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Name Calling: Identifying Stigma in the “Civil Union”/“Marriage” Distinction

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The Connecticut marriage equality case, Kerrigan v. Comm’r of Public Health, turns on a threshold determination that the state legislature’s distinction between “civil union” and “marriage” creates a cognizable injury of constitutional dimension. The court’s short explanation of its conclusion hinges on two social facts. First, “marriage” names a long-standing, complex, and revered social institution, while “civil union” is a new name with virtually no history. Second, the “civil union”/“marriage” distinction is framed against a historical background of stereotyping, prejudice, and discrimination against gay men and lesbians. The court’s explanation, while accurate, is all too brief.

This Article elaborates some aspects of everyday naming practices involving social identity and kinship, in order to assist us in understanding the injury that comes from mandating two distinct names for the core family relationship. It considers (1) the problem of family identity underlying Juliet’s “What’s in a name” soliloquy in William Shakespeare’s play Romeo and Juliet; (2) Louis Althusser’s concept of interpellation; (3) the feminist critique of language and names, focusing in particular on the “Miss”/“Mrs.”/“Ms.” controversy; and (4) the way in which concrete, diffuse, everyday social practices of naming and recognition are multiscalar, and interact with larger legal and social structures around recognition, dominance, and subordination. With these considerations in mind, it is easier to see that the “civil union”/“marriage” distinction has a cultural meaning that will create a stigmatic injury by reinforcing and activating dormant, dispersed sites of stereotyping and prejudice against gay men and lesbians. Moreover, the distinction will reinforce a preexisting sense of second-class status, which is arguably a violation of a broad version of a guarantee of dignity under a principle of equal protection. The “civil union”/“marriage” distinction thus involves and facilitates name calling and identifying stigma—just as the Connecticut Supreme Court concluded.

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Name Calling: Identifying Stigma in the “Civil Union”/“Marriage” Distinction

MARC R. POIRIER*

*[T]he question is nicely posed: what is there in legal marriage that is not exhausted by its legal consequences? Whatever that “x” factor is, precisely that is what separates legal marriage from civil union. Civil union appears to withhold only the cultural symbol or power of marriage*¹

*[L]aw has the potential for either impeding or facilitating social change. Legal developments may impede social change by serving to rationalize and validate the perpetuation of unjust social practices. On the other hand legal developments may reinforce ongoing social change, providing legitimacy for that change and influencing its future direction.*²

*What’s in a name?*³

I. INTRODUCTION

Partway through the Connecticut marriage equality litigation, *Kerrigan v. State*,⁴ the Connecticut legislature changed the game. By enacting An

* Professor of Law, Seton Hall University School of Law. I am grateful to my colleagues Tristin Green, Thomas Healy, Andrea McDowell, Michael Risinger, and Charles Sullivan for various thoughtful conversations on this topic, and to friends John Griffin, Steve Heyl, and Peter Riley as well. Naomi Cahn, Linda Fisher, Suzanne Kim, Lynn Wardle, and Jennifer Wriggins provided helpful responses to inquiries. Tristin Green, Suzanne Kim, Nancy Levit, Michael Poreda, and Charles Sullivan provided helpful comments on a draft. I thank my research assistants, Michael Poreda and Kate Riopel, and the Seton Hall Law library staff, especially Katie McCarthy and Jeanne O’Connor, for their agile research assistance. I also benefitted from working with Brienne Henderson on her student note on the California marriage equality case and with Jack Tracy on his student note on the circuit split on state criminal law regulation of sex toys. The opinions expressed herein are those of its author and not of his employer, Seton Hall University, the Catholic university in New Jersey.

¹ Katharine B. Silbaugh, *The Practice of Marriage*, 20 WIS. WOMEN’S L. J. 189, 205 (2005).

² Kathryn L. Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55, 63.

³ WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2, line 43.

⁴ *Kerrigan v. State*, 909 A.2d 89 (Conn. Super. Ct. 2006), *rev’d*, *Kerrigan v. Comm’r of Public Health*, 957 A.2d 407 (Conn. 2008). One may choose to call the overall controversy one about “marriage equality” or “same-sex marriage.” See, e.g., Barbara J. Cox, “*A Painful Process of Waiting*”: *The New York, Washington, New Jersey, and Maryland Dissenting Justices Understand that “Same-Sex Marriage” is Not What Same-Sex Couples Are Seeking*, 45 CAL. W. L. REV. 139, 143 (2008) (“[T]he constant use of the term ‘same-sex marriage,’ by advocates and opponents alike, seems

Act Concerning Civil Unions (“the Civil Union Act” or “Act”),⁵ it provided legal recognition and purportedly equal rights, responsibilities, and benefits to committed same-sex couples.⁶ The Act introduced a new name, “civil union,” for its new legal recognition of a same-sex couple, and explicitly reserved the traditional name, “marriage,” for the union of one man and one woman.⁷ Thus what had begun in August 2004⁸ as a lawsuit over Connecticut’s failure to provide any legal recognition for same-sex couples was transmuted into a lawsuit over nomenclature. The question became whether providing legal recognition equivalent to traditional marriage, but recognition embedded in a new and different name, was constitutional as a matter of state constitutional law.⁹

to have convinced each majority and plurality that the plaintiffs were not seeking recognition of their fundamental right to marry, but instead were seeking a new fundamental right to ‘same-sex marriage.’”); *id.* at 145–50 (section entitled “The Importance of Language in Framing the Issue for Marriage Equality”; Marc R. Poirier, *The Cultural Property Claim within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & L. 343, 345 n.3 (2008) [hereinafter Poirier, *Cultural Property*] (discussing the terminological choice between “same-sex marriage” and “marriage equality”). “Marriage equality” seems to be on the whole more progressive, for reasons Barbara Cox, among others, illustrates; but all the same does not seem appropriate when describing traditionalist viewpoints on the controversy. Moreover, “same-sex marriage” is by far the more used term at this point in time, at least in legal academic literature. I will accordingly vary my usage in this essay according to context.

⁵ An Act Concerning Civil Unions, Conn. Pub. Acts 05-10 (2005).

⁶ *Id.* § 14, codified at CONN. GEN. STAT. § 46b-38nn, invalidated by *Kerrigan v. Comm’r of Public Health*, 957 A.2d 407 (Conn. 2008) (“Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman.”). A Connecticut Attorney General opinion held that civil union continues to be available after *Kerrigan* unless and until the legislature acts to the contrary, so the Act has not been invalidated altogether; rather, what has been invalidated is the compulsory distinction in name between same-sex and opposite-sex couples. Conn. Op. Ag. No. 2008-019 (2008), available at 2008 WL 4760988. Same-sex couples may choose to enter into civil union instead of marriage after *Kerrigan*. However, new Connecticut legislation implementing the *Kerrigan* decision amends Conn. Gen. Stat. § 46b-38nn to provide for merger of civil union into marriage, voluntarily or involuntarily, on October 10, 2010. Conn. S.B. 899 § 10 (2009), 2009 Conn. Pub. Acts 13.

