. STAT. § 25-21,271(1) (2008) (“It shall be the duty of the district court [to determine] . . . that there exists proper and reasonable cause for changing the name of the petitioner”); *In re Picollo*, 668 N.W.2d 712, 714 (Neb. Ct. App. 2003) (noting that “the district court denied Picollo’s request, stating that Picollo ‘is an inmate of the Nebraska Department of Correctional Services. As such, the court is not satisfied that this request for a name change is for a proper purpose.’” (citation omitted in original)).

107. See *id.* (citing *Cruchelow*, 926 P.2d at 834).

108. See, e.g., *Lee v. Superior Court*, 11 Cal. Rptr. 2d 763, 768 (Ct. App. 1992) (upholding the lower court’s denial of petitioner’s request to change his name to Misteri Nigger).

109. *In re Bicknell*, Nos. CA2000-07-140, CA2000-07-141, 2001 WL 121147, at *2 (Ohio Ct. App. Feb. 12, 2001) (citing *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219 (1983)).

110. *Lee*, 11 Cal. Rptr. 2d at 765 (quoting *In Re Ritchie*, 159 Cal. App. 3d 1070, 1072–73 (1984)) (describing the abuse of discretion standard for appellate review of name change denials). Prior to *Lee*, however, only two reported California cases had upheld the discretionary denial of name change applications. *Id.* Denials were reversed in the five remaining cases reported in California prior to *Lee*. Of these, two were reversed on the ground that the one-year residency requirement imposed by the lower court was arbitrary. See *In re Smulevitz*, 224 P.2d 911 (Cal. Ct. App. 1950); *Turesky v. Superior Court*, 218 P.2d 784 (Cal. Ct. App. 1950). The numbers of appeals reported do not, of course, reflect the number of denied petitions that are not appealed.

111. See, e.g., *In re Porter*, 31 P.3d 519, 522 (Utah 2001) (“On the record before us, we simply disagree with the district court that the likelihood of confusion, misunderstanding, or substantial mischief is sufficient to deny the petition, nor is the concern that some may be unwilling to sue a person named Santa Claus sufficient.”).

112. *Id.* at 520 (quoting *Cruchelow*, 926 P.2d at 834). The courts’ language suggests that appellate review in name change cases should more closely resemble a de novo assessment as to whether there was a substantial reason to deny, rather than affording the lower court the normal deference under the abuse of discretion review.

supporting their reasons for denial.¹¹³ Many other wrongly denied petitioners may very well be discouraged from expending the effort of an appeal and paying for an attorney and court fees, and thus there are likely many more people whose denials would be overturned had they the time and resources to mount similar appeals.

As detailed in the Introduction, courts have found substantial reasons to deny petitions for names that contained offensive or obscene references;¹¹⁴ could incite violence;¹¹⁵ were typographically unconventional;¹¹⁶ were bizarre or ridiculous;¹¹⁷ might defraud or mislead the public;¹¹⁸ might confuse the public;¹¹⁹ might interfere with the rights of others;¹²⁰ or could be considered contrary to public policies, such as those that conceal the petitioner's ethnic or national origin.¹²¹ Until the 1970's, courts would deny a petition of a married woman to have a surname other than her husband's. Both courts and other state agencies refused to recognize a married woman's use of a surname other than that of her husband.¹²²

113. See, e.g., *id.* at 522 (“[T]he record contains insufficient factual support for the district court’s denial of Porter’s petition. In fact, the record below contains only factual support for granting the name change.”); see also *In re Mokiligon*, 106 P.3d 584, 586 (N.M. Ct. App. 2004) (reversing a petition that was summarily denied without a hearing).

114. See *In re Variable*, 190 P.3d 354 (N.M. 2008) (denying a petition for a name change to Fuck Censorship!).

115. See *Lee*, 11 Cal. Rptr. 2d at 767 (“Here, the surname has the potential to be in the ‘fighting words’ category.” (referring to the name Misteri Nigger)).

116. The petitions for name changes to “1069” and “III” exemplify this category. See *In re Dengler*, 287 N.W.2d 637 (Minn. 1979), cert. denied, 446 U.S. 949; *In re Dengler*, 246 N.W.2d 758 (N.D. 1976); *In re Ritchie*, 206 Cal. Rptr. 239 (Ct. App. 1984). In addition, single names could be characterized as typographically unconventional as well. See *supra* Introduction, at 2–3.

117. *In re Cooperman*, reprinted in N.Y.L.J., Oct. 18, 1976, at 16 (denying a petitioner’s request to change her surname from Cooperman to Cooperperson). *Cooperman* is the only case I encountered that denied a petition explicitly on the ground that it was ridiculous.

118. See, e.g., *In re Clark*, 85 N.Y.S.2d 667 (1948). In *Clark*, one actress sought to change her name to match that of another actress. *Id.* at 667–68. The two women had agreed to share the same name and pursue a career as a single actress. *Id.*

119. See, e.g., *In re Thompson*, 369 N.Y.S.2d 278, 279 (Civ. Ct. 1975) (denying a petitioner’s request to change his name to Chief Piankhi Akinbaloye). Typographically irregular names, such as the petitioner’s request in *Ravitch* to change her last name to “R.” have also been denied on grounds of confusion. See, e.g., *In re Ravitch*, 754 A.2d 1287 (Pa. Super. 2000).

120. See, e.g., *In re Serpentfoot*, 646 S.E.2d 267, 269–70 (Ga. Ct. App. 2007) (denying an application by a woman whose crimes had been reported in a local newspaper to change her surname to that of the publisher, so that if he continued to publish stories about her, his own surname would be tainted as well).

121. See, e.g., *In re Cohen*, 4 Conn. Supp. 342 (Super. Ct. 1936) (denying a petition by a man named Cohen to change his name to Connelly); *In re Jama*, 272 N.Y.S.2d 677 (Civ. Ct. 1966) (denying, on the grounds that the desired name was un-American, a petition by a man with the last name Jama to change his name to von Jama to better reflect his German heritage).

122. Scholars have written extensively on the right of women to choose their surnames. However, the focus is often on constitutional equal protection guarantees, rather than on fundamental or First

Ultimately, however, the standards developed by courts for evaluating petitions do not provide significantly more guidance to judges than do the statutes themselves. As a result, judges in courts of first instance are bestowed with a dangerous amount of discretion. Ellen Jean Dannin argues that, “[i]n many cases in which a judge has denied a statutory name change, the decision seems to be based upon the judge’s personal biases or lack of sensitivity to the petitioner’s personal interests.”¹²³ This point is illustrated clearly by the opinions denying name changes for reasons of public policy. Examples of these types of decisions include denials of petitions to change surnames because of ethnic or national associations; denials of petitions by same-sex couples to adopt the same surname; and denials of petitions by transgender individuals for names with different gender associations.¹²⁴ In these cases, what is considered a “substantial” or “legitimate” reason to deny a name change often appears to depend on governing social values, rather than on demonstrated interference with state interests that outweigh the individual interests, such as in the case of transgendered petitioners, same sex couples seeking to share the same surname. Decisions denying petitions on grounds of confusion also appear especially influenced by personal opinion and hypothesis rather than by actual evidence of harm.¹²⁵ Indeed, that appellate courts now increasingly reverse petition denials strongly suggests that current standards provide inadequate guidance.¹²⁶

Amendment rights to control one's name. See, e.g., Omi, *supra* note 33, at 253–62; Esther Suarez, *A Woman's Freedom to Choose Her Surname: Is It Really a Matter of Choice?*, 18 WOMEN'S RTS. L. REP. 233, 241–42 (1997).

123. Dannin, *supra* note 30, at 165.

124. Policy denials include, for example, petitions of individuals trying to Americanize ethnic surnames, or vice versa, same-sex couples trying to acquire the same surname, and transgender petitioners' requests to change their names to reflect their changed gender.

125. One notable example is *Jama*, 272 N.Y.S.2d 677. In *Jama*, the petitioner sought to add “von” before his last name to reflect his German heritage. *Id.* The court denounced as un-American “petitioner’s desire to affiliate himself with such close affinity with” a people who “[adopted] the philosophies of a monstrosity and his cohorts.” *Id.* at 677–78. The court also noted that the surname “Jama” was good enough for petitioner’s father. *Id.* at 678. Finally, the court denied the petition because surnames beginning with “von” occurred with more frequency among the German nobility; it believed that adding the “von” would be tantamount to bestowing a title. *Id.* However, merely because a name is more commonly used by nobility does not alone make it a title.

126. See, e.g., *In re Porter*, 31 P.3d 519, 522 (Utah 2001) (“[T]he record contains insufficient factual support for the district court’s denial of Porter’s petition. In fact, the record below contains only factual support for granting the name change.”); see also *In re Mokiligon*, 106 P.3d 584, 586 (N.M. Ct. App. 2004) (reversing a petition that was summarily denied without a hearing). Extreme examples further open judicial discretion to criticism. Slovenko recounts, “Years ago in New York it was a mistake to apply to Judge Peter Schmuck, as he refused all applications, citing his own name.” Slovenko, *supra* note 33, at 214.

III. POTENTIAL CONSTITUTIONAL CHALLENGES TO EXISTING NAME LAW

A. Potential First Amendment Challenges

Although much has been written about the self-expression function of names, questions about the interaction of name law with the First Amendment right to free speech have not been thoroughly addressed.¹²⁷ This Subpart analyzes potential First Amendment free speech challenges to existing name law. It first concludes that denials of name-change petitions do not impose direct restrictions on speech. However, because name-change statutes provide official sanction for some name changes, the statutory process may be seen as creating a limited public forum in which the state may not engage in impermissible viewpoint discrimination. Some denials may be susceptible to challenge under this doctrine. In addition, I conclude that denials may be susceptible to challenge as impermissible speech compulsion. Finally, I critique the argument that states may be given great latitude to restrict name changes because of their interest in preventing the compelled speech of others.

