

# ERADICATING WOMEN'S SURNAMES: LAW, TRADITION, AND THE POLITICS OF MEMORY

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## INTRODUCTION

*"My name is my identity and must not be lost."* -Lucy Stone

In explaining her reasoning for retaining her birth name after marrying Henry Blackwell in 1855, Lucy Stone, the first known American woman to keep her surname after marriage, fastened on a concept both implicitly and explicitly acknowledged in the annals of history: the symbolic nature of names and their centrality to one's individuality and identity.<sup>1</sup> She resisted what was understood to be the fundamental and essential tradition of wives adopting the husbands' surname after marriage, a tradition so fundamental as to be considered unassailable, even perhaps divinely ordained. Stone also gained the distinction of being the first woman denied the right to vote by reason of her name choice.<sup>2</sup> Even into the twenty-first century, the practice is considered one of the most fundamental aspects of traditional marriage, dating back to the origins of surnames themselves, which lends it a kind of mystical legitimacy. Yet, the historical record of surnames tells quite a different story.

English surname usage prior to the seventeenth century was not only variable, but

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1 ASHLYN K. KUERSTEN, *WOMEN AND THE LAW: LEADERS, CASES, AND DOCUMENTS* 19 (2003). This statement became the motto of the Lucy Stone League formed by Ruth Hale in 1921.

2 Omi Morgenstern Leissner, *The Problem That Has No Name*, 4 *CARDOZO WOMEN'S L.J.* 321, 353 (1998). Although her denial was before women gained the right to vote nationally with the Nineteenth Amendment in 1920, Massachusetts had granted women the right to vote in school committee elections in 1879. MassMoments.org, *November 2, 1915: Voters Deny Massachusetts Women the Vote*, <https://www.massmoments.org/moment-details/voters-deny-massachusetts-women-the-vote.html> [<https://perma.cc/48DY-EY9P>].

the practice for women bore little resemblance to the typical “traditional” practices seen in modern-day England and the United States. Women in England, like men, once held individualized surnames reflecting personal traits, occupations, or family relations.<sup>3</sup> When, centuries later, surnames began to be passed down to descendants, women often retained their own names after marriage, and were as likely as men to pass on those names to their children and grandchildren, and even at times to their husbands.<sup>4</sup> This surname flexibility, when considered with other historical evidence, suggests a more complex and nuanced status for women in English history than is typically acknowledged. Indeed, what we consider to be traditional when it comes to naming practices (i.e. women assuming the names of the husbands, and children those of the fathers) is in fact a relatively recent phenomenon rather than a product of ancient English practice. For roughly 800 years, English women underwent an extended period of decline in rights and status, with the most pronounced and abrupt shifts taking place in the early modern period beginning about the middle of the seventeenth century. That state of affairs became the foundational status quo at the establishment of the American colonies and eventually the new nation.

The advent of the Enlightenment, as well as the political creation of the nation-state and the advancement of colonialism and imperialism in the early modern period, brought about new notions of citizen and non-citizen, self and other. These concepts were employed to reinforce a patriarchal regime which deceptively claimed that the natural order, common sense, long history, and divine right supported the current male-oriented surname system in its creation of new systems of rights and identity. Strikingly, however, the collective social consciousness failed to acknowledge these developments. Instead, the older norms were wiped clean from collective memory and the new practices, being critical to maintaining the new dominant social status quo, were made “traditional.” When new modern and strictly gendered practices emerged, they quickly became so entrenched and political that both social and legal mechanisms sprang up to enforce them. Courts justified restrictive decisions about women’s surnames by reference to a “tradition” so fundamental and absolute that it merited legal coercion despite nearly a millennium of common law and empirical evidence to the contrary.<sup>5</sup> Today, while women in British and American society possess formal legal surname equality, sex-based naming conventions not only persist, but are also still enforced in certain ways via public policy.<sup>6</sup>

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3 See discussion *infra* Section I. A History of Surnames in Anglo-American Culture.

4 See *id.*

5 See discussion *infra* Section III.A. Tradition and Law: A Reciprocal Interaction.

6 See *id.*

The law often draws its principles from custom and practice, and justifies itself by reference thereto. Yet conversely, the law also works to support or discourage certain social practices, and changing the law is often the first step in altering societal perceptions and practice. It is not altogether surprising, then, that few couples deviate from the customary surname practice at marriage when the law has explicitly and implicitly worked against such a choice for the past few centuries; the current framework formally and informally prefers inegalitarian naming conventions. The fact that policy and law make resisting social trends more difficult speaks to our continuing patriarchal tendencies and our conceptions of family, identity, and values.

Surnames, once a fluid and variable convention in which women were often represented separate and apart from the men in their lives, became rigidly enforced as involuntary markers upon them through a variety of mechanisms, including social pressure, public policy practices, and legal decisions beginning in the nineteenth century in the United States. These cases referenced “tradition” going back centuries, perhaps even all the way to the birth of western civilization, but in reality judges were constructing their own version of history. This manipulation of the historical record and the common law was then used to promote concrete and compulsory policy, case law, and, occasionally, statutory law. The relationship between social custom and the common law is thus revealed to be dynamic, mutually constitutive, and, at times, contrived. Perceived traditions sometimes carry with them heavy political meaning beyond what appears at face value, such that when they are disrupted, the ways in which we have situated ourselves within our culture are shaken and enforcement mechanisms rise up to right the status quo. This process is not accidental; it is political.

There is a presumption permeating modern life that societies always tend to move in the direction of progress, albeit not necessarily linearly, and sometimes in fits and starts. Wherever we stand today, it is certainly better than where we stood a generation ago, or a century, or many centuries. So invested are we in the idea that earlier periods could not have been more enlightened or advanced than modern society that we are inclined to reject as incorrect or anomalous any evidence to the contrary (while we are disinclined to search for such evidence in the first place). In the words of Herbert Hirsch, “[t]he idea of history as some inexorable process moving toward the perfection of the human species and an era of justice and tranquility is another of those figments of the human imagination wholly without precedent.”<sup>7</sup> This tendency encourages a flawed or incomplete representation and study of history, which, in turn, serves to reinforce the same incomplete vision that

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7 Herbert Hirsch, *GENOCIDE AND THE POLITICS OF MEMORY: STUDYING DEATH TO PRESERVE LIFE* 35 (1995).

prompted it. This approach can be termed “chronological ethnocentrism.”<sup>8</sup> It is clearly evident in the case of women’s surnames specifically, and the implications of that issue for their status more broadly.

The historical development of surname usage reveals a great deal about tradition, culture, and collective memory, and their mediation through the law and politics of a society. The politics of memory is a critical vantage point from which to interpret these developments, as the warping of tradition and collective memory served multiple political purposes in the cultivation of a national culture and identity that produced and supported pronounced gendered hierarchies in England and the United States.

### **I. A History of Surnames in Anglo-American Culture**

Cultural surname practices worldwide are quite variable, and United States custom has certainly been influenced by diverse cultural practices and traditions. However, this Article focuses only on English history, primarily because the English common law was incorporated into the United States law and, as will be seen below, has had formal and concrete effects on the development of both custom and law in the United States regarding surnames.

Surnames entered the scene in England with the Norman Conquest of 1066; the previous Saxon culture utilized only given names.<sup>9</sup> Surnames gradually spread throughout the region, becoming more commonly adopted and used by the population over the ensuing centuries.<sup>10</sup> Multiple factors contributed to this trend, including the limited number of first names in use and the resulting difficulty in distinguishing individuals, the increase in government record-keeping and taxation and its attendant need to accurately identify and catalogue individuals, and the desire to more easily align and designate family estates and

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8 Jim Loewen, *Our Real First Gay President*, SALON.COM (May 14, 2012), [http://www.salon.com/2012/05/14/our\\_real\\_first\\_gay\\_president/](http://www.salon.com/2012/05/14/our_real_first_gay_president/) [<https://perma.cc/SKK7-2CQQ>] (noting that chronological ethnocentrism allows the writers of history to “sequester bad things, from racism to the robber barons, in the distant past” allowing society to “‘know’ that everything turned out for the best.”).

9 Surnames were commonly known in English as bynames and functioned as second names. In this Article I use the term “surname” to include the concept of “byname,” and do not intend to limit the meaning of “surname” solely to an inherited family name. Peter McClure, *Middle English Occupational Bynames as Lexical Evidence: A Study of Names in the Nottingham Borough Court Rolls 1303–1455*, 108 TRANSACTIONS OF THE PHILOLOGICAL SOCIETY 164, 164 (2010).

10 WILLIAM DODGSON BOWMAN, *THE STORY OF SURNAMES* 8 (1968).

the inheritance systems that would perpetuate them.<sup>11</sup>

Yet surnames at that time bore little resemblance to their modern forms. Up until around the seventeenth century, surname usage and adoption was a cultural practice that was flexible and inconsistent. Rather than being inherited from the father, surnames originally operated more as nicknames, assumed by common use: they might be chosen by the bearer or organically adopted by her or his acquaintances.<sup>12</sup> They were a reflection of the name-holder's occupation (e.g. Baker, Potter),<sup>13</sup> personal or physical characteristics (e.g. Goodman, Armstrong), residence (e.g. Bridges, Hilton for hill town), or family (e.g., Richardson, Hughes). As such, they were functional and could change easily and often within a person's lifetime. For instance, a young boy with very light hair might be called John Whitehead; after growing up and making carts for a living, he may be known as John Carter. Similarly, a person could be known by more than one surname simultaneously: one person may associate Robert with his father Thomas, calling him Robert Thomasson, while another knows him as Robert who lives by the wood, or Robert Wood. Members of the same family, therefore, often bore different surnames from each other.<sup>14</sup>

One of the least-known aspects of historical surnames is the ways and frequency in which they were applied to and used by women and reflected various components of women's lives. A great many historical records reveal that surnames relating specifically to women existed in various dynamic forms. Women regularly held individualized surnames that reflected their fathers (Stevendoghter,<sup>15</sup> Tomdoutter,<sup>16</sup> Rogerdaughter<sup>17</sup>); their mothers

11 L. G. PINE, *THE STORY OF SURNAMES* 11 (3d ed. 1970).

12 Talan Gwynek & Arval Benicoeur, *A Brief Introduction to Medieval Surnames* (1999), <http://www.s-gabriel.org/names/arval/bynames/> [<https://perma.cc/T73U-6VK6>].

13 Many occupational surnames that survive today are not recognized as such, either because they reflect a vocabulary that has since changed or because they represent occupations that no longer exist. For example, a "chandler" was a maker or seller of candles, a "draper" made or sold woolen cloth, while a "fuller" softened coarse material by pounding or walking on it, and was also known as a "walker." A "foster" made scissors, a "sawyer" sawed wood, and someone who covered roofs with slate or tile was a "slater" or a "tyler." A large number of modern English surnames descend from medieval occupations.