⁷ An Act Concerning Civil Unions, Conn. Pub. Acts 05-10 (2005).

⁸ The *Kerrigan* lawsuit was filed in August 2004. *Kerrigan*, 909 A.2d at 90.

⁹ *Kerrigan*, 957 A.2d at 413 (stating that the issue posed after passage of the Act is “whether the civil union law and its prohibition against same sex marriage pass muster under the state constitution.”). Instead of adding “civil union” and “civil union partner” systematically to many sections of the general statutes, the Civil Union Act provided that the terms “civil union partner” and “civil union” are to be understood as included in a number of traditional kinship terms relied on in Connecticut’s laws.

Wherever in the general statutes the terms “spouse,” “family,” “immediate family,” “dependent,” “next of kin” or any other term that denotes the spousal relationship are used or defined, a party to a civil union shall be included in such use or definition, and wherever in the general statutes [with some specified exceptions] the term “marriage” is used or defined, a civil union shall be included in such use or definition.

Conn. Pub. Acts 05-10, § 15, codified at CONN. GEN. STAT. § 46b-38oo. Nevertheless, the Act establishes a distinct term for the relationship and for the partners in the relationship. Section 15 includes same-sex couples in various legal kinship terms only after Section 14 has separated and distinguished them. “Civil union” is a different word from “marriage” and “part[y] to a civil union” is

Subsequent to the Act, the *Kerrigan* suit called for the Connecticut courts to consider separately the non-legal social and cultural benefits of the institution of marriage reflected in the name “marriage,” as well as whether the withholding of the term “marriage” in favor of a neologism, “civil union,” somehow communicated actionable stigma about same-sex couples.

In a relatively brief but foundational part of its opinion, the Connecticut Supreme Court reversed the trial court, finding that assigning a different name from “marriage” to legally recognized same-sex relationships did create a cognizable constitutional injury.¹⁰ It is to this part of the *Kerrigan* opinion that this Article turns its attention. Finding constitutional injury in something as intangible as the legal adoption of a different name is a tricky business. In fact it may plausibly seem like a “squabble”¹¹ of significantly lesser dimension than the conferral of tangible benefits and responsibilities.¹² This Article argues that the Connecticut Supreme Court was correct in its holding, and that moreover it has correctly identified the key factors that support that holding. The new and unfamiliar legal name and status “civil union” will be interpreted against a backdrop of, on the one hand, the widely recognized name, socially central function, and elevated status of “marriage;” and on the other hand, the until recently pervasive and to some extent continuing social stigmatization of homosexuality.

This conclusion merits a more careful description. The fact that this is a controversy about the names for a central set of social identity categories is much of what makes the *Kerrigan* court’s decision on nomenclature correct. The Act establishes and sets in motion different legal names for the purportedly legally equivalent familial relationships. Names, especially names of this sort, are used repeatedly in everyday life in various social settings. We use them to recognize and to sort. Those who encounter a couple or even just one member of a couple must now ask, in various contexts, “Do I say ‘marriage’ or ‘civil union’?” The imposition of this process of categorization and naming is not limited to the members of a same-sex couple themselves, but implicates all with whom they interact, indeed all who interact with *any* couple or family. The Act thus sometimes

different from “spouse” and so on. *Id.* at § 14.

¹⁰ *Kerrigan*, 957 A.2d at 416–20. The two dissenting opinions also found that a constitutional claim had been made, although for different reasons, with which the majority disagreed. *Id.* at 484 (Borden, J., dissenting) (agreeing that the plaintiffs had stated a constitutional claim); *id.* at 516 (Zarella, J., dissenting) (agreeing that the plaintiffs had stated a constitutional claim); *id.* at 419 n.16 (majority opinion) (responding to Justices Borden and Zarella).

¹¹ Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004) (separate opinion of Sosman, J.).

¹² See, e.g., *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006) (“[P]laintiffs’ claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples.”).

requires, and effectively always legitimates, society-wide reliance on an underlying gay/straight distinction, and suggests that it be applied visibly and repeatedly in daily life. The Act thus can reactivate, and will tend to reinforce rather than attenuate, longstanding subtle biases¹³ and unconscious distinctions around gay and lesbian couples and individuals; biases which persist even in the relatively tolerant society of Connecticut. These biases are more likely to be expressed to some extent in various harmful ways because of the mere process of repeatedly categorizing individuals in couples as gay or straight. It is for these reasons that the legally-prescribed differentiated kinship names of “marriage” and “civil union” will produce the harm that *Kerrigan* correctly discerns.

The tenor of this Article is theoretical, sociological, and feminist. Its approach may not seem of immediate use in legal pleadings and opinions, as its categories and modes of analysis find no immediate correspondence in the terms used in constitutional doctrine. And yet, exploring in some detail how an iterated differential legal naming of a central social institution can rise to the level of a constitutional injury is important as a pragmatic, political matter, as well as a theoretical and academic one.¹⁴ In states that are generally welcoming to LGBTQ (Lesbian, Gay, Bisexual, Transsexual, and Queer) folk,¹⁵ as individuals and as couples with their families, the question of differential naming of same-sex relationships is front and center. In two of the states that have adopted “civil union” for same-sex couples, Vermont and New Jersey, state commissions have recently found that the term does not deliver the equality required by those states’ highest courts’ interpretations of their state constitutions.¹⁶ In April,

¹³ The term “subtle bias” is tricky, as it can be used in various, not altogether consistent ways. I have previously used it broadly to indicate various processes of discrimination that do not involve “invidious intent”. Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMPLOYEE RTS. & EMPLOYMENT POL. J. 459, 467 (2003) [hereinafter Poirier, *Cognitive Bias*] (discussing “subtle bias”); see generally Symposium, *Combating Subtle Discrimination in the Workplace*, 34 COLUM. HUM. RTS. L. REV. 529 (2003) (presenting various articles that use “subtle discrimination” in various ways).

¹⁴ For an excellent argument that the task of legal academics differs from that of practitioners or advocates and yet, in its learned distance from the controversy at hand, may ultimately contribute importantly to understanding and progress, see Robert Leckey, *Thick Instrumentalism and Comparative Constitutionalism: The Case of Gay Rights*, 40 COLUM. HUM. RTS. L. REV. 425, 465–74 (2009). Leckey specifically argues that in the case of gay rights *Kulturkampf* issues, one role of the scholar is to elucidate the cultural and social underpinnings that inform any struggle around gender practices that is framed in constitutional terms, terms which may well be too thin adequately to account for the underlying issues at stake. *Id.* That is exactly the approach taken in this Article.