Although many people use their names as vehicles for self-expression, petitioners requesting name changes rarely make First Amendment free speech arguments.¹²⁸ When they do, these arguments are swiftly dismissed without much consideration. For example, in *Lee v. Superior Court*,¹²⁹ Lee argued on appeal that denial of his petition violated his First Amendment right to free speech. The court responded only by stating: “Since appellant’s common law right to use the surname has not been abrogated, none of his First Amendment rights have been prejudiced.”¹³⁰

The court’s summary dismissal of Lee’s First Amendment argument belittles the speech-related difficulties faced by petitioners who have been denied.¹³¹ Denied petitioners face significant difficulties in acquiring docu-

127. Only two courts appear to have addressed First Amendment challenges to name change denials. Both courts addressed the arguments briefly. See *Lee v. Superior Court*, 11 Cal. Rptr. 2d 763, 768 (Ct. App. 1992); *In re Variable*, 190 P.3d 354, 356 (N.M. 2008).

128. In contrast, many appeals by incarcerated persons argue that denial of their petitions violates their rights to free exercise.

129. 11 Cal. Rptr. 2d 763.

130. *Id.* at 768 (internal citation omitted).

131. These difficulties may be especially great for transgender individuals who may hesitate to ask to be called by their preferred names, for example during a hiring process. During a former job, a transgender coworker and I went through a training and interview process that lasted six weeks. Throughout, my coworker used and responded to his given female name, because the application required government identification and a background check. Unsure of the employer’s opinion of transgender individuals, he did not ask to be called by his male name until after he was hired.

mentation in their new names, and they may be unable to do so at all. They must use their state-recognized names for official purposes. They are known to other people and to institutions by the names on their documents, and must explain that they prefer to be called by different names. Getting others to use their preferred names in records and interactions may be difficult.

Nonetheless, denials of name-change petitions do not directly impose restrictions on the petitioners' speech.¹³² None of the difficulties faced by denied petitioners restricts something to which they are entitled based on their free speech rights. None of these difficulties in fact place limits on speech at all. The only actions limited are petitioners' ability to request, and in some cases require, others to speak in a certain way. Denied petitioners may continue to say and write that their names are whatever they prefer in arenas to which they are entitled to free speech. For example, a denied petitioner is always free to say, "My legal name is Mary, but I prefer to be called Jane." Although denied petitioners will be required to continue to use their official names on government documents, these are not traditional fora for speech. Thus, denying permission to use a chosen name on government documents does not directly restrict speech. It does, however, restrict the ability to control one's name.¹³³ In any case, this does not mean that a naming regulation does not cause problems with the First Amendment at all.

Although name-change denials do not impose direct restrictions on speech, some such denials could be challenged as limiting access to a government benefit based on impermissible viewpoint discrimination under the limited public forum doctrine.¹³⁴ Under this doctrine, when state action gives a subsidy to certain types of speech, it creates a limited public forum. A state that creates a public forum may make some content-based restrictions in light of the forum's designated purpose.¹³⁵ However, "[t]he State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." In

Petitions by transgender individuals to conform their names to their gender identities continue to be denied by courts of first instance. See, e.g., *In re Golden*, 867 N.Y.S.2d 767 (App. Div. 2008).

132. See *Lee*, 11 Cal. Rptr. 2d at 768 (noting the petitioner was free to refer to himself by his desired name).

133. By "control one's name" I mean the ability to use a name officially, and to control or attempt to control what others call you.

134. See *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–31 (1995). "Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829 (citing *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

135. *Id.*

Rosenberger v. Rectors and Visitors of the University of Virginia,¹³⁶ the University refused to refund the publication expenses of a Christian student newspaper out of the student activities fund designated for student journalism.¹³⁷ The Court applied the limited public forum doctrine, and held that “[t]he [student activities fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”¹³⁸ It found that the University’s restrictions on speech were not reasonable in light of the forum’s purpose. Thus, denying funds to the Christian student newspaper constituted impermissible viewpoint discrimination.¹³⁹

Providing official sanction for some new names creates a subsidy on certain speech and thus creates a metaphysical public forum. Just as the providing of University funds in *Rosenberger* increased student organizations’ ability to spread their messages, the granting of name-change petitions enables successful petitioners to more easily gain recognition of their desired names, and to more easily use the names themselves. Names given official sanction seem more legitimate than those used in addition to a legal name. Successful petitioners may also have their new names printed on all of their documents, which increases petitioners’ ability to express themselves through their chosen names by increasing the number of places the names can and will be used.

States may not argue that viewpoint discrimination is permissible in deciding on name-change petitions because names are government speech. *Sons of Confederate Veterans v. Commissioner of the Virginia Department of Motor Vehicles*¹⁴⁰ provides the commonly used four-factor test for government speech in a case where the court applied the public forum doctrine in *Rosenberger* to a subject more like the subject of this Comment. In *Sons of Confederate Veterans*, although other special interest groups were permitted to include their logos on license plates, the Sons of Confederate Veterans were restricted from using their logo, which included a confederate flag.¹⁴¹ The court found that the refusal amounted to viewpoint discrimination.¹⁴²

The Commissioner argued that the viewpoint discrimination was permissible because the license plate constituted government speech.¹⁴³ The court disagreed.¹⁴⁴ To do so it looked at the following factors:

136. *Id.*
137. *Id.* at 822–23.
138. *Id.* at 829–30.
139. *Id.*
140. 288 F.3d 610, 622–23 (4th Cir. 2002).
141. *Id.* at 613.
142. *Id.* at 623.
143. *Id.* at 616.
144. *Id.* at 622.

(1) the central “purpose” of the program in which the speech in question occurs; (2) the degree of “editorial control” exercised by the government or private entities over the content of the speech; (3) the identity of the “literal speaker”; and (4) whether the government or the private entity bears the “ultimate responsibility” for the content of the speech¹⁴⁵

Under this test, petitioners' desired names do not amount to government speech. The central purpose of the statutory name-change process is to record name changes, not to promote a government message or condone the message of a private individual. The individual exercises extensive editorial control, as recognized by the common law and the conventional practice of giving names. The individual is the “literal speaker.” Finally, the individual is ultimately responsible for the speech; government agencies that print the name merely record the chosen words. Under the *Sons of Confederate Veterans* test, name-change petitioners have a far stronger argument than license plate holders that names are individual speech. Names are far more important and personal to the speaker than even vanity plates or specialized licenses. Moreover, names have been used as a means of expression prior to their regulation by the state. In this way, the statutory name-change process shares some characteristics with benefits given to artistic expression or student publications, in that these do not create a means of expression, but rather provide a benefit to activities that were already used as means of expression rather than creating the opportunity for expression where there was not before. The distinction is important because, although states and the federal government could terminate the use of license plates as a means of both expression and identification, they could not end the expressive use of names. Nor could they cease recognition of name changes and proscribe both formal and informal use of any other name than that given, though this is unlikely to occur. However, as I will argue later, they may have an obligation to recognize name changes even if failing to do so does not restrict speech.¹⁴⁶

Even if courts accept that names are individual, rather than government, speech, the impermissible viewpoint discrimination doctrine will not protect all name-change petitioners. Because names must be used for identification and communication, courts may continue to deny petitions for names with offensive content, because such content-based restrictions will be found to be reasonably related to the purpose of the forum. The same argument works for typographically irregular names. Even a state requiring a certain number of

145. *Id.* at 618.

146. *See infra* Part III.B.

names, or limiting the number of characters that may be used, could be justified as reasonable content-based restrictions, so long as names that do not conform actually create recording difficulties.

In addition, in many cases, it would be difficult to determine whether a name-change denial amounted to actual viewpoint discrimination. Although it may be relatively easy to discern the desired message in the names Cooperperson and GoVeg.com, most cases are not so clear. For example, does denying the petition by a same-sex couple to assume the same last name amount to an attempt to suppress the expression that the couple is a family? One could argue that the reason the name is being denied is that the court is trying to suppress the expression that a same-sex couple is a family, and therefore restrict expressions of that opinion and ideology. On the other hand, it's not clear that the desire of the petitioners in these cases is to express a particular view in their choice of name.

A final First Amendment argument is that petition denials impermissibly compel speech. In *Wooley v. Maynard*,¹⁴⁷ the U.S. Supreme Court held that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."¹⁴⁸ In *Wooley* and in its predecessor, *West Virginia State Board of Education v. Barnette*,¹⁴⁹ the West Virginia state government compelled petitioners to say and display ideological statements. However, the right not to speak is not limited to the right to refrain from expressing ideological views. Petitioners whose name changes have been denied are forced to speak and write the name that the state chooses to acknowledge. A person must write or say the name acknowledged by the state in at least the following instances: when voting, paying taxes, responding to a summons for jury duty or other court matters, traveling, and acquiring bank accounts and credit cards. This list includes not only benefits but also rights and obligations. The right to vote and the obligation to pay one's taxes necessitate the use of a person's state-recognized name. Unless denied petitioners choose to live completely off the grid, incur punishment for failure to pay taxes or answer a summons, and relinquish the right to vote, they must say and write their state-approved names.

The First Amendment argument based on impermissible speech compulsion too is open to criticism. When courts deny petitions, they rarely insist that petitioners keep their current names. Rather, denials simply withhold

147. 430 U.S. 705 (1977).

148. *Id.* at 714.