14 Cynthia Blevins Doll, *Harmonizing Filial and Parental Rights in Names: Progress, Pitfalls, and Constitutional Problems*, 35 *How. L.J.* 227, 228 (1992) (citing *Smith v. U.S. Casualty Co.*, 90 N.E. 947, 948 (N.Y. 1910)).

15 P.H. REANEY & R.M. WILSON, *A DICTIONARY OF ENGLISH SURNAMES* li (3d ed. 1997).

16 *Daughters*, *id.*

17 *Id.* at xviii.

(Ibbotdoughter,<sup>18</sup> Anotdoughter<sup>19</sup>); their occupations (Selkwimman (female dealer in silk),<sup>20</sup> Bredsellestere (female seller of bread),<sup>21</sup> Vikerwoman (female servant of the vicar)<sup>22</sup>); or their familial status (Wedewe (widow),<sup>23</sup> Moder (mother),<sup>24</sup> Tomwyf (wife of Tom)<sup>25</sup>). Surnames of men often identified their mothers (Margretson,<sup>26</sup> Elynoreson,<sup>27</sup> Wideweson<sup>28</sup>); other female relatives (Marekyn (kinsman of Mary),<sup>29</sup> Maggekin,<sup>30</sup> Lovekin<sup>31</sup>); or their status with respect to a woman (Moderles (motherless),<sup>32</sup> Mariman (servant of Mary)<sup>33</sup>). Oftentimes a woman's given name would become the surname of her children or other relatives (Agnes,<sup>34</sup> Marie,<sup>35</sup> Edith,<sup>36</sup> Helene<sup>37</sup>). Even when surnames became more commonly inherited from parents, around the fifteenth century, women were often the parent to pass down the surname to the children; there are many historical examples of married women

18 *Id.* Ibb-ot is a diminutive Ibb, a pet form of Isabel. *Ibbott, id.*

19 *Daughters, id.* Annot is a diminutive of Ann. *Annatt, id.*

20 *Silk, id.*

21 P.H. REANEY, THE ORIGIN OF ENGLISH SURNAMES 84 (1967).

22 REANEY & WILSON, *supra* note 15, at li.

23 PETER FRANKLIN, THE TAXPAYERS OF MEDIEVAL GLOUCESTERSHIRE: AN ANALYSIS OF THE 1327 LAY SUBSIDY ROLL WITH A NEW EDITION OF ITS TEXT 62 (1993).

24 *Mothers, REANEY & WILSON, supra* note 15.

25 REANEY, *supra* note 21, at 83.

26 *Margretson, REANEY & WILSON, supra* note 15.

27 *Ellenor, id.*

28 FRANKLIN, *supra* note 23, at 107.

29 REANEY & WILSON, *supra* note 15, at xxxix.

30 *Maggott, id.* Magge is a pet form of Margaret.

31 *Lovekin, id.* Love is a female given name.

32 *Motherless, id.*

33 *Mariman, id.*

34 *Agnes, id.*

35 REANEY & WILSON, *supra* note 15, at xx.

36 FRANKLIN, *supra* note 23, at 63.

37 *Ellen, REANEY & WILSON, supra* note 15.

with surnames that differ from their husbands, whose children bear surnames matching the mother rather than the father.<sup>38</sup> Other times children would be given a surname matching that of their grandmother, rather than either their mother or father.<sup>39</sup>

With women regularly holding names reflecting their own status and characteristics, not only did they often retain those names after marriage and sometimes pass them on to their descendants, but they also, at times, passed their surnames on to their husbands.<sup>40</sup> This was usually done in an effort to attach the husband to the wife's family estate and to ensure the continuity of the family line for purposes of property inheritance.<sup>41</sup> Before coverture gained its strongest foothold, women's property inheritance was commonplace. Even after inheritance restrictions became more rigid, there remained a tension between the older practices and the newer; property ownership became tied to surnames, but neither property nor surnames had yet come to inhere solely in the male. Women came to inherit less and less frequently as primogeniture became the rule, but when they did, their surnames continued to take precedence and were passed on to other family members. Examples can be found as late as the nineteenth century in England: in 1796 Henry Gough married Barbara Calthorpe and became Henry Calthorpe.<sup>42</sup> In the early nineteenth century, Fysh Coppinger adopted his wife's surname of de Burgh when they married, and their children and grandchildren took de Burgh as their surname as well.<sup>43</sup>

While the frequency of these practices varied by period, region, and circumstance, these surname practices can be found in England as early as surnames first appeared, were in widespread use, and continued in the record for hundreds of years. They became less common in the seventeenth century, but the prevalence at which women's surname usage continued to demonstrate their individual attributes rather than the names of their fathers or husbands, and supported a legacy where those names were passed on to children and

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38 See Deborah Anthony, *To Have, to Hold, and to Vanquish: Property and Inheritance in the History of Marriage and Surnames*, 4 BR. J. AM. LEG. STUDIES 218, 232–33 (2015) for further discussion of this. Alternatively, at times the child's given name would match the mother's surname.

39 *Id.* at 235.

40 *Id.*

41 See *id.* at 236 for further discussion of property, surnames, and marriage.

42 *Administrative History*, CALTHORPE ESTATE 1799–1899, London Metropolitan Archives Reference Code: E/CAL.

43 *Administrative History*, BURGH, DE FAMILY 1637–1937, London Metropolitan Archives Reference Code: ACC/0742.

grandchildren, suggests that women possessed a social visibility and status, as well as an independent and autonomous legal identity in stark contrast with modern developments.

## II. Modern Surname Developments

The application of the legal principle of coverture in England had a significant effect on the status and public life of women, including their surnames. Coverture is the legal concept of a married woman falling under the authority of her husband without a legal identity of her own. It appeared in England relatively early—around the eleventh century, brought to the region by the Normans.<sup>44</sup> Yet, what emerged in formal legal treatises did not manifest in everyday practice, as women continued to exercise considerable autonomy in public life.<sup>45</sup> By about the eighteenth century, however, the rules of coverture became firmly embedded and strictly enforced within both private and public life.<sup>46</sup> Women were no longer permitted to own property in their own right; where they had been inheriting fairly regularly until around the fourteenth century, inheritance rules now gave preference to males in the devising of property, even distantly related ones, over direct female descendants.<sup>47</sup> Exceptions to the principle became fewer and fewer over time. What women did manage to inherit or otherwise own was formally held by the husband to do with as he wished, with or without his wife's consent.<sup>48</sup> Women's adoption of the husband's surname became nearly universal during this period, and a family's children nearly always took the name of their father.<sup>49</sup> As a result, the many surnames that had existed that represented women largely disappeared, as it became only men's names that were passed on to descendants and thereby became solidified in the modern naming framework. Nevertheless, a surprising number of matronymic surnames—those representing and passed down from women—have survived to this day, although they represent a small minority of the surnames currently in

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44 ARIANNE CHERNOCK, MEN AND THE MAKING OF MODERN BRITISH FEMINISM 91 (2010); COURTNEY STANHOPE KENNY, THE HISTORY OF THE LAW OF ENGLAND AS TO THE EFFECTS OF MARRIAGE ON PROPERTY AND ON THE WIFE'S LEGAL CAPACITY 11 (1879).

45 See Anthony, *supra* note 38, at 222–23.

46 See Deborah Anthony, *Analyzing the Disappearance of Women's Surnames and the Retrenchment of their Political-Legal Status in Early Modern England*, 29 HASTINGS WOMEN'S L. J. 7, 16–18 (2018).

47 See Anthony, *supra* note 38, at 227–228.

48 Ruth Kittel, *Women Under the Law in Medieval England*, in THE WOMEN OF ENGLAND 127–128 (Barbara Kanner ed., 1979).

49 Some exceptions to this can be found even into the nineteenth century in England. See Anthony, *supra* note 38, at 233. The restrictions were more rigid in the United States.



existence and are almost entirely unrecognized as originating from women. For example, the surname Madison means son of Maddy, which is a nickname for Maud; Marriott was a common diminutive of Mary, and its existence as a modern surname indicates that the name was passed down from a woman to a man, who then passed the name on to his own progeny, for it to remain in existence today. Many other examples of matronymic surnames likewise exist.<sup>50</sup>

It is important to note, however, that although many of these restrictions on women were enshrined in the common law of England, the law never formally required any particular application of surnames for either women or men. The English common law had always dealt with names as a matter of personal choice, allowing individuals to adopt and/or change their names as they wished for reasons other than fraud, even after the customary inheriting of names became firmly established.<sup>51</sup> As the United States adopted the English common law in its legal framework, the same surname rules applied. Thus, as a technical legal matter, wives were not required to take their husbands' names; yet, as will become apparent below, the practical application of the common law flexibility was quite a different matter.

### III. Tradition, Law, and the Making of Memory

#### A. Tradition and Law: A Reciprocal Interaction

The word tradition, from the Latin “handing over,” is defined by reference to inherited patterns of thought, behavior, belief, or custom that are commonly accepted as historical, creating a continuity in social attitude over time.<sup>52</sup> Anthropologists studying tradition have noted that a society's awareness of its traditions as such often results from situations in which palpable change is taking place, where tradition then becomes the conscious designation for cultural elements that are to be deliberately sustained in the face of such change.<sup>53</sup> Ironically, tradition is considered antithetical to modern society and yet is simultaneously

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50 See Deborah Anthony, *In the Name of the Father: Compulsion, Tradition and Law in the Lost History of Women's Surnames*, 25 J. JURIS. 59, 69–75 (2014).

51 *Malone v. Sullivan*, 605 P.2d 447, 448 (Ariz. 1980).

52 *Tradition*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/tradition> [https://perma.cc/YDJ8-CXMR].

53 Nelson H. H. Graburn, *What is Tradition?*, 24 MUSEUM ANTHROPOLOGY 6, 6 (2000).

revered by it.<sup>54</sup> That reverence is fragmentary, however; some traditions are conscientiously venerated while others are dismissed as archaic. In this cultural tension between tradition and progress, new practices and ideas are created, and in short order they are assumed to be ageless and long-standing—they are perceived as traditional even when they represent recent developments. Vesting new practices with the status of “tradition” lends them a kind of authenticity and moral authority that is difficult to contest; part of their value is in their assumed existence over long periods of time. Indeed, it has been discovered that a number of current traditions conceived to be age-old were in fact invented in relatively recent times, often within the past century or two, while being presented as rooted in antiquity.<sup>55</sup> The tradition of family surname usage is a prime example of a modern development instituted for specific reasons which was then promulgated as ancient and irrefutable. In this way, cultural practices can operate in such a way as to erase the collective consciousness of anything contrary to their dictates.