¹⁵ I will tend to use this formulation (or alternatively GLBTQ) unless another is historically accurate (as for example when referring to a period when the terms bisexuals and transsexuals were not spoken, or when describing someone else’s position that is articulated in different terms). The nominalization currently still seems to be “homosexuality.”

¹⁶ NEW JERSEY CIVIL UNION REVIEW COMMISSION, THE LEGAL, MEDICAL, ECONOMIC & SOCIAL CONSEQUENCES OF NEW JERSEY’S CIVIL UNION LAW 2 (Dec. 10, 2008), available at <http://www.nj.gov/oag/dcr/downloads/CURC-Final-Report-.pdf> [hereinafter NEW JERSEY FINAL REPORT]. THE OFFICE OF LEGISLATIVE COUNCIL, REPORT OF THE VERMONT COMMISSION ON FAMILY

2009, Vermont legislatively enacted a law recognizing “marriage” by same-sex couples.¹⁷ The *New Jersey Final Report*¹⁸ lays the groundwork for introduction of a “marriage” bill, probably this year,¹⁹ and may lead to a renewed state constitutional lawsuit in that state if the anticipated legislation fails.²⁰ In addition to Vermont, so far in 2009 Connecticut has enacted legislation conforming to the *Kerrigan* decision, Maine has replaced its partial recognition “domestic partnership” statute with a “marriage” statute, and New Hampshire has replaced its 2008 full “civil union” status with “marriage” recognition.²¹ Legislative efforts in several other states are also underway or are planned.²² Then there is California,

RECOGNITION AND PROTECTION 26–27 (2008), available at http://www.leg.state.vt.us/WorkGroups/FamilyCommission/VCFRP_Report.pdf [hereinafter VERMONT 2008 REPORT].

¹⁷ Vt. S.B. 115, 2009 Vt. Laws 3 (Apr. 7, 2009) (overriding gubernatorial veto) (effective Sept. 1, 2009) (entitled “An Act to Protect Religious Freedom and Promote Equality in Civil Marriage”); see Terri Hallenbeck, *Same-Sex Couples Gain Full Marriage*, THE BURLINGTON (VERMONT) FREE PRESS, Apr. 8, 2009, at A1.

¹⁸ *Supra* note 16.

¹⁹ See, e.g., George Amick, *Jersey Should Follow Vt. Lead*, THE TIMES OF TRENTON (N.J.), Apr. 13, 2009 (discussing prospects for enactment of a New Jersey marriage equality bill in late 2009); Mary Fuchs, *N.J. Gay Rights Advocates; Marriage Near*, (NEWARK) STAR-LEDGER, May 7, 2009, at 27 (describe expectations of New Jersey marriage equality advocates); Claire Heining, *Gay Marriage Could Become a Big Campaign Issue Next Year*, (NEWARK) STAR-LEDGER, Dec. 11, 2008, at 27 (describing plans for marriage equality legislation in New Jersey in 2009, as well as anticipated opposition to it).

²⁰ The theory would be that *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), establishes a state constitutional requirement of equality and that the NEW JERSEY FINAL REPORT, *supra* note 16, provides strong evidence that this equality is simply not attainable through legal recognition via civil union. See, e.g., Leslie Brody & John Reitmeyer, *Same-Sex Marriage Fight Heats Up in N.J.; Decisions in Iowa, Vermont Spark Intense Debate*, THE BERGEN (BERGEN COUNTY, N.J.) RECORD, Apr. 9, 2009 (quoting State Senator Ray Lesniak saying that if the legislature does not act to allow marriage for same-sex couples the state supreme court will); David S. Buckel, *Lewis v. Harris: Essay on a Settled Question and an Open Question*, 59 RUTGERS L. REV. 221, 226 (2007) (arguing that the constitutionality of the New Jersey civil union bill “is open to be settled by the judiciary”). Mr. Buckel argued *Lewis v. Harris* on behalf of plaintiffs.

²¹ Conn. S.B. 899 (2009), 2009 Conn. Pub. Acts 13; Maine L.D. 1020, 2009 Me. Laws 82 (2009); N.H. H.B. No. 436 (2009), 2009 N.H. ch. 59; see Abby Goodnough, *New Hampshire Approves Same-Sex Marriage*, N.Y. TIMES, June 4, 2009, at A19; Abby Goodnough, *Maine Governor Signs Same-Sex Marriage Bill as Opponents Plan a ‘Veto’*, N.Y. TIMES, May 7, 2000, at A21; Eric Moskowitz, *N.H. Ties Gay-Marriage Knot: Revised Bill Assures Religious Protections*, *Boston Globe*, June 4, 2009, at Metro Section, p. 1; Philip Shishkin, *Maine Becomes Fifth State to Legalize Same-Sex Marriage*, WALL ST. J., May 7, 2009, at A4.

²² Marriage equality bills are pending or contemplated in the District of Columbia, Illinois, Maryland, Minnesota, New Jersey, New York, Pennsylvania, and Washington State. Minn. H.F. No. 893, H.F. No. 1644, S.F. No. 120, S.F. No. 1210 (2009); N.Y. A.B. No. 7732, S.B. No. 4401 (2009); see Tom Barnes, *Senator Pushes Bill to Allow Same-Sex Marriage*, PITTSBURGH POST-GAZETTE, May 28, 2009 (describing a marriage equality bill introduced in the Pennsylvania Senate); Tim Craig, *Group Aims to Block D.C. Marriage Bill: Same-Sex Union Foes Seek Referendum*, WASH. POST, May 28, 2009 (describing plans for a District of Columbia marriage equality bill and plans by opponents for a preemptive referendum); Abby Goodnough, *A Push Is On for Same-Sex Marriage Rights Across New England*, N.Y. TIMES, Apr. 5, 2009, at 13 (listing six states with pending measures not expected to pass this year; presumably the author omits New Jersey because chances there for passage in 2009 are better); Jeremy W. Peters, *Gay Marriage Slow to Draw an Opposition*, N.Y. TIMES, May 20, 2009, at A1 (describing politics surrounding pending New York marriage equality bill); Jeremy W. Peters, *Assembly Passes Gay Marriage Bill: Senate Fight Awaits*, N.Y. TIMES, May 13, 2009, at A24; Nikita

Stewart, *Gay Marriage Fuels Debate Among D.C. Democrats*, WASH. POST, May 21, 2009, at DZ1 (District Councilmember David Catania plans to introduce marriage equality legislation in 2009); Amy Worden, *Pa. Senate to Weigh Contrasting Measures on Gay Marriage*, *Phila. Inquirer*, June 4, 2009, at B1 (a marriage equality bill has been introduced in the state Senate, and a mini-DOMA will be introduced). Rhode Island will entertain marriage equality legislation in 2011. Goodnough, *supra*.