149. 319 U.S. 624 (1943).

legal recognition from one possible new name. Petitioners may choose another name and are not actually forced to use an undesirable name. Although courts rarely insist that denied petitioners keep their current names, the option of choosing another name is less than satisfactory for many petitioners. Dengler, for example, felt as though “1069” was the sole way to describe his identity; each numeral had significance.¹⁵⁰ The state’s denial of his petition meant that he would not be able to find a name that was acceptable to both him and the state. Transgender petitioners denied official recognition of names based on the names’ gender associations are placed in similar predicaments. Petitioners will be frustrated in their attempts to adopt any name, so long as it communicates a gender different from that the state acknowledges. Same-sex couples seeking to share a family name may experience similar obstacles.

States may argue generally for greater latitude in restricting speech rights attached to name changes because names implicate the speech rights of others, who will be required to use those names that are given official government recognition. States may insist that they have a compelling interest in preventing the compelled speech of other individuals.

However, this argument is susceptible to three counterarguments. First, although at times using another individual’s name is a practical necessity, rarely will someone actually be compelled to use another’s name.¹⁵¹ Admittedly, however, there are some cases where use of a name will be a practical necessity,¹⁵² though they remain few and far between.

Second, for states seeking to protect their citizens against compelled speech, only a small category of names is likely to cause problems. Names with words that many people find inherently offensive could be restricted based on this justification. This is because the objection is to the very act of saying the word or words. Although objections to addressing someone as “Fuck” or

150. See *In re Dengler*, 287 N.W.2d 637, 638 (Minn. 1979).

151. But see *El-Hakem v. BJK Inc.*, 415 F.3d 1068 (9th Cir. 2005) (finding an employer to have violated Title VII by calling an Arabic employee “Manny” despite the employee’s repeated requests to be referred to as “Mamdouh”). This case, however, seems more concerned with the employer’s insistence on using an anglicized version of the employee’s name in a manner intended to cause offense than with the refusal to use the name “Mamdouh” at all. *Id.* A court would likely come to a different conclusion if an employer refused to call an employee “Fuck” on that person’s insistence.

152. For example, California has made it unlawful to refuse to do business with a person “because he or she has chosen to use or regularly uses his or her birth name, former name, or name adopted upon solemnization of marriage or registration of domestic partnership” and unlawful to require a person to use another name as a condition of doing business. CAL. CIV. PROC. CODE § 1279.6 (West 2008). Thus, California does compel persons doing business in the state to speak certain names. Note that the California statute appears not to protect voluntary name changes other than those made at time of marriage or registration of a domestic partnership, which limits the extent to which a person may be forced to use a name to which they object.

“Nigger” may thus easily be accepted as valid, objections to names with undesirable associations are less persuasive. For example, although many view Adolf Hitler’s actions as monstrous and reprehensible, calling a child “Adolph” or an adult “Mr. Hitler” should cause few problems for the speaker.¹⁵³ Moreover, although stating an obscenity, reciting a pledge, or displaying a motto on one’s personal property may cause others to draw conclusions about a person’s beliefs, almost no one would believe that using the words that make up the historical figure’s name suggests that the speaker supports his ideas.

Finally, the state’s interests in protecting against compelled speech are particularly weak with regard to its own employees and to other persons whose jobs necessitate interaction with the public. Compelled utterance of certain names may be seen as a hazard of accepting employment that involves such interaction. That is, acceptance of certain jobs may force the individuals to encounter situations that they would prefer to avoid. State actors and in some cases private citizens that offer public services may not discriminate based on their own sensitivities. For example, the California Supreme Court held last year that requiring a fertility doctor to provide services to same-sex couples did not violate the doctor’s First Amendment right to free exercise.¹⁵⁴ A doctor may have to treat someone covered in tattoos with white-supremacist messages, and a police officer or judge may have to record the word “fuck” if necessary to complete a report or opinion. Certain jobs may simply require a thick skin where the public interest in prompting action outweighs the individual employee’s interest in freedom from certain compelled speech.

B. Potential Substantive Due Process and Privacy Challenges

Control over one’s name, like other components or manifestations of individual autonomy and identity, should be protected as a fundamental privacy right protected by substantive due process under the Fourteenth Amendment.¹⁵⁵

153. Saying the name of an evil person or an offensive concept in our world is not the same as, for example, a character in *Harry Potter* saying “Voldemort.” In the book, the name of the villain is thought to give him strength when uttered; thus the other characters avoid saying his name, and instead refer to him as “he who must not be named.” J.K. ROWLING, *HARRY POTTER AND THE SORCERER’S STONE passim* (1998).

154. *N. Coast Women’s Care Med. Group, Inc. v. San Diego County Superior Court*, 189 P.3d 959, 967 (Cal. 2008).

155. Rosensaft argues similarly for a much narrower right: the right to change one’s name at marriage. See Rosensaft, *supra* note 33, at 216 (“First and foremost, the right argued for in this article is not a general fundamental right to change one’s name, but only a fundamental right for a spouse to take his or her spouse’s name upon marriage.”). Many of Rosensaft’s arguments also support a general right to control one’s name. See *id.* For example, he argues that naming is a fundamental aspect of identity, and has been traditionally protected under the common law. *Id.* I have attempted to examine

When using an individual's names, the government should be required to use those selected by the individual absent a compelling reason to do otherwise.

Because control over one's name should be deemed fundamental, many of the existing name-change laws require reform to be brought within constitutionally permissible boundaries.¹⁵⁶ Although states have many compelling interests in regulating name changes, the existing laws are not narrowly tailored. Moreover, regardless of the constitutionality of current state control over names, several policy reasons exist for reforming statutes towards requiring greater specificity and decreased judicial discretion. These policy arguments will be discussed in Part IV.

1. Is the Right to Control One's Name Fundamental?

There are two "often conflicting" lines of Supreme Court precedent on how to determine what rights are fundamental.¹⁵⁷ Lee Goldman writes:

The more liberal Justices, seeking to protect minority interests, ask whether a right is central to personal dignity and autonomy or is at the heart of liberty. The more conservative Justices, fearing judicial activism at the expense of democratic preferences, insist that a right is not fundamental unless it is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."¹⁵⁸

In *Lawrence v. Texas*,¹⁵⁹ Justice Kennedy explained

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression,

some of Rosensaft's arguments in greater depth, and have discussed counterarguments that he does not. I also consider how the existing name change statutes should fare under strict scrutiny, as well as under the less strict interest-balancing tests the Supreme Court has used for certain privacy rights. See Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 614 (2006) (discussing the various standards used by the Court in privacy cases besides strict scrutiny).

156. See *Roe v. Wade*, 410 U.S. 113, 152–55 (1973) (explaining the rules for finding a fundamental right and applying strict scrutiny to state action that affects fundamental rights).

157. Goldman, *supra* note 155, at 602.

158. *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992), and *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), for the liberal standard, and quoting Scalia's dissent in *Lawrence*, 539 U.S. at 593, for the more conservative approach. Scalia's dissent quotes *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

159. 539 U.S. 558.

and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.¹⁶⁰

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁶¹ the Court stated that “matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”¹⁶²

By contrast, in *Washington v. Glucksberg*,¹⁶³ the Court required that, in order for a right to be deemed fundamental, it must be “deeply rooted in this Nation’s history and tradition”¹⁶⁴ and “implicit in the concept of ordered liberty.”¹⁶⁵ The Court held that the analysis requires a “careful description’ of the asserted fundamental liberty interest”¹⁶⁶ when framing the right.

Naming may easily be considered a fundamental right under the more liberal test espoused in *Lawrence* and *Casey*.¹⁶⁷ Many scholars argue that names are fundamental components or manifestations of a person’s identity.¹⁶⁸

160. *Id.* at 562.

161. 505 U.S. 833.

162. *Id.* at 851.

163. 521 U.S. 702.

164. *Id.* at 721 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

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

166. *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

167. See *Rosensaft*, *supra* note 33, at 213. *Rosensaft* writes:

Although Justice O’Connor was speaking of abortion, her words in *Planned Parenthood v. Casey* seem to conjure up this idea of fundamental rights encompassing the notion of control over one’s own identity: “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” Given the cultural, religious, ethnic, and societal implications of one’s name . . . being able to name oneself is defining oneself and should be included among other similar fundamental rights.

Id. (quoting *Casey*, 505 U.S. at 851). The particular passage of *Casey* cited by *Rosensaft* focuses on the debate over the time at which life begins. The better citation to *Casey* may be the one cited *supra* note 162 and accompanying text. This is because control over names and other mutable aspects of identity are central to one’s autonomy and dignity.

168. See, e.g., *Rosensaft*, *supra* note 33, at 190 (“Kif Augustine-Adams summed it up best when she remarked that ‘[n]aming practices reflect conceptions of individuality, equality, family and community that are fundamental to identity.’” (quoting Augustine-Adams, *supra* note 45, at 1)); Teresa Scassa, *National Identity, Ethnic Surnames, and the State*, 11 CAN. J.L. & SOC. 167, 169 (1996) (“Names have been described as the simplest, most literal and most obvious of all symbols of identity.” (citation omitted)); Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 769 (2007) (“Though apparently trivial, names are also constitutive. To have a name at all is thought to be a fundamental element of identity and dignity.” (citing G.A. Res. 1386, ¶ 11, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959))).

Entire books are devoted to the significance of names. See generally RICHARD D. ALFORD, *NAMING AND IDENTITY: A CROSS-CULTURAL STUDY OF PERSONAL NAMING PRACTICES* (HRAF Press 1988); JUSTIN KAPLAN & ANNE BERNAYS, *THE LANGUAGE OF NAMES* (Simon & Schuster 1997); ELSDON C. SMITH, *THE STORY OF OUR NAMES* (Harper & Bros. Publishers 1950). The American Names Society has published a journal from the 1950s through the present dedicated to the subject of international naming practices. See the discussion *supra* Part I for more on the significance of names.