Some scholars conceive of legal systems as antithetical to tradition—or at least, to traditional societies—and a system of law is conceived as one in which “traditions have largely been broken down.”<sup>56</sup> Yet, the relationship between tradition and law is not so clear cut, as they are not mutually exclusive. Instead, they operate interchangeably in a nuanced manner. Both culture and law exert pressure on each other. Cultural changes often precede legal ones, but the legal system also imposes mandates that subsequently shift the social order. *Brown v. Board of Education of Topeka*,<sup>57</sup> for example, is perhaps one of the most prominent examples of this phenomenon; the new legal prohibition against racially segregated schools brought about sweeping social change across the country. Each system includes enforcement mechanisms, and while enforcement of tradition is certainly less formal than that of law, it can be just as powerful in its effect on behavior. At times, the law is employed to enforce a tradition beginning to erode.

Despite the common law standard of flexibility and personal choice in surname usage, the practice of a wife surrendering her name for her husband’s was as close to a legal requirement during the modern period as it could be without having any actual legal support as such. The practice became so entrenched, in fact, with such significant implications

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54 *Id.* at 8.

55 See THE INVENTION OF TRADITION (Eric Hobsbawm & Terrence Ranger eds., 1983).

56 See Craig T. Palmer & Kathryn Coe, *From Morality to Law: The Role of Kinship, Tradition and Politics*, POLITICS AND CULTURE (Apr. 29, 2010), <https://politicsandculture.org/2010/04/29/from-morality-to-law-the-role-of-kinship-tradition-and-politics/> [https://perma.cc/Z2P6-PLAC].

57 347 U.S. 483 (1954).

attached thereto, that when American women began to assert their common law right to choose their name in the late nineteenth and early twentieth centuries, the legal response was swift and negative.<sup>58</sup> In the absence of legal precedent, government and courts stepped in to create it out of whole cloth. The circumstances under which such cases arose were various. Although women could not be definitively forced to adopt the surname of their husbands in common usage, they could be—and were—punished for their refusal to do so in legal documents, with the sanction of state and federal governments and courts all the way into the 1970s. In a multitude of contexts, courts refused to recognize the individual identities of married women who had retained their birth names, instead holding that their proper and correct identification in the eyes of the law was as the wife of a given man. The implications of such rulings are more profound than the simple question of a person's chosen moniker; a woman's entire legal existence was contingent and relational. Allowing her an independent name might also suggest an independent identity, and courts were loath to permit that. In 1881, in a case apparently the first of its kind in the United States, a New York state court held in *Chapman v. Phoenix National Bank* that

by the common law among all English speaking people, a woman, upon her marriage, takes her husband's surname. That becomes her legal name, and she ceases to be known by her maiden name. By that name she must sue and be sued . . . and execute all legal documents. Her maiden surname is absolutely lost, and she ceases to be known thereby.<sup>59</sup>

As such, service of process on her in her birth name was legally invalid. Remarkably, no citations or evidence were provided for the legal principles asserted—a move that is not only highly unusual, but also anathema in court decisions. Despite the dearth of support, this decision later proved momentous, as it was cited in multiple cases as an accurate and precedential statement of the United States law. Several legal treatises relied on *Chapman* in their statement of the common law denying women's name autonomy, including *American Jurisprudence*<sup>60</sup> and *American Law Reports*,<sup>61</sup> which were themselves subsequently referenced for support by other cases addressing the issue. Suddenly what was never a common law principle henceforth became “well settled” and “immemorial.”

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58 See, e.g., *Dunn v. Palermo*, 522 S.W.2d 679, 683–84 (Tenn. 1975) (discussing cases enforcing the wife's mandatory assumption of the husband's name); *Kruzel v. Podell*, 226 N.W.2d 458, 461–62 (Wis. 1975).

59 *Chapman v. Phoenix Nat'l. Bank*, 85 N.Y. 437, 449 (1881) (holding that service of process against the defendant was improper as the person named did not legally exist).

60 *Id.* at 460.

61 35 A.L.R. 417 (1925).

The new invention was reinforced and perpetuated for a period of about a century.

Many other courts followed suit in the next few decades. In 1923, a Massachusetts court dismissed a woman's personal injury lawsuit because the vehicle in which she was injured was registered in her birth name, rather than her married name: "[W]hen she applied for registration of the automobile in 1923 she did so in a name that *was not hers* . . . ."62 The court went so far as to deem the car illegally registered and a "nuisance" on the road.<sup>63</sup> In 1890, as in *Chapman*, a Texas court invalidated service of process on a married woman who had retained her birth name. The court found that service had been rendered on the wrong legal person.<sup>64</sup> The person she was born as no longer legally existed, and the law would only recognize her legal existence in the name of her husband. In 1945, an Illinois appeals court sanctioned the denial of a woman's right to vote when she failed to re-register in her husband's name after her marriage.<sup>65</sup> That court emphasized throughout the opinion the "immemorial custom" and "long and well-settled common law" requiring such a result: by "long-established custom, policy and rule of the common law among English-speaking peoples . . . a woman's name is changed by marriage and her husband's surname *becomes as a matter of law her surname*."<sup>66</sup> The court cited the 1881 *Chapman* case in support of these principles, which had itself asserted them without any support.<sup>67</sup> In effect, that court decided that the state's purported "interest" in requiring a woman to adopt the name of her husband outweighed the woman's right not only to autonomy in choosing her name, but also her constitutional right to vote. In doing so, like the *Chapman* court, the state of Illinois transformed what had been merely a customary practice, mischaracterized as "immemorial," into a legally mandated one. Multiple states followed along in refusing to register married women to vote in their birth names, and then defending those actions in court—even pressing the issue on appeal—rather than changing the practice.<sup>68</sup>

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62 Bacon v. Boston Elevated Ry. Co., 152 N.E. 35, 36 (Mass. 1926) (emphasis added).

63 *Id.*

64 Freeman v. Hawkins, 14 S.W. 364, 365 (Tex. 1890); see also Harper v. Hudgings, 211 S.W. 63 (Mo. 1919); Morris v. Tracy, 48 Pac. 571 (Kan. 1897); Rudolph v. Hively, 188 S.W. 721 (Tex. Civ. App. 1916).

65 Rago v. Lipsky, 63 N.E.2d 642, 645 (Ill. App. Ct. 1945).

66 *Id.* at 644–45 (emphasis added).

67 *Id.*

68 See, e.g., Custer v. Bonadies, 318 A.2d 639 (Conn. Supp. 1974) (rejecting the state's argument that married women assume their husbands' surname as a matter of law and must therefore register to vote in that name); State v. Taylor, 415 So.2d 1043 (Ala. 1982) (upholding trial court decision that the state may not prohibit women from registering to vote in their birth names rather than their husband's names); Stuart v. Board

As the twentieth century progressed, the surname cases became more frequent, and the courts were unyielding in their suppression of women's legal identity. The Alabama Supreme Court took the earlier jurisprudence a step further, deciding that the "more perfect and complete" identification of a married woman was one which used her husband's *first* name as well as his surname, with the prefix "Mrs." applied, therefore making 'Hattie W. Jones' one 'Mrs. J.C. Jones'.<sup>69</sup> The case represents a clear departure from earlier cases that had held that the legally correct name of a married woman consisted of her given Christian name and her husband's surname.<sup>70</sup> This new double-erasure of identity does not appear to have taken a foothold in the legal development of the issue, but it suggests a perceived need to further buttress and tighten an area of law that was becoming subject to increasing scrutiny amidst challenges to the gendered hierarchy embedded in the status quo. Decades later, the legal landscape remained rigid; one woman was suspended from her job with a county health department in 1974 for refusing to adopt her husband's surname after marriage, violating the county's mandatory "name change policy."<sup>71</sup> In 1976, a federal court in Kentucky asserted that the state's common law required a woman to abandon her birth name and assume her husband's name at marriage.<sup>72</sup> Trial courts in Nebraska and Arizona as late as 1980 refused to grant divorces because the wife was listed in the court paperwork in her birth name rather than her married name.<sup>73</sup> A Florida court denied a woman the right to resume her birth name even *after* a divorce, surmising that it might embarrass her children.<sup>74</sup> The court thereby not only suggested that a mother's surname independence was inherently shameful to those connected to her, but also held that even unsubstantiated speculation as to the possible embarrassment that independence might

of Sup'rs of Elections for Howard County, 295 A.2d 223 (Md. 1972).

69 Roberts v. Grayson, 173 So. 38, 39 (Ala. 1937).

70 See, e.g., Uihlein v. Gladieux, 78 N.E. 363 (Ohio 1906); Brown v. Reinke, 199 N.W. 235 (Minn. 1924).

71 Allen v. Lovejoy, 553 F.2d 522, 523 (6th Cir. 1977) (upholding plaintiff's Title VII sex discrimination claim).

72 Whitlow v. Hodges, 539 F.2d 582, 583 (6th Cir. 1976). The appellate court declined to rule on the question of whether the trial court's assertion of Kentucky common law was accurate, but nevertheless upheld the decision denying the plaintiff the right to retain her birth name on her driver's license.

73 Simmons v. O'Brien, 272 N.W.2d 273 (Neb. 1978) (overturning trial court's refusal to grant divorce and holding that a married woman may legally bear a surname different from her husband); Malone v. Sullivan, 605 P.2d 447 (Ariz. 1980) (holding that no common law, statute, or rule requires a woman to assume her husband's name, and the court commissioner therefore abused his discretion in refusing to consider wife's divorce petition that was filed in her maiden name).

74 Pilch v. Pilch, 447 So.2d 989 (Fla. Dist. Ct. App. 1984) (overturning trial court's refusal to allow the wife's name change).

cause her offspring was of more legal import than the woman's rights to autonomy in her own name and identity.

For over a century, states in many cases asserted their own legal interest in the gendered tradition of marital surnames separate and apart from any interests or desires of either party to the marriage itself. In South Carolina, a court held that "an application to change the name of a wife without the concurrence and consent of the husband is . . . wrong in principle."<sup>75</sup> The court noted that should the husband successfully petition to change *his* surname, the wife's name would automatically change along with it, regardless of her own consent.<sup>76</sup> The court's interest, then, was not so much in marital harmony and mutual consent as it was in the husband's authority over the marital unit, even after separation. This was perceived by the court as most conducive to a potential reconciliation between the estranged couple,<sup>77</sup> in which the states have an asserted interest. Indeed, even when the husband agreed to the wife's name change, courts were still prone to deny such requests: one Texas court in 1977 seems to have approached this issue as concerning the collective rights of men, rather than of a particular man, when it refused to allow a woman's name change even when the husband had consented. The judge stated that allowing such a thing "would be detrimental to the institution of the home and family life and contrary to the common law and customs of this state."<sup>78</sup> In a similar 1974 Indiana case, a woman took her husband's name at marriage but later tried to change it back, with her husband's consent. In refusing to grant the petition, the trial court unilaterally decided there was no harm to her "sense of dignity and existence as an individual" or her identity by being forced to use her husband's name, contrary to the wife's own assertions.<sup>79</sup> Even more remarkable, however, was the state's emotional and vitriolic characterization of the wife in its argument that her name change request should be denied:

Perhaps she is claiming the woman's privilege that in an argument she does not have to use reason . . . . It can be reasonably inferred that she believes that fact that she is the breadwinner of the family should be publicized so

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75 *Converse v. Converse*, 30 S.C. Eq. 535, 539–40 (S.C. App. Eq. 1856).