Some states are facing or have recently faced legislation proposing to recognize same-sex couples legally under another name. Hawaii H.B. No. 444, S.B. No. 457 (2009) (proposing civil union equivalent of marriage); Illinois H.B. 2234 (2009) (proposing civil union equivalent of marriage); Minn. H.F. No. 999 (2009) (proposing civil union equivalent of marriage); N.M. H.B. No. 21, S.B. No. 12 (2009) (proposing domestic partnership equivalent of marriage); Wash. S.B. No. 5688, 2009 Wash. ch. 521 (2009) (enacting domestic partnership equivalent of marriage); see *Hawaii: Measure on Civil Union Dies in Senate*, N.Y. TIMES, Mar. 26, 2009, at A20; Lornet Turnbull, *Gregoire Expands Same-Sex Partnerships*, SEATTLE TIMES, May 18, 2009, available at http://seattletimes.nwsourc.com/html/localnews/2009233610_webdomestic18.html (describing signing of new full domestic partnership law, despite opposition). Nevada should also be mentioned in this catalog of approaches to state recognition. It recently adopted a “domestic partnership” statute that recognizes same-sex couples, conferring almost all the benefits and responsibilities of marriage, but not requiring employer payment of health benefits to domestic partners. 2009 NV S.B. 283, 2009 Nev. ch. 393; see Steve Friess, *Nevada Partnership Bill Now Law*, N.Y. TIMES, June 1, 2009, at A12; Ed Vogel & Molly Ball, *Domestic Partnerships to be Law in Nevada*, LAS VEGAS REVIEW-JOURNAL, June 1, 2009, at A1. Nevada’s “domestic partnership” is emphatically not the legal equivalent of marriage, because that would violate a state constitutional mini-DOMA. Editorial, *Domestic Partners*, LAS VEGAS REVIEW-JOURNAL, at B9 (discussing difference between Nevada “domestic partnership” law and recognition that would be prohibited under Nevada’s mini-DOMA); Vogel & Ball, *supra* (same).

Recognition of same-sex marriages valid elsewhere is another approach a jurisdiction may adopt, on its own merits, or as a stepping stone towards marriage equality via that jurisdiction’s own laws. The District of Columbia Council has just voted overwhelmingly to recognize same-sex marriages performed in other states. D.C. Leg. Bill No. 10 (2009) (proposing to add 28 U.S.C. § 1287a, to recognize a marriage between a same-sex couple valid in another jurisdiction); see Tim Craig, *D.C. Gay Marriage Measure Set for Mayor’s Signature*, WASH. POST, May 5, 2009. *But cf.* Hamill R. Harris, *U.S. House Members File Bill to Overturn Action by D.C. Council*, WASH. POST, May 22, 2009, at B8 (members of the United States House of Representatives have introduced a bill to define marriage in the District of Columbia as between one man and one woman, in order to defeat the bill originating in the District that would recognize out-of-jurisdiction marriages). A similar out-of-state marriage recognition approach may occur in Maryland. Editorial, *Rethinking Marriage*, BALT. SUN, May 10, 2009, at A24 (recommending recognition of out-of-state same-sex marriages as a bridge to marriage equality in Maryland); Laura Smitherman, *State Studies Gay Nuptials; Gansler Explores Recognition of Marriages in Other States*, BALT. SUN, May 30, 2009, at A1 (state attorney general is exploring the legality of recognition of out-of-state marriages in light of state statutory definition of marriage as one man and one woman). Maryland currently has partial recognition of a smallish set of domestic partner rights and obligations. See Smitherman, *supra*. New York currently recognizes out-of-state marriages by same-sex couples, though this approach, adopted by the governor, county executives, and lower courts, is currently before the state’s highest court. *Lewis v. New York Dept. of Civil Service*, 872 N.Y.S. 2d 578 (N.Y. App. Div. 3d Dept. 2009), *leave to appeal granted*, -- N.E.2d --, 2009 WL 971444 (N.Y. Mar. 31, 2009) (upholding recognition of valid out-of-state same-sex marriages of state employees under New York’s marriage recognition rule, and as a valid exercise of executive authority); *Godfrey v. Spano*, 871 N.Y.S. 2d 296 (N.Y. App. Div. 2d Dept. 2008), *leave to appeal granted*, -- N.E.2d --, 2009 WL 936963 (N.Y. Mar. 30, 2009) (upholding Westchester County executive order requiring recognition of out-of-state same-sex marriages, as a valid exercise of executive authority and as a valid application of New York’s marriage recognition rule); *Martinez v. County of Monroe*, 850 N.Y.S. 2d 740 (N.Y. App. Div. 4th Dept. 2008), *leave to appeal dismissed*, 889 N.E.2d 496 (N.Y. 2008) (applying New York marriage recognition rule to valid out-of-state same-sex marriages); *Golden v. Paterson*, 877 N.Y.S. 2d 822 (N.Y. Sup. 2008) (upholding Governor Paterson’s May 14, 2008, Executive Order requiring governmental agencies to recognize out-of-state same-sex marriages, as a valid exercise of executive authority and as a valid application of New York’s marriage recognition rule); *C.M. v. C.C.*, 867 N.Y.S. 2d 884 (N.Y. Sup. 2008) (recognizing a Massachusetts same-sex marriage for purposes of divorce in New York); *Beth R. v. Donna M.*, 853 N.Y.S. 2d 501 (N.Y. Sup. 2008) (recognizing a Canadian same-sex marriage for purposes of divorce in New York).

where a constitutional holding requiring the legal recognition of same-sex couples through “marriage” rather than “domestic partnership” was reversed by an initiative, Proposition 8, which has recently survived a state constitutional challenge and is now the subject of a federal constitutional challenge; meanwhile the “domestic partnership” regime prevails, except as to 18,000 California same-sex “marriages,” which are valid as “marriages” because they were celebrated between the June 2008 effective date of the California Supreme Court decision and the November 2008 initiative.²³ Last but not least, President Obama’s agenda for LGBT civil

In a blog posting describing the current marriage equality strategy, Matt Coles, Director of the ACLU Lesbian Gay Bisexual Transgender & AIDS project, describes a focus on legislative action in eleven states. Matt Coles, *Iowa and Vermont: The Politics of It*, Apr. 10, 2009, available at <http://blog.aclu.org/2009/04/10/iowa-and-vermont-the-politics-of-it/>; see also Goodnough (Apr. 5), *supra*, at 13 (describing momentum for marriage equality in New England in light of April 3, 2009, Iowa Supreme Court decision and then-pending Vermont legislative action). Circumstances are changing so fast that parts of this post are already out of date.