A name is more than just a representation or expression of oneself to others. Names form part of one's own self-concept, whether or not that self-concept is communicated to the public.¹⁶⁹ Ralph Slovenko writes that "while the primary function of the legal name is to spot a particular individual, at the same time it serves to integrate the disparate aspects of one's personality and give a sense of cohesive self."¹⁷⁰ Empirical studies have established links between types of names and personality, achievement, and mental health.¹⁷¹ Avner Falk provides an interesting discussion of clinical observations in which the identity issues of psychoanalysis patients were linked to their existing names or resulted in a name change.¹⁷² Falk also notes, "Not surprisingly the 'father of identity theory' himself, Erik Erikson, underwent both identity crises and name changes. There is little doubt that the name change from Erik Homburger to Erik H. Erikson is intimately related to his identity struggles."¹⁷³

169. See Andrew M. Milz, *But Names Will Never Hurt Me?: El-Hakem v. BJJ, Inc. and Title VII Liability for Race Discrimination Based on an Employee's Name*, 16 TEMP. POL. & CIV. RTS. L. REV. 283, 293 (2006) ("One's name is the closest thing she has to a way to define her individuality, in essence, a 'shorthand for self-concept.' The names we are given, be they our first names, surnames, or nicknames, significantly impact our development as individuals, crafting our personal identities and our perceptions of self." (quoting SMITH, *supra* note 168, at 277)).

170. Slovenko, *supra* note 33, at 217.

171. Psychological studies have found, for example, that Harvard students with "singular names" fared worse academically and personally, and that boys with "peculiar first names" were more "severely disturbed" than those with common names. A. Arthur Hartman, Robert C. Nicolay & Jesse Hurley, *Unique Personal Names as a Social Adjustment Factor*, 75 J. SOC. PSYCH. 107, 107 (1968). Another study found that "[n]ames that connoted psychological health versus maladjustment (pleasant/unpleasant temperament) [as determined through a survey of connotations of names] were indeed associated with pleasant/unpleasant temperament attributes." Albert Mehrabian, *Interrelationships Among Name Desirability, Name Uniqueness, Emotion Characteristics Connoted by Names, and Temperament*, 22 J. APPLIED SOC. PSYCH. 1797, 1797 (1992).

172. Avner Falk, *Identity and Name Changes*, 62 PSYCHOANALYTIC REV. 647, 651–53 (1975).

173. *Id.* at 654 (citing Erik H. Erikson, *Autobiographic Notes on the Identity Crisis*, 99 DAEDALUS 730 (1970)). Falk suggests that Erikson changed his surname because he felt different as a child from his family, and therefore his given name did not represent him. Erikson grew up with his Jewish mother and stepfather, but looked more like the Danish father that had abandoned Erikson's mother before Erikson met him. *Id.* at 654–55.

Personal experience and observation leads me to agree with scholars and researchers about the importance of names as components and manifestations of identity. For example, I choose to use the surnames of both of my parents (who are divorced), because it is important to me to identify as a child of both people and as a part of both families. I made this choice recently. Writing this Comment has led me to determine that I will keep these surnames permanently, not as a political or speech act, but because I would never feel quite like myself with another name. Moreover, had I been given a name at birth that I later felt did not adequately express my identity, had connotations that I abhorred, or suggested a gender with which I did not identify, state action that limited my ability to change that name would feel like an invasion of my autonomy and would create distress. Granted, the state does exert control over the bodies of its citizens, but I would argue that this occurs where there are compelling interests. Moreover, to those who would argue that state control over a person's body may cause physical harm, given what we know about modern psychology and psychiatry, emotional and psychological harm is equally intolerable absent compelling reasons to infringe on the individual's autonomy. For these

Some scholars argue that names are selected for us in ways that render them almost without meaning, and that most people retain the names they are given.¹⁷⁴ They therefore conclude that name choice is not terribly important, as most people do not choose their own names.¹⁷⁵

However, this Comment is concerned with those who choose to change their names, and the beliefs they possess about the importance of those names. Presumably those who take the time and effort to file papers, publish notice, and pay the name-change fee perceive the change to be important.¹⁷⁶ Because the decision may not be important or personal to many does not mean that is not important to others, as evidenced by those who spend a great deal of time and resources to change their name or appeal a denied petition. Those who consider a desired name to be an aspect of self and identity experience serious harm from restrictions on their ability to control their names. The opinions and desires of those who view name choice as critical to identity should be respected and protected.

The right to control one's name also passes muster under the more conservative fundamental rights test.¹⁷⁷ The more conservative test asks first whether the asserted right is "deeply rooted in this Nation's history and tradition."¹⁷⁸ In determining whether or not there is a fundamental right to assisted suicide, the Court in *Glucksberg* repeatedly asserted that suicide and assisted suicide had not only *not* been historically protected, but both had been criminalized and denounced throughout history in many cultures.¹⁷⁹ In contrast, the right to choose one's name possesses the required historical pedigree. Not only has the Anglo-American tradition not proscribed the right to change names, but the right is well-established in the common law of England and the

reasons, I believe naming should be protected as a fundamental right. Certainly, although a name has public expressive purposes, a person's choice of name is a very important, intimate, and personal decision. See Scassa, *supra* note 168, at 169 ("Like the language of which they are a part, names are of deep personal significance to the individual.").

174. See, e.g., Emens, *supra* note 168, at 768 ("Names are mere words—a string of letters and sounds typically chosen by someone else to identify us. Our first names and our last names are given by others before or shortly after we are born, when the choosers have no idea of our personalities or preferences, and thus are in some sense chosen blindly.").

175. *Id.*

176. Rosensaft points out that changing one's name is by no means a small task in terms of time and expense. Rosensaft, *supra* note 33, at 207–09.

177. See *id.* at 214–15 ("Fundamental rights have been denied when not 'deeply rooted in this nation's history and tradition,' but the right to change one's name upon marriage would pass that test as well." (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986))).

178. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

179. *Id.* at 723–28 (1997) ("The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it.").

United States.¹⁸⁰ The common law right continues to be given effect by many courts, and is explicitly codified in some of the current name-change statutes.¹⁸¹ In contrast, these statutes and state restrictions on name changes have come about more recently.

Roe v. Wade shares a similarity with the issue of control of names under this test as well. Although the Court did not explicitly apply the *Glucksberg* test in *Roe v. Wade*,¹⁸² the majority noted that laws proscribing abortion “are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.”¹⁸³ Name-change regulation began at the same time.¹⁸⁴ Moreover, as a general rule, state courts and the name-change statutes themselves explicitly upheld the common law right.¹⁸⁵ The *Roe* majority noted that throughout history “a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.”¹⁸⁶ The same is true with respect to the freedom to change names.¹⁸⁷

In order for a right to be considered fundamental under the more restrictive test, it must also be “fundamental to the concept of ordered liberty.”¹⁸⁸ It could be asserted that the right to control one’s name is not “fundamental to the concept of ordered liberty” because many other democratic nations continue to restrict names more heavily than does the United States.¹⁸⁹ However, these nations are also more restrictive of freedom of speech,¹⁹⁰ a freedom enshrined as fundamental in the U.S. Bill of Rights.¹⁹¹

180. See discussion *supra* Part II.A; Rosensaft, *supra* note 33, at 214.

181. See *supra* note 80.

182. *Roe*, 410 U.S. 113 (1973).

183. *Id.* at 129.

184. See discussion *supra* Part II.B and note 78.

185. See *supra* note 80.

186. 410 U.S. at 140.

187. See discussion, *supra* Part III.B.

188. 410 U.S. at 140 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

189. One Scholar notes “French law imposes immutability of name (whether first or surname) with little windows of opportunity to change.” Audrey Guinchard, *Is the Name Property? Comparing the English and French Evolution*, 49 (La. State Univ., First Workshop Series of the Centre of Civil Law Studies Seminar Paper, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1290042&download=yes. In addition, in France, “until 1992 parents could only register their babies with names from an approved list.” Charles Bremner & Marie Tourres, *Melting Pot Cracks as Muslims Reject Christian Names in France*, *TIMES* (London), Nov. 15, 2008, at 57, available at <http://www.timesonline.co.uk/tol/news/world/europe/article5158566.ece>.

190. See Elisabeth Zoller, *Foreword: Freedom of Expression: “Precious Right” in Europe, “Sacred Right” in the United States?*, 84 *IND. L.J.* 803 *passim* (2009) (“In the United States, this freedom passes for an absolute; nothing seems able to limit it, beyond the certainty of public disturbance in the form of immediate violence on the part of the author. The most typical example involves the prominence given to national security, developed here in an historic fresco by Geoffrey Stone. In Europe, however, it is not exclusively the sound and fury of guns, spilled blood, or the trespass to property that

Moreover, in *Burghartz v. Switzerland*¹⁹² and cases that followed, the European Human Rights Commission and Court have found a fundamental right to control one's name is encompassed in the right to privacy under Article 8 of the European Convention on Human Rights.¹⁹³ Although no U.S. court has examined whether a fundamental right to control one's name exists, at least two U.S. courts have held that the right of parents to name their children is a privacy right.¹⁹⁴

An obvious counterargument to respecting the right to control one's name as a privacy right is that names have significant public components. Names affect others who have to use, say, hear, and read them. This public aspect thus sets naming apart from other privacy rights. Supreme Court opinions involving fundamental privacy rights, including *Lawrence*, emphasize the

determines the limits of freedom of expression. The decisive point is that the exercise of this freedom involves 'duties and responsibilities,' as stated in the text of the European Convention (Article 10, section 2), and so it is a relative freedom.").