76 *Id.* at 539.

77 *Id.* at 540.

78 *In re Erickson*, 547 S.W.2d 357, 358–60 (Tex. Civ. App. 1977) (reversing trial court's denial of wife's name change request).

79 *Petition of Hauptly*, 312 N.E.2d 857, 859 (Ind. 1974) (overturning trial court denial of married woman's petition to legally resume her maiden name).

that all will know her husband has been emasculated and that she is the head of the family . . . indicating that perhaps Mrs. Hauptly's need was not for a change of name but for a competent psychiatrist . . . . Namely, a sick and confused woman, unhappy and unsatisfied with her marriage, unable to determine what she wants to do with her life . . . because she was kind of odd ball . . . .<sup>80</sup>

Such a response is telling in its unconventionality. The state's desire to maintain the hegemonic naming structure was almost personal in its intensity, going well beyond reasoned legal argument and application of legal precedent in its suggestion that no sane, secure woman would ever make such a request.<sup>81</sup>

The invented common law principle was used in several attempts to deny women the right to run for office as well. In Ohio, a taxpayer sued to prevent a married woman from being placed as a candidate on a judicial ballot in her birth name. The petitioner argued that the candidate's name had automatically changed to her husband's name at marriage, and because she had failed to officially change her name "back" to her birth name, her candidacy under her birth name was invalid.<sup>82</sup> Even as late as 2008, a challenge was levied when a married woman ran in a primary election using her birth name. The trial court struck her name from the ballot, calling it "misconduct" for her to have not used her married name, despite no such requirement existing in state law.<sup>83</sup> Though the decision was overturned on appeal, the principles involved are clearly still present in the public consciousness and are resistant to change, even to the point of garnering legal approval.

The federal government likewise lent its own formal authority to enforcement of the "tradition" into the 1970s. The United States Department of State concluded that any married woman's name was legally that of her husband, and routinely refused to issue passports to married women who applied using their birth names.<sup>84</sup> A married woman applying for citizenship in her birth name was denied the right to retain her birth name on

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80 *Id.* at 861 (Hunter, J., concurring).

81 The state supreme court appears troubled by the state's personal attacks on the wife (the concurring Justice even more so), ultimately deciding that the justification provided for the state's position was unreasonable and without merit. *Id.* at 860.

82 *State ex rel. Krupa v. Green*, 177 N.E.2d 616, 618 (Ohio Ct. App. 1961).

83 *Levey v. Dijols*, 990 So.2d 688, 691–92 (Fla. Dist. Ct. App. 2008).

84 *UNA STANNARD, MRS. MAN* 256 (1973) (discussing passports).

her naturalization documents; despite the fact that she was a professional musician well-known by that name, the court contended that forcing her to adopt her husband's name legally would result in no harm to her (or to any other professional women of "note and standing," according to the judge). Citing *Chapman* and opining that it represents "sound policy," the court held that upon her marriage she automatically abandoned her name in favor of his, regardless of her wishes.<sup>85</sup> In misstating the common law, the *Chapman* court had effectively invented new common law that was used as authority in future cases. The justifications for these decisions were typically meager, referring to vague notions of tradition and "long-established custom" and "rule of the common law . . . whereby a woman's name is changed by marriage and her husband's surname becomes as a matter of law her surname."<sup>86</sup>

Even the United States Supreme Court weighed in on the issue in 1972 in *Forbush v. Wallace*.<sup>87</sup> An Alabama woman brought a class action lawsuit challenging the constitutionality of an unwritten Alabama regulation that a wife's surname was by law that of her husband and that the driver's license of a married woman must be issued in her husband's last name as the only proper legal name of the wife.<sup>88</sup> A three-judge federal district court upheld the regulation in a per curiam decision, citing the "confusion" and inconvenience that would result if drivers were allowed to obtain licenses in whatever name they wished, which outweighed the interests of all women to autonomy in their names.<sup>89</sup> As with other cases not involving a dispute between spouses, the court concluded that the state itself had a legitimate interest in requiring a woman to adopt her husband's surname at marriage. The court asserted without explanation that "uniformity among the several states in this area is important."<sup>90</sup> It was likely not uniformity for its own sake that the court found so imperative, but uniformity in maintaining the subordinate status of married women: the court justified the upholding of the marital name requirement with the astonishing assertion that a woman's adoption of her husband's name "is a tradition

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

86 Rago v. Lipsky, 63 N.E.2d 642, 645 (Ill. App. Ct. 1945); see also Elberson v. Richards, 42 N.J.L. 69 (1880); Blanc v. Blanc, 47 N.Y. Supp. 694 (Sup. Ct. 1897); Rich v. Mayer, 7 N.Y. Supp. 69 (City Ct. 1889); Harper v. Hudgings, 211 S.W. 63 (Mo. 1919); Lane v. Duchac, 41 N.W. 962 (Wis. 1889).

87 Forbush v. Wallace, 405 U.S. 970 (1972).

88 Forbush v. Wallace, 341 F. Supp. 217, 219 (M.D. Ala. 1971).

89 *Id.* at 221–222.

90 *Id.* at 222.



extending back into the heritage of most western civilizations.”<sup>91</sup> This entirely fictitious (and uncited) claim says much more than that we are dealing with a custom that we value because it has been around for a while; it proclaims that the practice is fundamental to our very existence as a civilization. The Supreme Court affirmed the decision without a written opinion.<sup>92</sup> In 1976, the Sixth Circuit Court of Appeals relied on *Forbush* in a case upholding a similar unwritten regulation in Kentucky, despite there being some question from the appellate court as to the accuracy of the trial judge’s contention that the common law of Kentucky required a married woman to assume her husband’s name.<sup>93</sup>

The “tradition” held such power that when faced with resistance, the law was invoked to enforce it, elevating the tradition to a kind of quasi-law in effect, and for a period, actual law. Yet, the courts in doing so either failed to cite any definitive legal standard or common law history in support of such claims, or they cited earlier cases that themselves had cited no standard and instead simply fabricated it, simply asserting the principles as if taking judicial notice of an incontrovertible fact that can scarcely be refuted. Unwilling to acknowledge that they were in fact constructing new common law, what support was provided by the courts simply referenced the “fundamental,” “primary,” “natural,” and “time-honored” rights of men to the naming of their family that were implicitly founded in the laws of nature.<sup>94</sup>

The late 1970s and early 1980s saw these holdings begin to crumble when the *Chapman* precedent was more carefully examined in appellate courts across the country. In another name change request, a Milwaukee school board had insisted that an employee either use her husband’s surname or legally change her name “back” to her birth name, even though she had never used anything other than her birth name either before or after her marriage,<sup>95</sup> thus requiring the woman to secure judicial permission to continue to eschew the tradition. In an effort to comply, the woman filed a petition to “change” her name to her birth name. But the trial court denied her request. Holding that a woman’s name automatically legally becomes that of her husband upon marriage under common law principles, the court also concluded that granting the request would not serve the interests of any *potential future*

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91 *Id.*

92 *Forbush*, 405 U.S. at 970.

93 *Whitlow v. Hodges*, 539 F.2d 582, 583 (6th Cir. 1976).

94 *Rio v. Rio*, 504 N.Y.S.2d 959, 961 (App. Div. 1986); *In re Trower*, 66 Cal. Rptr. 873, 874 (Ct. App. 1968).

95 *Kruzel v. Podell*, 226 N.W.2d 458 (Wis. 1975).

children (she had none at the time of the petition).<sup>96</sup> Thus the court not only misstated and thereby altered the common law, it also prioritized the speculative interests of nonexistent people over the legal requests of the woman when such requests were disruptive of the male-oriented status quo. It held that the woman, by virtue of her marriage alone, legally possessed a name that she neither wanted nor had ever used. The Wisconsin Supreme Court, however, eviscerated this argument on appeal, pointedly dismissing the trial court's statement that the common law requires women to adopt the surname of the husband. The Court examined the 1881 *Chapman*, holding that "[i]t is well settled by common-law principles and immemorial custom that a woman upon marriage abandons her maiden name and assumes the husband's surname."<sup>97</sup> The Wisconsin Supreme Court concluded that this statement was nothing more than the personal opinion of the judge in the case rather than a reflection of established law, noting that no authority of any kind was cited for that statement and holding that it was "plainly error."<sup>98</sup>

It was becoming increasingly clear that "tradition" was wholly inadequate to serve as the sole foundation for an official legal principle that was otherwise directly at odds with emerging constitutional notions of gender equality, and courts were looking with more skepticism at the common law assertions of *Chapman* and its progeny. In 1975, a federal district court in Arkansas held that the state may not constitutionally require women to register to vote using their husband's or ex-husband's surname, nor could it require women to prefix their names with Miss or Mrs.<sup>99</sup> That same year, the Tennessee Supreme Court held that the state could not require a woman to take her husband's name for voter registration purposes.<sup>100</sup> A Florida district court held in 1976 that married women could not be denied a driver's license in their birth names or be required to take their husband's surname at marriage.<sup>101</sup> A federal appeals court in 1977 held that a woman who had been suspended from employment at a county health department for refusing to adopt her husband's surname after marriage was entitled to back pay.<sup>102</sup> The Arizona Supreme Court in 1980

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96 *Id.* at 460.

97 *Id.* (internal citation omitted).

98 *Id.* at 461.

99 *Walker v. Jackson*, 391 F.Supp. 1395 (E.D. Ark. 1975).

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

101 *Davis v. Roos*, 326 So.2d 226 (Fla. Dist. Ct. App. 1976).

102 *Allen v. Lovejoy*, 553 F.2d 522, 525 (6th Cir. 1977). Other cases ventured into the complex realm of the surnames of children. *See, e.g.*, *In re Schiffman*, 620 P.2d 579, 583 (Cal. 1980) (rejecting the "common law and

held that the marital surname custom had never been law and noted that not even New York courts, where *Chapman* originated, considered the decision precedential.<sup>103</sup> These cases typically rested on a reassessment of the common law, equal protection under the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964,<sup>104</sup> and/or state statutory and constitutional law prohibiting sex discrimination. By the early 1980s it had become established that a married woman had the right to use any name she chose after marriage.