Same-sex relationship recognition legislation is always controversial and rarely a sure thing. See, e.g., Marc Fisher, *Opinions Vary on Same-Sex Marriage in D.C.*, WASH. POST, Apr. 12, 2009 (suburban edition) (describing action by District of Columbia council to recognize same-sex marriages valid elsewhere and discussing the politics of legalization of same-sex marriage in the District of Columbia); Tim Craig, *D.C. Pledges Quick Review on Marriage Referendum*, WASH. POST, May 29, 2009, at B1 (discussing review of proposed popular referendum on District of Columbia recognition of out-of-jurisdiction marriage, in light of limitation on referenda undermining the District’s Human Rights Act); Goodnough (May 7), *supra* note 21 (opponents of Maine marriage statute plan to attempt a constitutional amendment); Chris Grygiel, *Foes Challenge Expanded Same-Sex Partner Rights*, SEATTLE POST-INTELLIGENCER, May 4, 2009, available at http://www.seattlepi.com/local/405838_domestic04.html?source=rss (describing a petition drive to repeal by referendum Washington State’s new all-but-in-name domestic partnership recognition of same-sex relationships); Harris, *supra* (describing bill in Congress that would reverse District of Columbia recognition of out-of-jurisdiction same-sex marriages); Heinger, *supra* note 19 (describing political controversy over the anticipated marriage equality legislation in New Jersey); Rex W. Huppke & Monique Garcia, *Illinois Gays Not Betting on Marriage: State’s Political Realities Steer Gays to Push for Civil Unions*, CHICAGO TRIBUNE, Apr. 14, 2009; Adam Nagourney, *Same-Sex Marriage Holds Peril for G.O.P.*, N.Y. TIMES, Apr. 29, 2009, at A15 (discussing internal disagreement within the Republican party over the importance to voters of the same-sex marriage issue); Adam Nagourney, *Signs G.O.P. Is Rethinking Stance on Gay Marriage*, N.Y. TIMES, Apr. 29, 2009, at A4; Jeremy W. Peters, *Group Begins Ad Blitz Against Same-Sex Marriage*, N.Y. TIMES, May 28, 2009, at A22 (describing planned ad blitz in New York by the National Organization for Marriage); Peters (May 20), *supra* (describing marriage politics in New York); Peters (May 13), *supra* (same); Jeremy W. Peters, *Advocates on Both Sides Seek Momentum on Same-Sex Marriage*, N.Y. TIMES, Apr. 9, 2009 (assessing prospects for marriage equality legislation in New York and New Jersey); Shishkin, *supra* note 21 (describing anticipated attempt to amend Maine constitution in reaction to its new marriage equality statute); Sheryl Gay Stolberg, *Gay Issues in View, Obama is Pressed to Engage*, N.Y. TIMES, May 7, 2009, at A1; Turnbull, *supra* (describing plans for referendum in Washington State to overturn new full domestic partnership law); Karl Vick, *“The Mormons Are Coming”: Supporters of Same-Sex Marriage Trumpet the Church’s Work Against It*, WASH. POST, May 29, 2009, at A3 (discussing political strategy around visibility of Mormon and Catholic opposition to marriage equality); Worden, *supra* (describing conflict in Pennsylvania Senate). Positions on same-sex marriage will also likely be a litmus test in upcoming judicial confirmation hearings, including Supreme Court nominations. See Shailagh Murray, *Gay-Marriage Issue Awaits Court Pick: Same-Sex Unions Supplant Abortion As Social Priority for Conservatives*, WASH. POST, May 17, 2009, at A1.

²³ Domestic Partner Rights & Responsibilities Act, 2003 Cal. Stat. 2586 (ch. 421), held unconstitutional, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *rev’d by referendum*, Proposition 8, Nov. 2008, *aff’d as to prospective effect*, *Strauss v. Horton*, -- P.3d --, 2009 WL 1444594 (Cal. 2009) (affirming constitutionality of Proposition 8, but holding that the approximately 18,000 California

rights expressly includes achieving legal recognition for same-sex equality through “civil union,”²⁴ but does not include “marriage.”²⁵ A better understanding of how the differentiation of legal names for couples relationships delivers an ongoing cognizable harm will be helpful to the cause of marriage equality in all these arenas.

This Article scrutinizes the two key issues articulated by the *Kerrigan* majority opinion as creating the cognizable though intangible harm. First is differential recognition, in which an honored and central name, status, and identity (“marriage”) is withheld from one group while it is retained for another. Second is the fact that the new name (“civil union”) is applied to a group (same-sex couples, as a proxy for gay men, lesbians, and bisexuals) that has suffered a long history of stigma and subordination and as such, the new term will be read and acted on in light of that history.

The *Kerrigan* majority does not particularly acknowledge another intangible harm—the ongoing, repeated social non-recognition that comes from applying a brand-new name, “civil union,” to legal same-sex family relationships. The facts are clear that the name “civil union” for same-sex couples and their families is often not recognized or understood, both in

marriages between same-sex couples that occurred between June and November, 2008, remain valid and recognized in California), *federal challenge to Proposition 8 filed*, Perry v. Schwarzenegger (N.D. Cal. May 22, 2009) (No. CV 09 2292) (challenging Proposition 8 as a matter of Due Process and Equal Protection, and also seeking a declaratory judgment that sections of the California Family Code declaring marriage to be between one man and one woman are unconstitutional); *see, e.g.*, Matt Coles, *Prop 8: Let's Not Make The Same Mistake Next Time*, available at <http://gbge.aclu.org/content/view/604/76/> (analyzing the LGBTQ loss in Proposition 8 referendum); Geoffrey A. Fowler, *Gay-Rights Outreach Grows in California*, WALL ST. J., Apr. 13, 2009, at A4 (describing plans of California marriage equality advocacy groups in light of anticipated defeat in the California Supreme Court on challenge to constitutionality of Proposition 8); Andrew Harmon & Neal Broverman, *Legal Experts Concerned by Fed. Prop. 8 Case*, ADVOCATE.COM, May 27, 2009, available at http://www.advocate.com/print_article_ektid86574.asp (describing opposition of LGBT leadership groups to federal court Proposition 8 lawsuit); Jesse McKinley & Rebecca Cathcart, *Bush v. Gore Foes Join to Fight California Gay Marriage Ban*, N.Y. TIMES, May 28, 2009, at A1 (describing federal lawsuit challenging Proposition 8 and dismay of LGBT advocacy groups at this departure from their preferred strategy of avoiding federal courts for the time being on the issue of marriage equality); Jesse McKinley, *Proposition's Opponents Say Fight Will Continue*, N.Y. TIMES, May 27, 2009 (describing LGBT advocacy groups' plans for another referendum on “marriage” in California, in light of *Strauss v. Horton*); John Schwarz et al., *Ruling Upholds California's Ban on Gay Marriages*, N.Y. TIMES, May 27, 2009, at A1 (describing *Strauss v. Horton* and reaction to it); John Schwarz & Jesse McKinley, *Court Weighs Voters' Will Against Gay Rights*, N.Y. TIMES, Mar. 6, 2009, at A12 (describing oral arguments in Proposition 8 challenge litigation).