191. For example, in *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), the district court confronted a French court's order imposing a daily penalty on Yahoo! until it removed Nazi memorabilia from its U.S. auction site. *Id.* at 1184–85. The court explained, "The French order prohibits the sale or display of items based on their association with a particular political organization and bans the display of websites based on the authors' viewpoint with respect to the Holocaust and anti-Semitism. A United States court constitutionally could not make such an order." *Id.* at 1189 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)). A plurality of the Court of Appeals sitting en banc ultimately concluded that the First Amendment protection afforded to Yahoo! was more limited, because of the issue of extraterritoriality. See *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1217–18 (9th Cir. 2006).

192. App. No. 16213/90, 18 Eur. H.R. Rep. 101 (1994).

193. *Id.* at 108–10; see also Gross, *supra* note 27 (discussing other cases). Admittedly, the Court gives the signatory nations a "margin of appreciation" that one scholar notes "is probably too wide." Gross, *supra* note 27, at 270. However, the deference afforded signatory nations may have more to do with the nature of the relationship between the Court and signatory nations, which requires respect for sovereign autonomy, than with the importance placed on the individual right. *Id.* (discussing the margin of appreciation).

194. See *O'Brien v. Tilson*, 523 F. Supp. 494, 496 (E.D.N.C. 1981) (holding that parents' right to name their child is encompassed within the right to privacy protected by the 14th Amendment); *Jech v. Burch*, 466 F. Supp. 714, 718–19 (D. Haw. 1979) (same). Although both courts found that the offending statutes failed the rational basis test, citations to cases such as *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), implied that they viewed the parental naming right as part of the privacy rights rubric. The right may thus be subject to higher scrutiny, though the courts in *Jech* and *O'Brien* found such analysis unnecessary. In fact, the court in *O'Brien* explicitly stated that it "need not decide whether the state must show a compelling state interest or some lesser interest . . . because even under the most relaxed of standards . . . the statute proves to be patently defective." *O'Brien*, 523 F. Supp. at 496. But see *Henne v. Wright*, 904 F.2d 1208 (8th Cir. 1990) (holding that there is no fundamental right to give a child a surname with which it had no legal association). However, the court in *Henne* refused to reach the broader issue of whether a parent generally has a right to name a child. *Id.* at 1213. Notably, in *Henne*, the issue before the court was whether a mother could give her illegitimate child the surname of a man who had not been proven to be the father of the child. *Id.* The court thus seemed more concerned with this issue of paternal liability than with the issues raised by *Jech*, *O'Brien*, and this Comment.

private nature of the rights at issue.¹⁹⁵ Because names serve public and private functions,¹⁹⁶ one could make the argument that control over one's name cannot be considered a privacy right.

However, the individual exercise of other fundamental privacy rights also affects others or requires public recognition. The best example is the right to marry.¹⁹⁷ Under current U.S. law, marriage entitles a couple to recognition by the government and to interaction with the state as a married couple. The state grants marriage licenses and recognizes one or both spouses' new name on state identification documents. The state also grants benefits to the couple that are based on marital status, most notably tax benefits. Other institutions, such as hospitals, are required to make accommodations and grant privileges, such as visitation rights.

The Court in *Roe* also recognized that the decision to abort is not as completely private as other protected rights.¹⁹⁸ This did not lead the Court to declare the right not to be fundamental, but rather to recognize that other interests must be balanced at a certain point.¹⁹⁹ The necessity of state and public recognition should not inform the right's classification as fundamental or not, nor is that possibility raised by any of the previously cited cases. However, this does not mean that public recognition should not be considered at all. It means that it should only be considered when balancing the individual and state interests at the later stage of analysis.

Opponents of recognizing a fundamental right to control one's name may also counter that doing so would require government to act, rather than simply prevent government action.²⁰⁰ Even if so, choice of name would not be the only fundamental privacy right the recognition of which requires action by the state. Recognizing a fundamental right to marry may also be said to

195. See *Lawrence v. Texas*, 539 U.S. 588, 578 (2003).

196. See discussion *supra* Part I.

197. The Supreme Court has found a fundamental privacy right to marry. See *Zablocki v. Redhail*, 434 U.S. 374 (1978).

198. In *Roe v. Wade*, 410 U.S. 113 (1973), the court wrote:

It is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Id. at 159. Because names are both private and public there will always be multiple interests at stake in naming. However, only in extreme cases will protecting the public interests outweigh the individual interests in controlling what one calls oneself and in what one requests to be called by others.

199. See *id.*

200. They would then argue that the state action at issue does not violate the Constitution because the Constitution bars the government from acting to restrict fundamental rights; it does not mandate the government to affirmatively act.

require action by the state.²⁰¹ Imagine if a state decided to use the same discretionary policy in giving out marriage licenses. It seems unlikely that the Court would hold that there is no fundamental right to marry on the grounds that finding the existence of such a right would compel the state to act by granting more marriage licenses as well as providing marital benefits such as tax benefits. However, this is precisely the argument that would be used against the name right (that naming should not be protected because doing so compels state action). Marriage, a recognized fundamental right, compels state action, because states must confer equally marriage-related benefits, such as marriage licenses, tax benefits, and spousal medical rights in public hospitals.

In fact, neither the right to marry nor the right to control one's name require government action in theory, although they may as a matter of practicality and policy. The government would likely be permitted to stop recognizing and regulating marriages altogether, provided it made no distinction between citizens based on marital status. Likewise, the state could cease to use names, replacing them instead with identification numbers.²⁰²

I argue simply that, although states have no obligation to recognize or use names, they may not through their use of names and for their own purposes impede citizens' ability to use their names for self-expression and for identity-formation. That is, states may not commandeer a convention with significant social, cultural, religious, and personal meanings that existed long before the state, and then disallow that convention from being used for its prior purposes. For example, states could not, after choosing to use marriage as a basis for determining benefits and establishing records, dictate the nongovernmental

201. For this and other reasons, one scholar argues that the right to marry should not be considered a fundamental privacy right. See Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949, 955 (1992) ("Rather than a right to be free from state interference, the right to marry can only be conceptualized as the right to place the power of the state behind previously agreed-to, consensual arrangements, and to forge a linkage between a variety of different rights and obligations derived from those arrangements."). Maltz suggests that strict scrutiny protections could arguably be granted to "some interests that are implicated by the marriage contract," but that marriage benefits should "be protected specifically without disrupting general state control over the contract of marriage itself." *Id.* at 967.

202. It is just as unlikely that the government would stop using names or would stop recognizing marriages as it is that a person would be able to change names using the common law process. However, the state is unlikely to stop using names because their use is too entrenched in current recording systems. The state is unlikely to stop recognizing marriages because of the political uproar that would ensue. However, that the government has used names to such an extent that it cannot now reverse course without significant problems should not factor into the determination of the right's status as fundamental.

rituals required to effect marriage.²⁰³ Similarly, states may not choose to records names and use them for their own purposes, and then place limits on individual use of names for other functions that names served prior to state use, absent a compelling interest.

Marriage and naming are both customs “older than the Bill of Rights—older than our political parties, older than our school system.”²⁰⁴ Both carry great significance and serve important functions to individuals and groups, outside of the legal functions they fulfill for the state. These functions include social, cultural, religious, personal, and other uses, and existed long before state intervention into either.

When states choose to use these preexisting customs to aid their governance, they may not interfere with the customs' other uses, absent compelling reasons; otherwise they are improperly interfering with fundamental rights. This must be so even if giving effect to the rights that existed prior to state intervention requires states to take positive actions. Otherwise, states could restrict individual rights by using social, cultural, and religious conventions for states' own purposes and then arguing, after state use has become entrenched, that the rights may no longer be used for their individual purposes, because such uses compel positive government action.

2. Does State Regulation Burden the Right?

Determining that the right to control one's name is fundamental does not end the inquiry. A court must next ask whether the existing legal regime substantially interferes with the exercise of that right.²⁰⁵ This Comment argues that, in light of the practical necessity of obtaining government identification, the near impossibility of gaining official recognition of new names outside of the statutory name-change process, and the broad discretion bestowed on judges

203. Clearly many would object if the government decided to acknowledge only the marriage ceremonies of one religious or cultural group, or dictated what words must be said as vows. Indeed, the procedure required to be recognized by the State as married is separate.

204. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). The court in *Griswold* referred only to marriage. For a discussion of the historical relationship between names and the State, see Scott et al., *supra* note 40.

205. In *Zablocki v. Redhail*, 434 U.S. 374 (1978), the court held:

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.

Id. at 386–87 (citing *Califano v. Jobst*, 434 U.S. 47, 55 n.12 (1977)); see also *Goldman*, *supra* note 155, at 601.

to grant or deny name-change petitions, the existing name-change regime infringes on the fundamental right of individuals to control their names.

Whether or not states acknowledge abrogation, the common law right to change one's name has been effectively abrogated.²⁰⁶ Government identification is a necessity in contemporary society, and proof-of-identity requirements mean that such identification is not issued under names established by common usage. Thus, persons who desire to change their names are left with the statutory name-change process. This process is at best an expensive and time-consuming endeavor and at worst, when petitions are denied, a bar to petitioners' control over their names.²⁰⁷

For denied petitioners, the interference is significant. They must either live with and continue to use the names that the court approves, or appeal. Under the first option, petitioners are not able to use their desired names officially, which limits the degree to which they can use those names at all. At a minimum, denied petitioners must use the undesired name in order to travel, seek employment, drive, acquire credit cards, open bank accounts, vote, and pay taxes.²⁰⁸ This list includes not only benefits, but also civic rights and obligations. Under the second option, mounting an appeal, petitioners incur greater costs in time and money, and must prove that the denial was an abuse

206. See Rosensaft, *supra* note 33, at 206–12 (“[I]n contemporary society, the common law right to change one’s name is practically meaningless. The realities of contemporary society requires [sic] a state-sponsored corroboration to establish our identity.”); see also JASPER, *supra* note 73, at 5 (“Although most states still allow individuals to legally change their name through common usage, most government agencies and private businesses are not comfortable with such an informal way of changing one’s name.”).