Yet, even though the law retreated from compulsive enforcement of the custom, that custom nevertheless forged on quite robustly. While exceptions are permitted,<sup>105</sup> they are far from the norm, and the underlying principle remains strongly entrenched. There persists a strong social stigma against violating the “traditional” marital name change norms.<sup>106</sup> Research has found that women who maintain their birth names after marriage are viewed as less committed to the marriage,<sup>107</sup> and men are less likely than women to view it as acceptable.<sup>108</sup> A 2011 study found that nearly three quarters thought it was generally better if a woman takes her husband’s name; half thought it was a good idea for states to *legally require* it; and nearly half disagreed that it was “okay” for a man to take his wife’s name at marriage.<sup>109</sup> It is notable that the abstract attitudes of women tend to be more egalitarian than their actual personal plans, suggesting that social pressure continues to play a role in decision-making in this area.<sup>110</sup> It is estimated that between seventy-five and ninety-five

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custom, which have given the father a ‘primary right’ to have his child bear his surname . . .”).

103 *Malone v. Sullivan*, 605 P.2d 447, 449 (Ariz. 1980).

104 42 U.S.C. §§ 2000e-2000e-17 (1964).

105 Exceptions are permitted for women more than for men; in many states, men are still prohibited from adopting the surname of the wife at marriage. See Deborah Anthony, *A Spouse by Any Other Name*, 17 WM. & MARY J. WOMEN & L. 187 (2010).

106 Rachel Stoiko & JoNell Strough, ‘Choosing’ the Patriarchal Norm: Emerging Adults’ Marital Last Name Change Attitudes, Plans, and Rationales, 34 GEND. ISSUES 295, 297 (2017); Laurie Scheuble et al., *Marital Name Changing Attitudes and Plans of College Students: Comparing Change over Time and Across Regions*, 66 SEX ROLES 282, 284 (2012); Claudia Goldin & Maria Shim, *Making a Name: Women’s Surnames at Marriage and Beyond*, 18 J. ECON. PERSP. 143, 146 (2004).

107 Scheuble et al., *supra* note 106, at 285.

108 *Id.* at 284.

109 Hamilton et al., *Marital Name Change and Gender Attitudes*, 25 GENDER & SOC’Y 145, 156–57 (2011).

110 Scheuble et al., *supra* note 106, at 284.

percent of all women assume their husband's name upon marriage,<sup>111</sup> though the numbers appear to fluctuate over time and by region in inconsistent ways.<sup>112</sup> A 1994 study determined that ninety percent or more of women took their husband's name, and of the rest, only two percent used their birth name exclusively with no change or name combination.<sup>113</sup> Recent research into public attitudes about marital names (as opposed to actual practices) yielded similarly conservative results: all existing studies investigating the future plans of college students found that a majority planned to conform to the traditional norm, with the range from 60% to 95%,<sup>114</sup> with that number appearing to have increased over time.<sup>115</sup> *The New York Times* reports, however, that an analysis conducted by The Upshot roughly estimated that around 20% of women in recent years have kept their birth names after marriage, which is more than at any other time in history, though their reasons were often more practical than political or ideological.<sup>116</sup> The most common rationale provided by both women and men for preferring the wife to change her name was tradition,<sup>117</sup> consistency across time and region “suggests powerful ideological underpinnings of the patriarchal name change norm in the United States for heterosexual marriages.”<sup>118</sup>

Even less common than a wife retaining her birth name is a husband taking his wife's name—that practice is exceptionally rare. There are no studies about the numbers of men taking the names of their wives at marriage—perhaps because the numbers are considered so small as to not merit mention, or perhaps because it does not occur to researchers to

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111 Goldin & Shim, *supra* note 106, at 144; David R. Johnson & Laurie Scheuble, *Marital Name Change: Plans and Attitudes of College Students*, 55 J. MARRIAGE & FAM. 747 (1993); Jennifer Christman, *The Name Game Despite Options, 90% of Women Choose to Take Husband's Name*, ARK. DEMOCRAT-GAZETTE, Mar. 8, 2000, at F1; *Hillary Drops Her Maiden Name*, BRISBANE TIMES (Apr. 30, 2007, 9:37 AM), <https://www.brisbanetimes.com.au/news/world/hillary-drops-her-maiden-name/2007/04/30/117788007743.html> [<https://perma.cc/9P3D-UPJQ>]; Betsy Rubiner, *Married Women and Surnames: Tradition Still Plays a Large Role*, SEATTLE TIMES, Nov. 3, 1996, at L6.

112 Scheuble et al., *supra* note 106, at 283.

113 *Id.* at 282 (citing J. Brightman, *Why Wives Use Their Husbands' Names*, 16 AMERICAN DEMOGRAPHICS 9–10 (1994)).

114 Stoiko, *supra* note 106, at 298.

115 *Id.*

116 Claire Cain Miller & Derek Willis, *Maiden Names, on the Rise Again*, N.Y. TIMES (June 27, 2015), <https://www.nytimes.com/2015/06/28/upshot/maiden-names-on-the-rise-again.html> [<https://perma.cc/3NAT-VJQR>].

117 Stoiko, *supra* note 106, at 303, 309.

118 *Id.* at 308.

investigate such a phenomenon. Marital naming choices are highly influenced by societal pressures and the continuing entrenchment and social importance of concepts of tradition. Furthermore, while a couple's choices are legally broader than they once were, they are even today not egalitarian, and are often restricted by gender. While women are legally permitted to simply and easily change their names at marriage in every state but Louisiana, in many states men are prohibited from doing so via the same streamlined process. Men are instead required to file a legal action, pay court filing fees, and publish notice in the local paper, all at significantly increased time, hassle, and expense. A minority of states explicitly allow the same rights for men as for women in their marital names. Although on its face this appears to be discrimination against men, it is not: taking their husbands' names at marriage was never a "right" of women, but rather a requirement. The right is really to have a spouse adopt one's name at marriage, which continues to inhere in the husband.<sup>119</sup>

Indeed, even the continued use of the term "maiden name" serves to reinforce the hierarchical naming structure. A "maiden" is, by definition, simply an unmarried woman, but the word is not used in that way in contexts other than with names. The continued use of the term—with no male equivalent—in both public discourse and on official documents leaves no room for women who keep their birth names after marriage or who change their names through a context other than marriage (because she would then have two different "maiden," or pre-marriage, names). Nor does it allow for men to change their names at marriage or at any other time. This then gives official formal sanction only to the standard and customary naming structure and serves to reinforce its continuity.

### **B. Tradition in the Naming of Children**

After women won the right to their own surname autonomy, the underlying principles forged on in related cases. Where the logic of natural male rights to the naming of the wife has fallen away as constitutionally indefensible, it has pressed on in the context of the naming of children, with mixed results. These cases often continue to defer to the man's naming rights, if not over his wife any longer, then at least over his children. Courts have espoused the notion that a father has a "protectible [sic] interest in having his child bear his surname"<sup>120</sup> and that it is "well known" that "a surname provides a means of identifying the child with the father's family."<sup>121</sup> In 1976, a Washington county registrar refused to issue a standard birth certificate for a child born out of wedlock because the

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119 See Anthony, *supra* note 105.

120 Newman v. King, 433 S.W.2d 420, 423 (Tex. 1968).

121 Bennett v. Northcutt, 544 S.W.2d 703, 707 (Tex. Civ. App. 1976).

child carried the mother's surname, even with the consent of the father.<sup>122</sup> As late as 2006, an Oregon trial court granted an unmarried father's demand to have his child's last name legally changed from the mother's to his by virtue of his status as the father, implicitly granting the father's request for a "paternal presumption" in the naming of his children. The decision was overturned on appeal, and the father's request was ultimately denied, along with the "paternal presumption" the trial court had endorsed.<sup>123</sup> In a 1985 case in Kansas, the parents divorced and the father subsequently died, and the mother had remarried. The mother's petition to change the surname of the minor child was denied in part because the trial court determined that "[a] deceased father . . . is . . . entitled to have his child bear his name in accordance with the usual custom of succession to the paternal surname."<sup>124</sup> The appellate court agreed, noting the "longstanding tradition in this country that a child carry the surname of his father" and concluding that "there is a protectable parental, generally paternal, interest in seeing that a child's name remains unchanged."<sup>125</sup> Yet, when it is the father who is requesting the change, that presumption that "a child's name remains unchanged" appears to run the other direction: in a 2011 Kansas case, the parents were divorced at the time of the birth, the father was not listed on the birth certificate, and the child was given the mother's surname. The father later petitioned to change the child's surname to his. The trial court judge noted that "tradition says the child has the father's last name,"<sup>126</sup> and held that it would serve the child's best interests to carry her father's surname and ordered that it be changed.<sup>127</sup> Under the current naming scheme, a woman's heritage is minimized; there is little concern about her family name dying out by her marriage, nor recognition of the mother as part of the child's legacy through her surname, whereas all of these are of central concern to courts on behalf of men.

The commonly employed presumption of historical universality is clearly factually inaccurate. The notion of custom is subject to interpretation and thus is easily manipulated. However, such arguments also conflate tradition and ubiquity with law and justice. It is at

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122 *Doe v. Dunning*, 549 P.2d 1 (Wash. 1976).

123 *Doherty v. Wizner*, 150 P.3d 456, 463 (Or. Ct. App. 2006).

124 *Matter of Morehead*, 10 Kan. App.2d 625, 626 (Ct. App. 1985).

125 *Id.* at 627.

126 *In re Denning*, 198 P.3d 212 (Kan. Ct. App. 2009).

127 *Id.* (affirming trial court's decision to change the child's surname to that of the father). *But see* *Rio v. Rio*, 504 N.Y.S.2d 959, 961 (App. Div. 1986); *Jenkins v. Austin*, 255 S.W.3d 24, 27 (2008) ("Neither parent has the absolute right to confer his or her name upon the child."); *In re H.M.C.*, 876 N.E.2d 805, 808 n.5 (Ind. Ct. App. 2007) ("A father and mother enjoy equal rights with regard to naming their child.").

best questionable whether tradition simply for its own sake should ever be a guiding force in law. Certainly the legal landscape would be quite different today if the maintenance of what is viewed to be tradition were generally held to be a legitimate state interest in its own right, particularly with respect to demographic groups that have been historically subjected to pervasive oppression and discrimination.