²⁴ The White House's statement of the Civil Rights Agenda of President Barack Obama, http://www.whitehouse.gov/agenda/civil_rights/ (last visited Mar. 24, 2009) (“Obama supports full civil unions that give same-sex couples legal rights and privileges equal to those of married couples.”); BARACK OBAMA, *THE AUDACITY OF HOPE* 222–23 (2006) (voicing support for legal recognition of same-sex couples via “civil union”).

²⁵ In fact, then candidate Obama wrote that he believes for religious reasons that marriage is between one man and one woman. OBAMA, *supra* note 24, at 222–24 (stating candidate Obama's religion-based opposition to recognizing same-sex couples legally through marriage, but also expressing his openness to continuing revelation on the issue); *see also* Stolberg, *supra* note 22 (describing President Obama's political dilemma on a number of LGBTQ issues, including relationship recognition).

everyday social interactions and, occasionally, in some service transactions,²⁶ such as emergency room visits, where much more is at stake. This risk of social non-recognition creates a constant annoyance, additional identity work,²⁷ both in claiming recently-conferred legal rights and in establishing kinship identity to strangers, and it can risk great losses in emergencies where services are withheld because of non-recognition. So the mere unfamiliarity of the term “civil union” to the world at large is another plausible source of principally intangible injury. Social non-recognition is not however an injury that I will focus on here.²⁸

There is of course another significant type of non-recognition injury, deriving from the refusal of various legal jurisdictions to recognize “civil union” or similar marriage substitutes even though they are legal in the state in which they were celebrated.²⁹ Whether such states would recognize a “marriage” of a same-sex couple as valid under the principle of *lex loci celebrationis* when they would not recognize a “civil union,” or whether on the contrary their public policy would prohibit that kind of recognition also,³⁰ is an important question. To be sure, this kind of legal non-recognition harm, though tangible, may not be attributable to policies of the state of Connecticut at all, but rather to policies of other states when faced with a demand for recognition of a Connecticut “civil union.”³¹

The Article also does not engage the question whether, assuming there is cognizable harm, it is of such dimension that the court should remedy it posthaste. This is the issue that Kris Franklin has deftly identified as the “authoritative moment”—when a court, faced with a question involving recognition, has to decide the boundary of its authority to interpret queer

²⁶ The term comes from Erving Goffman, *The Interaction Order*, 48 AM. SOC. REV. 1, 14 (1983).

²⁷ The term comes from Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000).

²⁸ I hope to explore the mostly intangible injuries from social non-recognition of civil unions separately, as part of an article in progress on information costs, identity claiming work, and kinship forms, tentatively entitled *Identity Claiming Work, the Standardization of Kinship Forms, and the “Civil Union” / “Marriage” Distinction*.

²⁹ The problem of interstate recognition of same-sex marriages has created a vigorous scholarly discussion. See, e.g., ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES (2006); Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433 (2005); Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriages and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L. J. 87, 105–12 (2004); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215 (2005). Thanks to Joanna Grossman for insisting on this point.

³⁰ As for example with the federal Defense of Marriage Act, 28 U.S.C. §1738C (2009), and most states’ mini-DOMAs, depending on how they are applied to out-of-state same-sex marriages and marriage substitutes.

³¹ Indeed, in the trial court opinion in *Kerrigan*, Judge Pittman acknowledged that this kind of recognition problem might create a real injury, but he held that it was not caused by the Civil Union Act but by other jurisdictions’ recognition policies. *Kerrigan v. State*, 909 A.2d 89, 101 (Conn. Super. 2006).

families.³² To some extent this question can be construed as a question of choice of remedy.³³ Case law and secondary authorities differ on whether and when it is permissible for a court to defer imposing a constitutional remedy in order to permit the legislature to act.³⁴ This issue is also beyond the scope of this Article.

The Article proceeds as follows. Part II provides some background on the emergence of the term “civil union” and sets out the *Kerrigan* analysis of the claim of constitutional harm from legislating a different name for legal same-sex relationships. Part III discusses family names and kinship

³² Kris Franklin, *The “Authoritative Moment”: Exploring the Boundaries of Interpretation in the Recognition of Queer Families*, 32 WM. MITCHELL L. REV. 655, 659 (2006).

³³ This is how Vermont Chief Justice Amestoy characterized the issue. *Baker v. State*, 744 A.2d 864, 886–88 (Vt. 1999) (discussing leaving the choice of the name used for legal recognition in terms of remedy); *id.* at 888 (specifically citing Cass R. Sunstein, *Foreword, Leaving Things Undecided*, 110 HARV. L. REV. 4, 101 (1996)); *see also* DAVID MOATS, *CIVIL WARS: A BATTLE FOR GAY MARRIAGE* 138–44 (2004) (describing the disagreement between Chief Justice Amestoy and Justice Johnson in *Baker v. State* in terms of remedy); Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont’s State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73, 99–104 (2001) (discussing the disagreement between Chief Justice Amestoy and Justice Johnson as to remedy in terms of concern for state constitutional processes).

³⁴ *Compare, e.g., Baker v. State*, 744 A.2d 864, 886–88 (Vt. 1999) (permissible for court to defer remedy to allow legislature to consider alternatives) and *Lewis v. Harris*, 908 A.2d 196, 221–24 (N.J. 2006) (same), *with Baker v. State*, 744 A.2d at 897–904 (Johnson, J., dissenting) (not permissible for court to defer remedy) and *Lewis v. Harris*, 908 A.2d at 230–31 (Poritz, C.J., concurring and dissenting) (same); *see* Jeffrey L. Amestoy, *Foreword: State Constitutional Law Lecture: Pragmatic Constitutionalism—Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 RUTGERS L.J. 1249, 1249–51, 1255–56, 1259–60 (2004) (situating *Baker v. State* within a theory of “pragmatic constitutionalism” which recognizes that other, nonjudicial actors within a state also play a role in determining constitutional principles, and suggesting that a court deferring remedy as a matter of “constitutional strategy” may be especially appropriate in state constitutional cases); WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 150–53 (2002) [hereinafter ESKRIDGE, *EQUALITY PRACTICE*] (arguing that judicial deferral of remedies for rights, such as occurred in *Baker v. State*, is sometimes justified as a short- to medium-term strategy for achieving longer term liberal equality goals); Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 36 (2000) [hereinafter Johnson, *Vermont Civil Unions*] (arguing that “[b]y bringing the legislature into the act, the Court [in *Baker v. State*] acted not so much as the dictator of a result, but as a catalyst for change”); Gil Kujovich, *An Essay on the Passive Virtue of Baker v. State*, 25 VT. L. REV. 93, 97 (2000) (assessing *Baker v. State* in light of the passive virtues of the judiciary advocated by Alexander Bickel, *The Supreme Court 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) and the decisional minimalism advocated by Cass Sunstein, *The Supreme Court 1995 Term, Foreword, Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996)); Mae Kuykendall, *Gay Marriages and Civil Unions: Democracy, The Judiciary and Discursive Space in Liberal Society*, 52 MERCER L. REV. 1003, 1011–16 (2001) [hereinafter Kuykendall, *Gay Marriages*] (arguing that litigation over recognition of same-sex couples forces courts to employ a new vocabulary for family relationships, which in turn will shape the political and cultural discourse that will ultimately resolve recognition claims and nomenclature issues); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 874–76 (1999) (arguing that interpretation of state constitutions is far less text-centered than interpretation of the federal constitution, because of the interplay between judicial interpretation and political mobilization, and using state constitutional politics around gay rights and same-sex marriage recognition in Hawaii and Oregon as case studies); Williams, *supra* note 33, at 101–04 (identifying within the approach of *Baker v. State* strategic elements aimed at agenda setting and a legislative remedy); Kara M.L. Young, Comment, *Prudent Use of Judicial Minimalism: Why Minimalism May Not Be Appropriate in the Context of Same-Sex Marriage*, 27 U. HAW. L. REV. 501 (2005) (arguing that judicial minimalism is not appropriate in certain contexts, and that the marriage equality controversy is one of them).