207. Petitioning for a name change “requires a brief appearance in court, [and] can cost between \$200 and \$500. This includes the filing fee which, ordinarily, will run between \$100 and \$200, and court costs ranging from \$200 to \$400. In addition, there is the expense of publishing a legal notice in a newspaper.” Suarez, *supra* note 122, at 239. Rosensaft argues that even those whose petitions succeed have experienced substantial interference with their rights because of the time, money, and disclosure of private information required by most states to effect a name change. See Rosensaft, *supra* note 33, at 207–09 (describing the financial requirements, notice requirements, and disclosures required for making a name change petition, and noting that doing all of this does not ensure success, because of the discretion granted to the court). Rosensaft also argues that the information requested of petitioners and the requirement that petitioners publish their new names invades petitioners’ privacy. *Id.* at 208.

208. For example, registering to vote in the state of New York requires a DMV identification number or a social security number. If the identity of the person registering cannot be verified using these forms of identification, that person must provide a government document, utility bill, or bank statement with name and address as verification. New York State Voter Registration Form (Apr. 2007), available at <http://www.vote.nyc.ny.us/pdf/forms/boe/voterreg/voterregenglish.pdf>; see also Suarez, *supra* note 122, at 238 (“[T]he IRS [matches] every Social Security number on its tax returns with the Social Security Administration’s records. The names on tax returns must match the exact names listed in the records provided by the Social Security Administration, or the IRS will reject the returns.” (citing Dan Goodgame, *The Point of No Return*, TIME, Apr. 17, 1995, at 26)).

of discretion by the lower court.²⁰⁹ Thus, the statutory name-change process erects substantial obstacles to an individual's control over his or her name. The obstacles multiply for denied petitioners.²¹⁰

Some courts note, when they deny petitions, that petitioners are still free to call themselves whatever they want unofficially.²¹¹ However, it is incorrect to assert that the ability to assume an alias sufficiently protects the right to control one's name. The argument assumes that petitioners' only desire is to possess new names—to add to their identities. However, the right to control one's name extends beyond the ability to augment and add communicators of identity. It includes also, and often more importantly, the ability to discard undesirable names.²¹² A famous historical example of this phenomena occurred during World War I. The British royal family changed its surname from Saxe-Coburg-Gotha to Windsor, in the context of growing anti-German sentiment in Britain.²¹³

That disallowing petitioners from discarding undesired names functions as a burden on the right is perhaps most clear in the case of transgender petitioners. These individuals commonly seek to discard names with undesired

209. See discussion *supra* Part II.C.

210. See Suarez, *supra* note 122, at 238. Suarez notes:

Today, men, as well as women, cannot fully exercise their rights to choose whatever names they desire because of obstacles presented to them by agencies and institutions If women and men do in fact have a right to choose their own names, all agencies and institutions, primarily governmental ones, need to be flexible enough to enable them to fully exercise this right.

Id.; see also JASPER, *supra* note 73, at 5. Jasper writes:

[I]t is unlikely that any government agency or private institution, such as a bank, will amend their official records to reflect your new name without a court order. In fact, certain documents, such as a passport, birth certificate and social security card cannot be amended without a court order, with few exceptions, e.g., a marriage license.

Id. Though passport regulations permit use of names assumed through common use, they also require three public documents bearing the desired name; one must be a form of government-issued photo identification. See 22 C.F.R. § 51.25(c)(5) (2008).

211. See, e.g., *In re Variable*, 190 P.3d 354, 356 (N.M. Ct. App. 2008) ("Petitioner has a right under the common law to assume any name that he wants so long as no fraud or misrepresentation is involved." (citing *In re Ferner*, 295 N.J. Super. 409, 414 (Law Div. 1996))). Dannin writes, "Ironically, while denying a person a statutory name change, which would fulfill the state interest in record keeping, many judges advise the petitioner of the availability of the common law method." Dannin, *supra* note 30, at 164.

212. See Slovenko, *supra* note 33, at 217 ("A change of name may indeed be a way of dissociating oneself from one's family and background, and starting afresh.")

213. The Royal Family Name, The Official Website of the British Monarchy, <http://www.royal.gov.uk/ThecurrentRoyalFamily/TheRoyalFamilyname/Overview.aspx> (last visited Sept. 2, 2009) ("In 1917, there was a radical change, when George V specifically adopted Windsor, not only as the name of the 'House' or dynasty, but also as the surname of his family. The family name was changed as a result of anti-German feeling during the First World War, and the name Windsor was adopted after the Castle of the same name.").

gender associations. A transgender individual seeking to pass as female, for example, will have to recognize and use her male name so long as it remains on her government-issued identification. Courts continue to deny petitions by transgender individuals.²¹⁴

3. Are the States' Interests in Regulating Name Changes Compelling?

Although very few names actually interfere with state interests, states do have reason to regulate name changes. First, the state has interests in regulating name changes as part of its police powers. These interests include being able to track, identify, and communicate with its citizens.²¹⁵ The state's police function also includes maintaining order by ensuring that those it governs can effectively communicate with and identify each other.²¹⁶ The state's interest in regulating names as part of its police powers is compelling because, for example, one needs to use names to file lawsuits or other government documents relating to an individual.

To ensure the state's interests in exercising its police powers are adequately protected, the state should be able to control the name-change process for purposes of recording changes. It should also be able to institute procedures to ensure that the new names chosen can be used by others in speech and can be used in administrative systems. States should thus be able to prevent name changes that include words that are extraordinarily offensive, because it would be difficult for others to avoid having to use the words chosen. States should also be able to prevent names that have typographical characteristics that prevent them from being recorded without extensive changes to institutional computer systems. However, states should only be able to prevent the latter types of names if actual evidence exists that they cannot be recorded by the current systems, and that it would be impracticable to change the recording system to accommodate them.²¹⁷

214. See, e.g., *In re Golden*, 867 N.Y.S.2d 767, 767 (N.Y. App. Div. 2008) (reversing the New York Supreme Court's May 9, 2008 denial of petitioner's request to change her name to reflect her desired gender).

215. See Scassa, *supra* note 168, at 170–71 (“The state interest in names relates to both a police function (control over the population, records, taxation) and to the general institutions of property.”).

216. See Dannin, *supra* note 30, at 157 (“Clearly, where a name does not make a person's identification certain, it is difficult to protect his legal rights. The individual who needs protection may be either the person relying on the name to single out a particular person or the person who has been misidentified.”).

217. One cartoonist provides an extreme, but not inconceivable, example of a clash between an unusual name and the limitations of administrative systems. In the comic, a mother is speaking on the phone:

Phone: Hi, this is your son's school. We're having some computer trouble.

For reasons that seem clear, the state's interest in preventing fraudulent and misleading names is also compelling. In contrast, preventing names that are merely confusing, bizarre, or ridiculous cannot be considered a compelling interest. Plenty of given and permitted names fall into these categories. It is hard to see how, beyond minor administrative inconvenience, such names impact state interests or harm others in ways that warrant their prohibition.

The current statutory name-change regime permits courts to deny name changes when they are not satisfied with petitioners' reasons for requesting the change.²¹⁸ However, petitioners' reasons for changing names, provided they are not trying to commit fraud or harm others, really do not interfere with state interests. So long as petitioners do not have nefarious purposes, their reasons for changing names do not seem to interfere or cause problems with identification and communication in the manner that the particular name chosen by a petitioner would. A person's reasons for requesting, for example, the name Mohammed—whether religious or merely aesthetic—do not affect the public interests in the name choice in any way. With respect to those states that require the petitioner to have a good reason to want to change their name, if control over one's name is a fundamental privacy right, the burden should always be on the state to provide reasons why the petition should be denied.

States may argue that the compelling interest in conserving state resources justifies limiting the number of petitions courts must hear, and that requiring

Mother: Oh Dear – did he break something?
 Phone: In a way –
 Phone: Did you really name your son Robert?); DROP TABLE Students;--?
 Mother: Oh. Yes. Little Bobby Tables, we call him.
 Phone: Well, we've lost this year's student records. I hope you're happy.
 Mother: And I hope you've learned to sanitize your database inputs.

Randall Munroe, *Exploits of a Mom*, XKCD—A WEBCOMIC, <http://xkcd.com/327> (last visited July 13, 2009). The name the mother chose in this comic, Robert?); DROP TABLE Students;--, contains a computer code command to delete all data about students. One scholar notes that, "when technology configures around and is bound by tradition, letting an individual define oneself may not always be free of complications. However, the problem here also seems easily remedied through more robust technology design." Augustine-Adams, *supra* note 45, at 33. Like Augustine-Adams, I argue that the better policy choice would require institutions to find a way to accommodate unusual names. However, a court could constitutionally refuse to require institutions to do so. The court might find it impracticable to require all institutions to change their computer systems to accommodate all names; the impracticability of adjusting all state and private systems to accommodate and record unusual names likely constitutes a compelling state interest. Keeping names recordable so that they may be used for recording and communication is a compelling interest.