#### IV. Politics and the Making of Cultural Memory

Surnames are more than simply superficial identifiers; they are psychologically, socially, and politically meaningful. They serve as statements of individuality, religion, family relations, culture, identity, and politics. At times they have been forcefully ascribed or prohibited to exert control and dominance.<sup>128</sup> Use of the surname MacGregor was banned in Scotland in 1603 after conflicts between that clan and King James VI.<sup>129</sup> Nazis in the 1930s mandated the addition of the name “Sarah” or “Israel” to the names of Jews to mark them as other.<sup>130</sup> While the United States immigrants were commonly (and not always voluntarily) given new surnames at Ellis Island to more effectively integrate them into American culture, American slaves often had no surnames at all due to their status as property, or were given the surname of the master, with that name sometimes changing with each successive owner.<sup>131</sup> As surnames became more closely tied to property, identity, and power, their political importance grew. Nowhere is this more evident than with the surnames of women. As law and practice surrounding women’s names became increasingly restrictive, the significance ascribed to them expanded, operating as both a contributor to and a reflection of women’s diminished social and political standing.

As part of this process, the history of women’s surnames was wholly erased from the collective consciousness. All of the customary surname practices were not just abandoned; they were wiped clean from social memory, with the new narrative asserting that the modern restrictions on women were in fact representative of the better part of a millennium of English tradition and law. The massive scale and success of such a sweeping falsehood—

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128 See, e.g., *supra* note 53 (discussing examples of systematic surname coercion as a means of social control and dominance).

129 JAMES FINLAYSON, SURNAMES AND SIRENAMES 23 (1863), <http://archive.org/details/cu31924029805383> [<https://perma.cc/9NZ7-2P8R>].

130 Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 770 (2007).

131 Lisa Kelly, *Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings*, 99 W. VA. L. REV. 1, 12–17 (1996).

essentially uncontested even into the current day—merits additional examination.

History, as the vehicle by which we distinguish truth from untruth and come to understand the past, is not static or locked in as objective fact. Narratives of the past are mutable and shifting, creating political and social meaning for the present, and supporting or challenging dominant perspectives while imbuing them with value and structure.<sup>132</sup> The altered narrative surrounding marital surnames is a prime example of this phenomenon.

In his work *On Collective Memory*, Maurice Halbwachs construed memory not as an individual neurological occurrence, but rather as a collective cultural and social one. As a social construction, he argued, memory is provisional and subject to manipulation and revision, making it both a public and a private phenomenon.<sup>133</sup> Other scholars have expanded upon these ideas, noting the ways in which social memory constructs the past not only to define it, but also to shape the present and future, both representing and forming social relations.<sup>134</sup> Cultural memory is not passively received, but actively performed in the creation of shared cultural knowledge and identity.<sup>135</sup> History and memory are thus intertwined and at times oppositional.<sup>136</sup> The historical narrative is particularly important

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132 See Katharine Hodgkin & Susannah Radstone, *Introduction*, in *CONTESTED PASTS: THE POLITICS OF MEMORY* 1 (Katharine Hodgkin & Susannah Radstone eds., 2003); Marita Sturken, *TANGLED MEMORIES: THE VIETNAM WAR, THE AIDS EPIDEMIC, AND THE POLITICS OF REMEMBERING* 1 (1997).

133 MAURICE HALBWACHS, *ON COLLECTIVE MEMORY* (1992); see also Mieke Bal, *Introduction*, in *ACTS OF MEMORY: CULTURAL RECALL IN THE PRESENT* (Mieke Bal et al., eds., 1999).

134 JAMES FENTRESS & CHRIS WICKHAM, *SOCIAL MEMORY* 25 (1992); Alon Confino, *Collective Memory and Cultural History: Problems of Method*, 102 *AM. HIST. REV.* 1386, 1390 (1997); see also Leo Spitzer, *Back Through the Future: Nostalgic Memory and Critical Memory in a Refuge from Nazism*, in *ACTS OF MEMORY: CULTURAL RECALL IN THE PRESENT*, *supra* note 133 (discussing the central nature of the future in acts and aspects of memory); Bal, *supra* note 133, at vii; MICHEL FOUCAULT, *LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS* (Donald F. Bouchard ed., 1977) (examining the constructed nature of cultural history, arguing that cultural traditions represent contrived conceptions that we have imposed upon history, rather than objectively true historical fact); Jonathan Crewe, *Recalling Adamastor: Literature as Cultural Memory in "White" South Africa*, in *ACTS OF MEMORY: CULTURAL RECALL IN THE PRESENT*, *supra* note 133 (discussing the ways in which memory manipulation can function as "social forgetting rather than remembering" so as to fictionalize and idealize a history that did not take place).

135 Bal, *supra* note 133, at vii; see also Sturken, *supra* note 132, at 7; RAINGARD ESSER, *POLITICS OF MEMORY: THE WRITING OF PARTITION IN THE SEVENTEENTH-CENTURY LOW COUNTRIES* 239–240 (2012) (discussing the "public memory created and perpetuated" by those writing on historical events of the Eighty Years' War, which served to support cultural identities of the seventeenth century).

136 Sturken, *supra* note 132, at 5–6 (rejecting Pierre Nora's assertion that history's fundamental purpose is to "suppress and destroy" memory, instead arguing that history and memory are entangled).



because tradition is a central component of the legitimacy of the present structures.<sup>137</sup> While inconvenient aspects of the past are expunged, new falsified memories can survive for many generations as they are passed on through the socialization process,<sup>138</sup> thereby influencing individual as well as collective identity and impacting decisions made at every level, as the sense of self is implicated in these collective social conceptions.<sup>139</sup> In this sense, history is made backwards. Existing power structures construct and define history and identity, self and other, citizen and non-citizen in the present, which then serve to inform ideas of the past. The past is then cyclically bound and marshaled in the service of current policy, molding and shaping cultural understanding, and the national memory becomes national property. In the case of surnames, the rivalry between history and memory becomes apparent as new cultural memory mandates suppressed the aspects of history that contradicted its principles.

Political power is paramount in mediating the tension between history and memory; collective memory is, at its core, political.<sup>140</sup> The politics of memory reflect the appropriation, invention, and invocation of the past in ways that significantly impact power relations. A particular set of notions are advanced about culture, law, society, and the nation, sometimes serving subversive or malicious ends in the struggle over meaning,<sup>141</sup> even to the point of collective self-deception.<sup>142</sup> Aleida Assman argues that this process is actively undertaken by political leadership to support existing power structures by the creation of a particular image of the past.<sup>143</sup> Thus, collective cultural memory is the result of a struggle over which

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137 ALEIDA ASSMAN, *CULTURAL MEMORY AND WESTERN CIVILIZATION: FUNCTIONS, MEDIA, ARCHIVES* 13 (2011).

138 *Id.* at 395.

139 *Id.*

140 See Popular Memory Group, *Popular Memory: Theory, Politics, Method*, in *MAKING HISTORIES: STUDIES IN HISTORY—WRITING AND POLITICS* 205 (Richard Johnson et al. eds., 1982).

141 See Hodgkin & Radstone, *supra* note 132, at 5, 12; see also HERBERT HIRSCH, *GENOCIDE AND THE POLITICS OF MEMORY: STUDYING DEATH TO PRESERVE LIFE* (1995) (examining Nazi Germany as a case study in how memories and their coinciding myths are manipulated by those in leadership to construct identity and belief, and legitimate malicious purposes).

142 See Roy Baumeister & Stephen Hastings, *Distortions of Collective Memory: How Groups Flatter and Deceive Themselves*, in *COLLECTIVE MEMORY OF POLITICAL EVENTS: SOCIAL PSYCHOLOGICAL PERSPECTIVES* 277 (James W. Pennebaker et al. eds., 1997).

143 ASSMAN, *supra* note 137, at 12–13; see also HIRSCH, *supra* note 141 at 23–24 (arguing that memory is a sociopolitical phenomenon, the control of which is a manifestation of political power).

version of events gains purchase based on current political needs.<sup>144</sup> The past, constantly shifting to accommodate political needs and current public policy, becomes elusive.<sup>145</sup>

The process of cultural memory creation in modern times is often heavily tied up in a sense of national identity and collective ownership of national memory.<sup>146</sup> The manipulation of political memory was particularly pronounced in the early modern period. Nation-states were developing out of the consolidation of political and military power, and with that came an increased historical awareness.<sup>147</sup> E. J. Hobsbawm suggests, for instance, that the drive for a strong nation-state in the nineteenth century led people to concoct the imagery of their new nationalistic notions into the past, far beyond where they are actually supported by historical evidence.<sup>148</sup> He sees a shift from organic, local memory to hegemonic, nationalistic approaches to memory beginning around 1800,<sup>149</sup> “when nationalism was at its heyday and traditions were being invented thick and fast.”<sup>150</sup> What

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144 See HERBERT HIRSCH, *supra* note 141, at 29; *see also* Sturken, *supra* note 132, at 6.

145 HIRSCH, *supra* note 141, at 32.

146 Hodgkin & Radstone, *supra* note 132, at 26; *see also* Katharine Conley, *The Myth of the “Dernier Poeme”*: Robert Desnos and French Cultural Memory, in *ACTS OF MEMORY: CULTURAL RECALL IN THE PRESENT*, *supra* note 133 (discussing the false cultural memory that served nationalistic purposes in the context of French heroism and resistance during the Nazi occupation); Alessandro Portelli, *The Massacre at the Fosse Ardeatine: History, Myth, Ritual, and Symbol*, in *CONTESTED PASTS: THE POLITICS OF MEMORY* 33, 38 (Katharine Hodgkin & Susannah Radstone eds., 2003) (investigating incorrect versions of events that achieved hegemony in Rome regarding an incident that took place during the German occupation during World War II, suggesting that the reasons for the strength of the compromised collective memory related to the creation of the national identity which served the purposes of the Italian state).

147 JUDITH POLLMANN & ERIKA KUIJPERS, *Introduction: On The Early Modernity of Modern Memory*, in *MEMORY BEFORE MODERNITY: PRACTICES OF MEMORY IN EARLY MODERN EUROPE* 2 (Erika Kuijpers et al. eds., 2013).

148 E.J. HOBBSAWM, *NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY* 76 (1992); *see also* Marouf Cabi, *Clash of National Narratives and the Marginalization of Kurdish-Iranian History*, 4 *CONTEMP. REV. OF THE MIDDLE EAST* 335 (2017) (investigating the marginalization of certain historical narratives and the transformation of myth into historical fact for nationalistic political purposes in Iranian and Kurdish national narratives); ALEXANDR OSIPIAN, *The Usable Past in the Lemberg Armenian Community’s Struggle for Equal Rights, 1578–1654*, in *MEMORY BEFORE MODERNITY: PRACTICES OF MEMORY IN EARLY MODERN EUROPE* 27 (Erika Kuijpers et al. eds., 2013) (noting in his study of the Armenian community of Lemberg that the early modern European culture saw the distant past as the decisive site of the creation of foundational rights and status).