names and categories. It provides several perspectives on why names for core kinship categories are so important, how they work, how they can recognize and foster changes in social structure, or on the contrary, stabilize social structures, standardize kinship forms and slow change. One conclusion ultimately drawn here is that kinship category names, trivial as they may seem, have a considerable force and influence in everyday life, much like other kinds of names that have been the subject of scrutiny in recent decades. Marriage-marking honorifics for women (“Miss”/“Mrs.”/“Ms.”) will be the point of comparison, though gender markers on occupations, the role of gendered given names, the changing of surnames upon marriage, the conferral of paternal names on children, and so on would all be relevant. All I seek to do here is to open up the understanding of why names such as “civil union”/“marriage” are so important, and perhaps suggest that several decades of feminist argument challenging unexamined naming practices would be more than a little relevant.

Part IV re-engages the two social facts that led the *Kerrigan* majority to find a cognizable harm at stake. The neologism “civil union” is likely to be read against a background of a long historical practice of stigmatizing gay men and lesbians, both singly and as couples. This stigma bleeds through the supposed neutrality of the new name “civil union.” In part this is for no other reason than because it is new and has no history of its own. Just as important, though, is the recognition that to deploy “civil union” and “marriage” properly requires everyone involved in interactions where these names are to be used to identify the couple as same- or different-sex. The mere fact of imposing a nomenclature distinction is problematic. Not only does the “civil union” distinction force partners in same-sex couples to come out as probably gay, lesbian, or bisexual over and over again, including in their interactions with strangers; but as a practical matter in daily life, the provision in the law for two different categories requires everyone involved in interactions with same-sex couples to affirmatively identify them over and over again as a same-sex couple, therefore probably gay, lesbian, or bisexual. The law’s provision of a separate name serves to perpetuate microperformances and microidentifications of a historically stigmatized category. It thus contributes to the likelihood that individually held cognitive stereotypes and prejudices will persist and be deployed. Reminding everyone that the couple is gay or lesbian will trigger stereotypical associations and consequent behaviors.³⁵

Part IV also briefly considers the argument that the reservation of the traditional term “marriage” for different-sex couples creates a stigmatic injury by elevating different-sex couples and thus implicitly excluding

³⁵ See Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 450–58 (2007) (discussing the mechanism of stigmatic injury).

same-sex couples from an intangible but important recognition by the state. I view this as a different though related type of injury from implied stigma. Using the framework of Kenneth Karst's arguments about equal citizenship,³⁶ one can identify a type of stigmatic harm that involves the state elevating one group and thereby symbolically subordinating other groups.³⁷ An example that comes to mind involves some kinds of legal recognition of religion. Karst understands that one problem with government endorsement of one religion is that it implicitly assigns adherents of other religions to a second-class status.³⁸ This argument captures something important about the "civil union"/"marriage" distinction as well. Even if not intended to be stigmatizing or demeaning, the naming distinction will be understood to acknowledge special and not so special citizens. In an arena as important as marriage and family, perhaps this should not be permitted.

Part V is a recapitulation, tying together the threads in my argument about how the "civil union"/"marriage" distinction necessarily amounts to name calling and identifying stigma.

I follow here Greg Johnson's recommendation to refer to "civil union" in the singular when discussing it as an institution,³⁹ just as we refer to "marriage" in the singular when discussing the institution of marriage. Even if "civil union" turns out to come up short as an alternative to "marriage" for same-sex couples, we should avoid subtly slanting our discussion by treating "civil union" as no more than a collection of individual relationships that are undeserving of a name collectively as an alternative family institution.⁴⁰

This Article was drafted during the winter and spring of 2009, a period in which legal and political developments around the legal recognition of same-sex couples unfolded in the United States as rapidly as they ever have. Its background discussion is current as of June 10, 2009.

³⁶ See generally KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989) [hereinafter KARST, *BELONGING TO AMERICA*]; Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) [hereinafter Karst, *Foreword: Equal Citizenship*].

³⁷ See Healy, *supra* note 35, at 436–38 (noting how nonadherents of the government-endorsed religion are cast as "second-class citizens"); Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 2003 SUP. CT. REV. 357, 371 [hereinafter Karst, *Justice O'Connor*] ("[G]overnment's message of exclusion is itself a stigmatic harm, and an unconstitutional denial of full membership in the community.").

³⁸ See, e.g., Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 512 (1992) [hereinafter Karst, *The First Amendment*] (explaining that legal recognition of a particular religion inherently classifies followers of that religion as "insiders" and nonfollowers as "outsiders").

³⁹ Greg Johnson, *Civil Union, A Reappraisal*, 30 VT. L. REV. 891, 906 (2006) [hereinafter Johnson, *Reappraisal*].

⁴⁰ *Id.*

II. THE BACKGROUND OF “CIVIL UNION” AND THE *KERRIGAN* ANALYSIS OF THE CLAIM OF CONSTITUTIONALLY COGNIZABLE INJURY

A. *The Background of “Civil Union”*

It might seem straightforward to begin by asking, “Where does ‘civil union’ come from?” The answer at face value would be Vermont.⁴¹

But first let us take an important detour. Where does *marriage* come from? At once a more complex vista opens up. Individual marriages are individual choices, at least in one sense—sometimes marriages are prompted by families, inter-couple bargains or exigencies, or other circumstances. Marriage, however, is defined and regulated by the state, so there is a legal component, and as well a myriad of social expectations, sometimes themselves fixed in religious or cultural norms, sometimes more fluid. Some persons of faith would go further, arguing (however inaccurately as a historical matter) that marriage is and always has been one way or another—relevantly to us, between one man and one woman—that it is ordained by God, that it is a sacrament, and so on. Without exploring all these avenues here, suffice it to say that marriage is rich, deep, and long as an institution, in our culture and in our history. It comes from and goes to a lot of places.