218. No recent published opinion appears to exist in which a court denied a petition solely for the petitioner's failure to provide a sufficient reason for the change. However, as noted *supra* Part II, many state statutes still place the burden of proof on the petitioner to show a reason for granting the request. Dannin notes that "judges, as officials of the state, often exercise their discretion to deny name changes requested for insubstantial reasons." Dannin, *supra* note 30, at 163.

petitioners to present sufficient reason for the change and granting courts wide discretion to deny the petition serves this interest. I disagree.

First, the objective of conserving resources is not directly served by denying more petitions on the grounds of insufficient reasons or otherwise, but rather by preventing their submission in the first place—especially when the vast majority of denials go unrecorded, so others do not know what their chances of success are prior to filing a petition. Whether a petition is denied or granted makes little difference in terms of state resources. States could better prevent against exhaustion of limited resources by ensuring that court fees cover the costs of proceedings. Second, repeat petitioners are likely sufficiently deterred by the amount of time, effort, and expense required to secure a name change. Repeat petitioners are probably few and far between, especially because name changes that result from marriage and divorce are not usually handled by the statutory process.²¹⁹ Also, more clearly outlining what kinds of names are impermissible would do more to create fewer petitions, as people would know where they stand in advance.

4. Is State Regulation Narrowly Tailored to the Compelling Interests?

Under the existing statutory regime, courts are permitted to—and often do (at least in courts of first instance)—deny petitions that do not threaten compelling state interests.²²⁰ Thus, vesting unfettered discretion in the courts has produced state action not narrowly tailored to protect the state interests.²²¹ A

219. Only two courts appear to have discussed a petitioner's multiple name changes, or multiple name change attempts. See *In re Mokiligon*, 106 P.3d 584, 586–87 (N.M. Ct. App. 2004); *In re Greenfield*, 322 N.Y.S.2d 276 (City Civ. Ct. 1970). In *Greenfield*, seven years had elapsed between the petitions. 322 N.Y.S.2d at 277. Other courts have discussed multiple petitions, but these are repeated petitions for the same or similar names after earlier petitions were denied. See, e.g., *In re Rivera*, 627 N.Y.S.2d 241, 242–44 (City Civ. Ct. 1995) (noting petitioner had previously applied to another New York City court and was denied twice; the petition, made by a transgender woman attempting to acquire a female name, was then granted).

220. The examples of denials for less-than-compelling reasons are numerous, and include petitions by transgender individuals denied because of the gender associations of their chosen names; the petitions by Cooperperson, Sacco Vandal, and Steffi Owned Slave; the single name petitions; petitions by same-sex couples; and petitions by those who want to change the ethnic associations of their names. That such denials are now routinely overturned on appeal as abuse of discretion indicates that these were initially denied for less-than-compelling reasons. See *supra* Introduction and Part II for discussions of these cases. But see *infra* Part IV.A for an argument that the availability of appellate review is not sufficient to protect petitioners, and a clearer standard must be used at the initial petition stage.

221. In recent years, appellate courts have overturned all but a few appealed decisions under an abuse-of-discretion standard. If the decisions by lower courts fail to pass an abuse-of-discretion test, they will certainly fail to pass muster under strict scrutiny. Part IV of this Comment argues that the appellate process does not provide sufficient protection for petitioners, even though appellate courts tend to render decisions that would comply with strict scrutiny.

regime that either explicitly defined impermissible classes of names or listed acceptable grounds for denial would prove equally effective in safeguarding state interests. Such a regime would also better protect individual interests, because it would decrease the number of petitions denied for reasons that are not compelling. Restricting courts' discretion seems the most effective way to assure this reform.

Moreover, the suggested approaches would likely protect state interests more effectively than does the existing regime. Without guidance, courts permit names that hinder compelling state interests, such as names with numeric or other special characters. At least two petitioners have been permitted names with numerals, and at least one a name with an exclamation point.²²² As discussed in Part III.B.3 above, such names may interfere with the state's compelling interest in preventing names that cannot be recorded, provided that evidence exists that the name is impracticable and there is no way to change recording systems to permit the name without great cost. Under the current regime, courts are also permitted to grant petitions for names that contain language that is so offensive as to render the name unusable, as making sure names can be used by the state and other private individuals and institutions is a compelling interest. Thus, the proposed reforms better safeguard both individual and state interests.

Opponents of the proposal may argue that case-by-case judicial discretion (and the resulting development of a common law standard) is more narrowly tailored than any statute, because it ensures more accurate results based on the facts of an individual case. Although possible in theory, this argument has not been borne out in practice. Initial petitions are often denied for reasons that are far from compelling.²²³ Conversely, a factor-based approach to petitions would allow for flexible, individualized analysis while also providing sufficient restraint on courts, so that both the individual and state interests are protected.

IV. SUGGESTIONS FOR REFORM

A. Reasons for Reform

Even if state restrictions on name choices do not rise to the level of constitutional violations, there are many policy reasons to reform the existing name-change process.

222. See *supra* notes 11–12 and accompanying text.

223. See *supra* note 220.

First, even if control over one's name is not a fundamental right, the state should restrict naming practices as little as possible because of the great importance of specific names to their bearers, compared to the minimal importance of those same names to the state, except in a minute number of circumstances.²²⁴ So long as names do not interfere with the public interests in identification and communication,²²⁵ a person's choice of name is comparatively unimportant to the state and to others. Given the value our nation places on individual rights, the better policy is to restrict matters of great importance to individuals as little as possible—an idea reflected in the strict scrutiny requirement. Therefore, although the state may not be constitutionally required to follow the strict scrutiny standard in deciding when to regulate naming, it may be best to do so where possible.

Second, statutes that are more narrowly tailored would better protect the public and private interests in naming.²²⁶ Current name-change statutes protect neither set of interests effectively.²²⁷ Neither statutes nor case law have succeeded in developing a clear standard that restricts name changes based on hard evidence of the types of names that truly cause problems for the state.²²⁸ Moreover, most judicial name-change decisions do not produce written opinions.²²⁹ The lack of clear standards and precedent likely means that individuals are often restricted from choosing names that would be perfectly permissible. By contrast, courts may permit changes that state agencies and other members of the public find quite problematic. Clearer guidelines could help ensure that acceptable, noninterfering name choices are not wrongly denied, and that petitioners with similar name choices are dealt with

224. See Parts I, III and IV for discussion of the importance of names both as a vehicle for speech and as a part of one's identity.

225. This occurs only in a few extreme cases.

226. See Dannin, *supra* note 30, at 169 (advocating a model name statute to better and more consistently balance individual rights and state record keeping).

227. This is the basis for which Dannin proposes her model statute, though Dannin does not discuss the constitutionality of existing name laws. *Id.* at 153.

228. See discussion *supra* Part II.

229. For instance, between July 2005 and June 2006, New Jersey state courts received 4,690 case filings for name changes outside of the marital context (equivalent to approximately 0.05 percent of the state population—and a 15 percent increase from the previous year). Emens, *supra* note 168, at 768–69 n.9 (citing New Jersey Judiciary Civil Statistics (June 2006) 87, table Civil Caseload Summary by Case Type). Under the Westlaw keycite for name changes, New Jersey judges produced no written opinions in these cases during that period. In total, there are only twenty-one cases under the headnote in New Jersey.

similarly;²³⁰ clearer guidelines could also prevent courts from permitting name changes that significantly impede compelling state interests.

Third, under the current system, the availability of appeal does not adequately protect petitioners. Indeed, most of the recent decisions this Comment criticizes were overturned on appeal. However, resort to litigation, particularly appellate litigation, is impracticable for most petitioners.²³¹ Litigation is costly and there is no money at stake in appealing a name change. Most name-change petitioners likely do not have the means to mount an appeal if their petitions are denied, and may further be deterred by the abuse-of-discretion standard on appeal, which is quite difficult to overcome. Moreover, given the paucity of written judicial opinions in name-change cases, it seems likely that there are many more wrongly denied petitions than those recorded. Reform of the process as described below would reduce the number of petitions wrongly denied in the first instance, providing far better and less costly protection than an after-the-fact appeal.

To underscore this point: In examining the previously discussed cases, it may seem that change is unnecessary because the final result often comports with my suggestions of what are appropriate and inappropriate reasons to deny petitions. However, in many of these cases, courts arrived at the constitutionally sound result only after appellate review. Faced with such a high proportion of petitions wrongly denied in the first instance, and given the difficulties and costs of mounting an appeal, it is unsatisfying to assert that the current system sufficiently protects the individual interests. Although there is no way to gather the data, it seems safe to assume that many denied petitioners do not have the time or money to litigate the denial of their name-change petition. Faced with the abuse of discretion standard on appeal, most petitioners would likely find fighting the petition a battle they would rather not fight. Therefore, decisions that would violate petitioners First and Fourteenth Amendment rights may often stand unchallenged. By ensuring that most petitions are rightly decided in the first instance, statutory reform would better protect these constitutional interests.

Fourth, the current system is inefficient, particularly with regard to “unusual” petitions, meaning those petitions where a name requested does not fit into established precedent and prompt courts to write opinions—as with most of the names discussed in this Comment. The lack of statutory

230. Dannin also advocates for a more detailed name change statute for this purpose. See Dannin, *supra* note 30, at 169–70. She argues that although the common law has been adequate in the past, naming practices are evolving too quickly for the common law to adapt. *Id.*

231. See *id.* at 153 (“Legislation creates certainty avoiding burdensome and expensive litigation by providing judges with a clear and stable reference and reducing the number of situations requiring judicial decisions.”).

guidelines means that many of these petitions require unnecessarily complicated litigation,²³² and often are appealed. Further, because states have not set guidelines for their courts, erroneous or unreasonable decisions have to be appealed. Statutory reform of the naming process would make the system more efficient by limiting the number of cases that need to be formally litigated.²³³ Because guidelines for name changes would be clearly established by the legislature, proceedings would require less briefing, argument, and consideration by the court. Appeals would also be decreased. “Unusual” petitions would become more like the routine grants and denials that occur for most petitioners.