149 Pollmann & Kuijpers, *supra* note 147, at 6.

150 *Id.* at 5.

was older was viewed as more legitimate.<sup>151</sup> History was thereby utilized as an ideological weapon in the battle for constructing nationalist identity.<sup>152</sup> That new history entailed a long-standing suppression of women; not only were women denied many of the rights and benefits attendant to the advent of citizenship, but the collective memory was altered to justify and legitimize it. That national memory became central to any notion of what it meant to be English, and later, American. Eschewing it was not simply a matter of personal preference; it was an offense to the nation writ large.

With the nation-state came new concepts of national identity, citizenship, and self versus other, with invented master narratives concocted to support them.<sup>153</sup> This allowed individuals to conceive of themselves first and foremost as citizens in order to form a political community.<sup>154</sup> Not coincidentally, this is the same period during which women's rights had become most constricted and their surname options most confined. The privileges of citizenship were becoming clearly defined, but the process was taking place in the context of capitalism, colonialism and imperialism and their integral concepts of superiority and domination.<sup>155</sup> Indeed, "almost all early modern claims to rights or authority were also claims about the past;"<sup>156</sup> grounding citizenship rights in history and tradition would lend them a necessary legitimacy that was difficult to contravene. Citizenship rights were selectively granted, such that certain disfavored groups, including women, were formally excluded in ways previously not seen.<sup>157</sup>

In an environment where political and social authority derives so heavily from the

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151 *Id.* at 6.

152 Cabi, *supra* note 148, at 348.

153 Hodgkin & Radstone, *supra* note 132, at 15.

154 See JONATHAN M. HESS, *Memory, History, and the Jewish Question: Universal Citizenship and the Colonization of Jewish Memory*, in *THE WORK OF MEMORY: NEW DIRECTIONS IN THE STUDY OF GERMAN SOCIETY AND CULTURE* 41–42 (Alon Confino & Peter Fritzsche eds., 2002); see also Anne Heimo & Ulla-Maija Peltonen, *Memories and Histories, Public and Private After the Finnish Civil War*, in *CONTESTED PASTS: THE POLITICS OF MEMORY* 42 (Katharine Hodgkin & Susannah Radstone eds., 2003) (stating that the national memory "produce[s] a common history to which all the community may relate").

155 See Deborah Anthony, *Analyzing the Disappearance of Women's Surnames and the Retrenchment of their Political-Legal Status in Early Modern England*, 29 *HASTINGS WOMEN'S L. J.* 7, 9 (2018).

156 POLLMANN & KUIJPERS, *supra* note 147, at 6.

157 See *id.* for further discussion of the selective granting of citizenship rights.

past, it is easy to see how and why the past “falls subject to constant reinvention,”<sup>158</sup> often deliberately, so as to legitimize present power structures and the desired public discourse via a monolithic narrative of history. The implications are significant and far-reaching. Part of the power of the ability to reshape memory, and thereby alter the past, is that both the process and its effects are concealed and therefore largely shielded from public contestation. The “creators of a new future” are also “constructors of a new past.”<sup>159</sup> Once the cultural narrative is altered and the past incorporated as part of the present, it can be difficult to disrupt, as new generations develop a strong identification with the historical regime.<sup>160</sup> Revisionary memory can thus reign supreme for generations, particularly given the nationalistic identity’s “apocalyptic claim to truth.”<sup>161</sup> Presented as objective fact, “the appeal to memory articulates the narrative of the nationalist past, and enjoins its subject to recognize and own it.”<sup>162</sup>

### A. Surnames and Political Memory

Scarcely are these processes more clearly evident than in the case of English women’s history. In the Early Modern period (approximately 1500–1800 A.D.), those holding political and legal power reconceived women’s historical narrative. A rich and varied history of women’s autonomy and individuality in their names, their family relationships, and their participation in public life was expunged in order to legitimize the “traditional” and natural status of what was actually a rather new structure of female inferiority and legal impotence.

An examination of the word “surname” itself is enlightening. The definition of the word shifted as its practical usage was reshaped. It was originally used to primarily mean “[a]n additional name, usually derived from a quality, an achievement, or a place and attached to one’s given name; . . . also, an epithet; a suffixed name-element,” with an

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158 *Id.* at 8.

159 Ulrich Niggemann, ‘You Will See Who They Are That Revile, and Lessen Your . . . Glorious Deliverance’. *The ‘Memory War’ about the ‘Glorious Revolution,’* in *MEMORY BEFORE MODERNITY: PRACTICES OF MEMORY IN EARLY MODERN EUROPE* 63 (Erika Kuijpers et al. eds., 2013) (quoting Melinda Zook) (discussing the “memory war” of the Glorious Revolution).

160 See Hodgkin & Radstone, *supra* note 132, at 12.

161 Hodgkin & Radstone, *supra* note 154, at 169 (quoting Abbas Vali).

162 *Id.*

alternate definition being “a last name, surname; a family name, cognomen.”<sup>163</sup> By the eighteenth century, however, “surname” had come to be known primarily as a family name,<sup>164</sup> implying its hereditary and patrilineal nature.

Even more striking is the dynamic surrounding the etymology of the word itself. “Surname” originates from the Old French *surnom*, from *sur* “upon” or “over,” and *nom* “name.” The word was Anglicized as “surname,” and used in English beginning around the fourteenth century.<sup>165</sup> Remarkably, however, official authoritative and academic publications from the nineteenth and early twentieth century assert that the word “surname” actually originates from “sir” name (a man of rank or position),<sup>166</sup> or “sire” name (father).<sup>167</sup> The word morphed into “sirname” in the late seventeenth century.<sup>168</sup> Bailey’s 1736 dictionary contains the word “sirname” 19 different times, and other dictionaries defined

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163 *Surname*, MIDDLE ENGLISH DICTIONARY (2014), <https://quod.lib.umich.edu/cgi/m/mec/med-idx?size=First+100&type=headword&q1=surname&rgxp=constrained> [<https://perma.cc/NQC6-EL6W>]. University of Michigan’s online Middle English Dictionary defines words used in Middle English (1100-1500) as they were used during that period.

164 Stormonth defined “surname” as “a name added to, or over and above, the baptismal or Christian name . . . the family name.” JAMES STORMONTH, DICTIONARY OF THE ENGLISH LANGUAGE, INCLUDING A VERY COPIOUS SELECTION OF SCIENTIFIC TERMS FOR USE IN SCHOOLS AND COLLEGES AND AS A BOOK OF GENERAL REFERENCE 632 (Edinburgh, W. Blackwood, 6th ed. 1881), <https://archive.org/details/etymologicalpron00storrich> [<https://perma.cc/QG3Y-QV59>]. Webster in 1828 defined “surname” as “[a]n additional name; a name or appellation added to the baptismal or Christian name, and which becomes a family name . . . originally designated occupation, estate, place of residence, or some particular thing or event that related to the person.” NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 710 (New York, S. Converse, Vol. 2. 1828), <https://archive.org/details/americandictionary02websrich> [<https://perma.cc/4E84-F8BA>].

165 *Surname*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987).

166 *Sir*, MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1994).

167 *Sire*, MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1994).

168 See, e.g., Samuel Clarke, THE LIVES & DEATHS OF MOST OF THOSE EMINENT PERSONS WHO BY THEIR VIRTUE AND VALOUR OBTAINED THE SIRNAMES OF MAGNI, OR THE GREAT WHEREOF DIVERS OF THEM GIVE MUCH LIGHT TO THE UNDERSTANDING OF THE PROPHECIES IN ESAY, JEREMIAH, EZEKIEL, AND DANIEL, CONCERNING THE THREE FIRST MONARCHIES: AND TO OTHER SCRIPTURES CONCERNING THE CAPTIVITY, AND RESTAURATION OF THE JEWS (2d ed. 1675), <https://quod.lib.umich.edu/e/eebo/A33329.0001.001?view=toc> [<https://perma.cc/UEN3-GL4L>]; J. H. Lawrence-Archer, AN ACCOUNT OF THE SIRNAME EDGAR: AND PARTICULARLY OF THE FAMILY OF WEDDERLIE IN BERWICKSHIRE (1873); MEMORIAL FOR THOSE OF THE SIRNAME OF FRASER (1729); A BILL TO ENABLE JOHN FRESTON, ESQ; AND THE HEIRS OF HIS BODY, TO TAKE AND USE THE SIRNAME AND ARMS OF SCRIVENER (1754); A BRIEF ACCOUNT OF S. UPON A. WITH . . . A DESCRIPTION . . . OF THE COLLEGIATE CHURCH, THE MAUSOLEUM OF SHAKSPEARE . . . TO WHICH IS ADDED, SOME ACCOUNT OF THE LIVES OF THREE . . . PRELATES WHO DERIVE THEIR SIRNAMES FROM STRATFORD, ETC. (1800).

the word “sirname” as an alternate version of “surname.”<sup>169</sup> James Finlayson’s 1863 book expounding upon the history of surnames is entitled *Surnames and Sirenames*, in which he at times seems to equate the two words or use them interchangeably.<sup>170</sup> Bowman’s 1932 *The History of Surnames* claims that surnames “were generally called *sirnames*.”<sup>171</sup> All references to “sirname” as an appropriate alternative to “surname” are factually incorrect; the meaning of the word had nothing at all to do with noblemen, fathers, or patriarchy. When the usage of surnames was altered, the history of the word itself was retroactively invented to be consistent with that new usage and thereby to reinforce it. This was made all the easier by the identical pronunciation of the two distinct prefixes. These written documents then served to distort and reshape the collective memory of surname operation and the “tradition” attendant thereto. The word was cleanly appropriated to refer exclusively to patriarchal naming systems, coming to mean “sire” name quite literally, as it was owned by the male alone and conferred upon other members of the family by the father exclusively. With what was purported to be centuries of history to back up the “tradition,” it became exceptionally difficult to disrupt.

The concept of the “nation” and its unifying history going back into antiquity can be seen in William Blackstone’s expansive eighteenth century legal treatise on the English common law. In discussing coverture and women’s legal non-personhood, Blackstone noted that the “legal existence of the woman is suspended during the marriage”<sup>172</sup> and she falls under the dominion of the husband and is stripped of all rights that require legal autonomy, with the husband even possessing the right to “correct” and “chastise[.]” her as he would his servants or children.<sup>173</sup> The work is imbued with the sense that the principles he was laying down to paper were founded on a law, custom, and culture that were fully ancient in nature, representing traditional English practice, and thereby implying their legitimacy.<sup>174</sup> He referred to the English common law as “handed down by tradition, use and experience”; stating that the “unwritten law . . . includes not only general customs . . . but also the particular customs of certain parts of the kingdom . . . . It is true indeed that . . . all laws

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169 *Sirname*, *supra* note 164, at 600.

170 Finlayson, *supra* note 129 at iv, 5, 8, 15, 22, 24.

171 BOWMAN, *supra* note 10, at 9 (emphasis in original).

172 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (Oxford, Clarendon Press, Vol. 1 1765).

173 *Id.* at 432.

174 *Id.* at 442. Blackstone does allow that the English common law was likely influenced and shaped by various cultures.

were intirely traditional . . . .” He claimed to use for his exposition customs going back to the Saxons, as well as judicial records and “treatises of learned sages,” stating that this traditional common law “receive[s its] binding power . . . by long and immemorial usage . . . , universal tradition and long practice.”<sup>175</sup> Blackstone even seemed to minimize the influence of the Norman invasion on English common law, using as evidence the fact that the civil law system never took hold there despite its spread throughout the continent, thereby implying also that the principles expounded upon in his treatise are founded primarily on ancient (pure) English custom without significant Norman influence.<sup>176</sup> His conclusion that the principle that women’s legal existence was “incorporated and consolidated into that of the husband” was thus also implicitly a fundamental part of long-standing ageless English tradition, ignoring all evidence to the contrary that dated back even to Saxon times, when the rights of women were remarkably expansive.<sup>177</sup> He contended as part of this framework that the law of coverture serves, “for the most part” to benefit and protect women, asserting without irony that “[s]o great a favorite is the female sex of the laws of England.”<sup>178</sup>

Earlier English jurist Henry de Bracton, commonly referred to as Bracton, similarly stated that husbands and wives at marriage become “a single person, because they are one flesh and blood,” wherein the husband “rules his wife.”<sup>179</sup> Neither Blackstone nor Bracton discussed marital surnames, yet the principles they set down were commonly referenced to justify the legal treatment of women in the Early Modern period and the new marital surnames requirements imposed upon them. But Bracton and Blackstone were themselves likely engaged in an enterprise of more than simply recording extant English law. They were also themselves involved in the political process of English historical memory construction. As such, they were able to dictate the legal principles that most strongly coincided with their desired status quo, pointing to the evidence they identified that supported their positions, while dismissing whatever contrary empirical evidence and common practice existed. In that sense, they created English history while they also recorded it. Individual judges operated in a similar vein when they concluded, apparently basing largely on their own personal opinions and preferences, that the marital name requirements they laid down

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175 *Id.* at 17, 63, 64, 45.

176 *Id.* at 17–22.

177 Evidence suggests that Saxon women possessed significant rights and status in public life, legal position, property holdings, and social custom. *See* Anthony, *supra* note 38, at 220–23.

178 BLACKSTONE, *supra* note 172, at 433.

179 4 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 335 (c. 1220–1250), <http://bracton.law.harvard.edu/index.html> [<https://perma.cc/3V45-6AP2>].

were in actuality principles originating from time out of mind, ignoring not only factual examples to the contrary, but centuries of common law contradicting those requirements. Indeed, when application of the common law allowing personal choice of names found itself at loggerheads with the dominant social structure of women's inferiority in marriage, the common law was forcibly manipulated and transmuted to satisfy the preferred status quo.

In fact, so entrenched was the cultural memory of marital names, and so invested was the public in the perceived patriarchal nature of the tradition, that when English writers first began to point out the existence of female-derived and matrilineal names in English history, a backlash of anger ensued. The proposition was rejected and considered a patently offensive suggestion of the moral degradation of English culture.<sup>180</sup> Charles Bardsley had noted the prevalence of historical matronymic English names in his 1873 *Our English Surnames, their Sources and Significations*.<sup>181</sup> He received such a scathing response to the suggestion in a review by *The Guardian* that he spent some time in the preface to the second edition defending the point, identifying multiple historical examples as evidence.<sup>182</sup> Subsequent writers conceded that Bardsley was correct, but they went to some lengths to explain away the obvious frequency of matronymics in a way that did not seriously disrupt the cultural memory of gendered naming. The first assumption was that the only possible explanation for such an event was the birth of illegitimate children, since all children would otherwise (naturally) carry the name of the father.<sup>183</sup> But surely there could not have been quite *that* much illegitimacy in English history. So other possible explanations were advanced: the adoption of children by unmarried women, the death of the father, and the need to distinguish townspeople carrying the same names might explain it.<sup>184</sup> Perhaps even, in some cases, a particularly strong-willed mother was married to a particularly weak father.<sup>185</sup> All such explanations were created from the fully embedded and largely invisible vantage point of the modern status quo, which was supposed to represent incontrovertible (and inherently good and right) ancient custom—the default, ordinary, and natural occurrence would still have been a patronymic naming system. Even without any specific evidence

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180 BOWMAN, *supra* note 10, at 94.

181 CHARLES WAREING ENDELL BARDSLEY, *OUR ENGLISH SURNAMES: THEIR SOURCES AND SIGNIFICATIONS* (1873).

182 See CHARLES WAREING ENDELL BARDSLEY, *ENGLISH SURNAMES: THEIR SOURCES AND SIGNIFICATIONS* xiii–xv (9th ed. 1915).

183 BOWMAN, *supra* note 10, at 94.

184 See *id.* at 95; REANEY & WILSON, *supra* note 15, at 78.

185 BOWMAN, *supra* note 10, at 95; REANEY & WILSON, *supra* note 15, at 78.



supporting such explanations—indeed, the evidence points the other direction, since many examples of matronymics involved *married* mothers with surnames different from their living husbands who passed their own names on to their children<sup>186</sup>—it was presumed that any exceptions must have been based on unusual circumstances in the particular case. It could not have been that the entire naming framework operated differently than had been portrayed. If the tradition were truly as fundamental as was supposed, however, then even many of the purported reasons for matronymics would not suffice; a strong-willed mother, the death of the father, or multiple individuals bearing the same name would surely not be sufficient to overturn a practice as essential as patronymics. They are generally not enough to overturn it even today. The more accurate conclusion—that surname practices were once much more representative of women—was unthinkable. The erasure of the nuanced history of women from the cultural memory, and the political mechanisms served by it, was extraordinarily successful.

As Alon Confino notes, not only the representation of memory in the historical documents, but also the interpretation of and response to it by the public, are critical considerations.<sup>187</sup> Although a thorough examination of the ways in which the public engaged with new dictates about the status of women is beyond the scope of this Article, there is evidence suggesting that even when formal legal documents and treatises in English history asserted the legal incapacity of women, women's lived reality appears to have been quite divergent from the principles expressed therein. Despite doctrine expounding upon the common law, many of the older traditions continued for centuries, with considerable resistance to the new restrictions exhibited in women's actual lived experience. Scholars have remarked upon the surprisingly prominent social status of medieval women.<sup>188</sup> Marc Meyer observed with respect to women, "legal theory and practice are often diametrically opposed;"<sup>189</sup> custom often controlled practice over formal legal doctrine.<sup>190</sup> Indeed, as Heineman notes, gender "exists at the intersection of the individual and the collective," thus "den[ying] the possibility of studying the political, the social, or the cultural in isolation."<sup>191</sup>

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186 See Anthony, *supra* note 38.

187 Confino, *supra* note 134, at 1392.

188 See, e.g., Kathleen Casey, *Women in Norman and Plantagenet England*, in *THE WOMEN OF ENGLAND FROM ANGLO-SAXON TIMES TO THE PRESENT* 89 (Barbara Kanner ed., 1979).

189 Marc Meyer, *Land Charters and the Legal Position of Anglo-Saxon Women*, in *THE WOMEN OF ENGLAND FROM ANGLO-SAXON TIMES TO THE PRESENT* 70 (Barbara Kanner ed., 1979).

190 See Anthony, *supra* note 38, at 230–31 for further discussion of the tension between legal dictates and practical life.

191 Elizabeth Heineman, *Gender, Public Policy, and Memory: Waiting Wives and War Widows in the Postwar*

Gender is inextricable from other aspects of social organization, and must be considered in a broad context. Thus, contemporary statements of the legal history of women are not immune to the effects of cultural memory. Instead, they have served as incontrovertible evidence of women's inferior status, thereby justifying, reinforcing, and perpetuating it.

Social change brought about by manipulated social memory requires individual buy-in to be effective.<sup>192</sup> In the case of marital and family naming, this was achieved in the modern period, and is to this day clearly evidenced by personal opinion and choice on the matter.<sup>193</sup> When formal law was for the most part no longer able to enforce compliance with the hegemonic custom, then collective emphasis on the importance of tradition was intensified (and very effectively so). After the battles of the 1970s wherein women achieved autonomy in their names, there appears to have been a cultural backlash. Fewer women were deciding to keep their names after marriage, in an apparent attempt to respect the tradition and eschew the political, "feminist" implications of keeping their names. The fact that as late as 2011 about three quarters of respondents thought it was better for a wife to take her husband's name than any alternative, and all studies found the majority of college students—and sometimes an overwhelming majority—planning to conform to the "traditional" norm, provides strong evidence of the power of the cultural emphasis on the value of tradition and the nobility inherent in individual cultural vanguards resisting its erosion.

## CONCLUSION

In the words of the United States Supreme Court Justice Oliver Wendell Holmes:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do . . . in determining the rules by which men should be governed.<sup>194</sup>

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*Germanys*, in *THE WORK OF MEMORY: NEW DIRECTIONS IN THE STUDY OF GERMAN SOCIETY AND CULTURE* 215 (Alon Confino & Peter Fritzsche eds., 2002).

192 Katharine Hodgkin & Susannah Radstone, *Transforming Memory: Introduction*, in *CONTESTED PASTS: THE POLITICS OF MEMORY* 25 (Katharine Hodgkin & Susannah Radstone eds., 2003).

193 See, e.g., Stoiko & Strough, *supra* note 106; Scheuble et al. *supra* note 106; Goldin & Shim, *supra* note 106.

194 OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (2013), <http://www.gutenberg.org/files/2449/2449->

Holmes stated in legal terms what has been laid out by scholars of the politics of memory: that prejudice, implicit assumptions, power, and political desire have as much to do with the cultural and legal landscape as do historical fact, reason, and logic. The same is clearly the case with the law and practice of marital names, which have been—and in some ways still are—based on moral sentiment, habit, prejudice, and stereotype. Over and above that, the guiding sentiments are founded on a flawed view of historical practice and tradition. Historical events related to women have been eradicated from collective memory, reinforcing and justifying a dominant status quo that eliminated the rights and identity of women. In discarding the historical narrative, a powerful “tradition” replaced it that was not, in fact, traditional at all, but rooted itself so deeply it still remains one of the most commonly expected gender-specific practices of modern times.