Statutory reform would also increase efficiency by decreasing the number of problematic petitions. If the law set out clear guidelines for permissible name characteristics, petitioners would be likely to conform their choices to these guidelines in advance. Petitioners who desired names with impermissible characteristics would know in advance that their requests would likely be denied and would therefore be less likely to invest in submitting futile petitions. Under current law, most petitioners do not know their chances of success until the court issues its decision.

More explicit, narrowly tailored statutes would also result in a more efficient process. Clearer criterion for the granting of petitions creates less to argue over in litigation, decreasing suits and appeals. A clearer statute could also reduce the number of petitions, because those seeking a name change will know the chances of success in advance. Petitioners who, for example, want names containing numbers currently have no way of knowing whether the requests will be granted or not. If name-change statutes provide that numbers are impermissible characters to have in names, these petitioners will not likely bother to spend the time and money filing petitions they know will be denied.

Finally, the current system permits courts to avoid challenging a statutory regime with serious constitutional deficiencies, because they can refer to the common law right when they deny a petition and claim that that right is sufficient. Moreover, the existence of the common law right to change one’s name without state process creates problems for governments trying to keep track of residents. Therefore, it may be best for states to officially abrogate the common law right and impose a standard that would satisfy substantive

232. See Slovenko, *supra* note 33, at 214 (noting that some “cases are not so clear, and have resulted in costly and burdensome litigation”); see also Rosensaft, *supra* note 33, at 207–09 (arguing that the statutory process is expensive and inconvenient, particularly in comparison to name changes by women at marriage). Rosensaft also argues that the publication requirement may be an invasion of privacy. Rosensaft, *supra* note 33, at 208.

233. Dannin, *supra* note 30, at 153.

due process requirements.²³⁴ Abrogation would be constitutionally permissible so long as the name-change process was reformed to be more efficient and protective of the individual interests. Abrogation would also better reflect the practical realities. Finally abrogation of the common law right would disallow courts from hiding behind and avoiding discussion of constitutional issues. A more narrowly tailored law would need to be developed as a result.

B. Potential Improvements

There are several ways that states could improve the existing system for name changes. They could enact more detailed statutes²³⁵ that list, explicitly, reasons for which the court must deny a petition and reasons for which it may not deny a petition.²³⁶ This type of statute would provide clearer guidelines and more predictable results. Because petitioners would know the grounds on which a petition would be denied, the number of petitions would likely decrease, and certainly fewer would be litigated. The proposed statute would limit the court's discretion, and thus better assure that petitions were not wrongly denied or wrongly granted. However, if not crafted carefully, such a statute would be less flexible than the existing system, and may rapidly become obsolete.

States could also create a statute that provides factors for the court to balance.²³⁷ To ensure that only compelling reasons are considered, the factors

234. Dannin's model statute abrogates the common law process. *Id.* at 176.

235. This is the route Dannin recommends. *Id.* However, there are some problems with Dannin's proposal. First, it appears to give the state the power to proscribe the number of names that it will recognize. *See id.* at 171. Although administrative agencies may only be able to accept a certain number of characters, a less restrictive solution would be for those agencies to use only so many letters of their names as will fit on the forms. The IRS, for example, identifies tax returns using only the first four letters of a person's last name, and matches this with the social security number. The post office also uses only the first four letters of the last name when forwarding mail. Second, although Dannin's proposed statute uses the language "shall be granted," indicating that the court possesses no discretion, it still appears to require a "sufficient reason" on the petitioner's part. *See id.* at 177. As discussed earlier, petitioners' reasons for a name change do not affect the state interests. Third, though the statute does provide a list of reasons that may not be used as grounds for denial, it offers no guidance as to what types of petitions, other than fraudulent ones, should be denied. *Id.* The statute thus leaves room for courts to grant petitions that infringe on state interests. Notably, Dannin's statute also proposes the creation of a state agency to process name changes. *Id.* at 177-78.

236. For example, such a statute would say that all names with numbers or special characters are impermissible, all names with obscenities are impermissible, but all transgender petitions must be granted so long as the name does not bear any impermissible characteristics, etc.

237. For example, the statute would say courts should consider such factors as:

Whether the typographical characteristics of the name render it unusable by state and private entities.

Whether the name is so offensive that the majority of people would strongly object to having to write or speak it.

The importance to the individual of the name chosen.

could be exhaustive. Such a statute would have similar advantages to the previous proposal, though to a slightly lesser extent; the types of names that would be permitted and denied would be less predictable, as the standards will be fuzzier, and there may be more room for litigation because of the flexibility of factors. However, because the statute would provide fewer guidelines and would confer greater discretion on courts, it would create less predictability and consistency, and might also require more cases to be litigated. These issues would arise because the statutes would provide fewer advance guidelines than an explicit statute and courts would have more discretion, resulting in the need for more discussion and argument.

Problems with the existing regime could also be solved via common law precedent holding that courts may deny petitions only when the competing public interests are compelling. This reform would retain the flexibility and individualized approach that is the advantage of the existing system, while giving courts a stricter standard to follow. It would also change the burden of proof in states that require a petitioner to show a good reason and would heighten the level of public interest required to deny the petition. However, a common law precedent would not provide the same predictability of statutory reforms that clearly set forth grounds for petitions to be denied and grounds that are impermissible for courts to consider., because the criteria for permission and denial would not be set forth in advance. The common law standard might also not be a clear enough to protect sufficiently against wrongly denied petitions; appellate review would likely remain as the only real protection for petitioners.

States could also follow Louisiana's model and provide that the state's interests be represented by a state agent other than the court. Section 4752 of title 13 of the Louisiana Statute provides, "The proceedings shall be carried on contradictorily with the district attorney or district attorney pro tem of the parish in which the application is made, who shall represent the state, and who shall be served with a copy of the petition and citation to answer the same."²³⁸ Under this model, the state representative decides whether or not to contest the position; the process would resemble the opportunity provided by other states for interested persons to object.²³⁹ The advantage of this method is that the judge does not have to act as both the representative of the state and the balancer of interests; however, it does not necessarily solve the predictability and vagueness problems. The method may however still lead to fairer results,

The extent to which the state's refusal to recognize such a name would interfere with the individual's interests in controlling their name.

The extent to which allowing the name change would interfere with the rights of others.

238. LA. REV. STAT. ANN. § 13:4752 (2006).

239. See, e.g., CAL. CIV. PROC. CODE § 1278 (West 2008).

as argument by an opposing party might enable judges to more fairly balance interests. In addition, as advocates, the district attorney and attorney general are likely better situated than the court to determine whether the state has an interest in preventing a person from using a particular name. However, the proposed reform would make name-change proceedings more adversarial, and would thus likely increase the time spent in litigation. Also, the district attorney's office may not prioritize name-change proceedings, and may fail to contest problematic petitions. Finally, this system would not be as predictable for petitioners.

Although just one of these changes would create important improvements, the best reform would combine elements of each. The ideal statute would provide a set of exhaustive factors for the court to balance, as well as a list of grounds upon which a state may not deny a petition. These would include: insufficient reasons; choice of name that is unusual or ridiculous; choice of name with inappropriate gender or ethnic associations; or choice of name that reflects a different family relationship (unless there is compelling evidence of a purpose to perpetuate fraud). These criteria would ensure that the statute remained sufficiently flexible to meet changing times and social values, except in cases where names should be permitted in spite of such changes in social opinion and values because those values would impermissibly interfere with individual rights of those who did not share those values. Finally, the statute would instruct the state to weigh the individual's interest in autonomy against the interests of the state in keeping effective records, preventing fraud, and preventing interference with the rights of others. The latter are the compelling public interests at stake in name-change cases; the proposed statute would thus prevent denials of name changes that did not interfere with compelling state interests.

The simplest option by far would be for the U.S. Supreme Court to issue an opinion holding that the right to change one's name is a fundamental privacy right, and that instead of the loose "substantial reason" standard and variations that state courts apply, courts must apply strict scrutiny and deny name-change petitions only when compelling state interests would be infringed by a petitioner's choice of name. Such an approach would require the least state action and administrative change. However, it would not create predictability or ease court costs. It might even encourage more petitions, though the amount of litigation might perhaps be decreased. However, this approach would only work if courts found the right to be fundamental. The other suggested reforms require only legislative action, whether spurred by appellate review or not.

CONCLUSION

Names are important, both to the individuals to whom they refer and to the public that relies on them as means of identification and communication. However, because names are not only a means of enabling public interaction, but also aid a person's expression and construction of identity, a balance must be struck between public and private uses. Current state law controlling name changes does not do an adequate job protecting the individual petitioners' interests.

Control of one's name is worthy of protection as a fundamental right, because a name is an important component of a person's identity. Such control is also worthy of First Amendment protection because the law as it is now impermissibly compels speech. It also grants a benefit to some, and leaves out others based, in some cases, on the viewpoint or beliefs expressed by a petitioner.

Even if courts decline to recognize these rights, there are several policy reasons for reform, such as the great importance to petitioners compared to the relatively slight importance to the public (so long as names avoid certain extremes). Additionally, the system as it is now does not adequately protect the public and private interests involved. There are many fairly simple reforms that states could make to name-change statutes that would better protect all affected. These changes would also create a more efficient, predictable means of processing name-change requests.