Now the question “Where does civil union come from?” and the response “It comes from Vermont” seem impoverished, almost pathetic. And I think in fact that may be a good part of the point.

The term “civil union” was created by the Vermont legislature in response to the space left open by the marriage equality suit in Vermont, *Baker v. State*.⁴² That case focused on “[t]he legal benefits and protections flowing from a marriage license,”⁴³ and expressly reserved for another day the question of whether “notwithstanding equal benefits and protections . . . the denial of a marriage license operates per se to deny constitutionally protected rights.”⁴⁴ As to remedy, the *Baker* majority left it up to the legislature to decide whether to revise the state’s statutes to include same-sex couples as married, or to provide some other institution that would afford same-sex couples the same legal benefits, as required by that state’s

⁴¹ See, e.g., David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions and Denies Access to Marriage*, 16 STAN. L. & POL. REV. 73, 75 (2005) (“In America, the concept of civil unions first took form in Vermont . . .”). The term “civil union” originated in France. Johnson, *Vermont Civil Unions*, *supra* note 34, at 44.

⁴² *Baker v. State*, 744 A.2d 864 (Vt. 1999).

⁴³ *Id.* at 884. In fact the majority opinion recited a large catalog of the principal legal benefits. See *id.* at 883–84 (listing the many benefits and protections granted to persons holding a Vermont marriage license). It simply did not address intangible cultural and social consequences that flow from married status.

⁴⁴ *Id.* at 886.

constitution.⁴⁵ Justice Johnson dissented.⁴⁶ Rather than give the legislature the leeway granted by the majority, Justice Johnson would have issued the requested injunction in order or provide an immediate remedy to the violation of the plaintiffs' civil rights.⁴⁷ She noted the issue of whether a separate institution with a different name conferring the same benefits would create an inferior status; but in view of her preferred remedy—marriage for same-sex couples, and right away—she expressly did not discuss the issue in detail.⁴⁸ The Vermont legislature in response, after a contentious debate, determined not to redefine marriage but to confer the constitutionally required rights, benefits, and responsibilities in a form with a new name—“civil union.”⁴⁹

Other terms for “marriage substitutes” for the legal recognition of same-sex couples had already surfaced, though their legal content was impoverished. Municipalities began to recognize “domestic partnerships” legally in the 1980s.⁵⁰ The term was also adopted in contractual parlance for human relations policies of private corporations, universities, and other employers. Some states eventually adopted partial “domestic partnership” recognition, and in the years subsequent to the Vermont legislature’s action in 2000, some of those states used “domestic partnership” for a status practically equivalent to marriage.⁵¹ But the term “domestic partnership”

⁴⁵ *Id.* at 886–87. It noted the examples of “domestic partnership” and of some foreign jurisdictions’ “registered partnership.” *Id.* It did not include the term “civil union,” which had not yet been used.

⁴⁶ *Id.* at 897–904 (Johnson, J., concurring in part and dissenting in part). Justice Johnson also offered an analysis of the issue presented as a straightforward matter of sex discrimination. *Id.* at 904–12.

⁴⁷ *Id.* at 898.

⁴⁸ *Id.* at 899 n.2.

⁴⁹ See generally ESKRIDGE, EQUALITY PRACTICE, *supra* note 34, at 43–82 (describing the Vermont litigation and subsequent Vermont legislative deliberation); MOATS, *supra* note 33, at 142–44 (describing the Vermont legislature’s deliberations); Michael Mello, *For Today I’m Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 166–242 (2000) (describing the Vermont legislature’s deliberations).

⁵⁰ See ESKRIDGE, EQUALITY PRACTICE, *supra* note 34, at 12–15 (summarizing the early history of domestic partnership ordinances); WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 1049 (2d ed. 2004) (same).

⁵¹ Domestic Partner Rights & Responsibilities Act, 2003 Cal. Stat. 2586 (ch. 421), held unconstitutional, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *rev’d by referendum*, Proposition 8, Nov. 2008, *Proposition 8 aff’d as to prospective application*, *Strauss v. Horton*, -- P.3d --, 2009 WL 1444594 (Cal. 2009), *federal challenge to Proposition 8 filed*, *Perry v. Schwarzenegger* (N.D. Cal. May 22, 2009) (No. CV 09 2292) (challenging Proposition 8 as a matter of Due Process, Equal Protection, and 42 U.S.C. § 1983, and also seeking a declaratory judgment that sections of the California Family code declaring marriage to be between one man and one woman are unconstitutional); 2007 Or. Laws ch. 99. Washington State has had a more piecemeal version of “domestic partnership,” and only recently adopted a “domestic partnership” that is the full-fledged equivalent of “marriage.” Wash. S.B. No. 5688 (2009), 2009 Wash. Laws ch. 521 (enacting domestic partnership equivalent of marriage). See generally Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555 (2004); Tumbull, *supra* note 22.

seemed cold, clinical, and often it is misunderstood as a business relationship.⁵² The term “reciprocal beneficiary” was also already in use, having been created by the Hawaii legislature as a compromise offering a few of the benefits of marriage to couples who could not get married once the legislature was authorized by a state constitutional amendment to define marriage as between one man and one woman.⁵³ The Vermont legislature chose a new term, “civil union.”⁵⁴

By the time of the superior court decision in *Kerrigan* in 2006, the nomenclature issue had already been addressed by the Supreme Judicial Court of Massachusetts.⁵⁵ That court required the state legislature to accord “marriage” to same-sex couples, not just “civil union,” a compromise proposed by the state senate.⁵⁶ And during the pendency of the *Kerrigan* lawsuit, the “civil union”/“marriage” distinction was addressed by the New Jersey Supreme Court.⁵⁷ The New Jersey court, like

It should be noted that Colorado adopted a “designated beneficiary agreement” statute in April 2009. 2009 Colo. H.B. 1260, 2009 Colo. Sess. Laws ch. 107. This law creates a checkoff list of some of the major benefits and responsibilities available to married couples and makes them available to unmarried couples, both opposite- and same-sex. The agreement is recorded with the county clerk. There is thus no need to develop a whole set of legal documents addressing each right or obligation individually. Moreover, each benefit/obligation can be selected or not, and the two partners need not adopt each benefit/obligation reciprocally. See Nancy Polikoff, *More on Colorado’s Designated Beneficiary Law*, Apr. 22, 2009, available at <http://beyondstraightandgaymarriage.blogspot.com/search/label/Colorado> (discussing the Colorado designated beneficiary approach); Nancy Polikoff, *The Extraordinary New Colorado Law*, Apr. 15, 2009, available at <http://beyondstraightandgaymarriage.blogspot.com/2009/04/extraordinary-new-colorado-law.html> (same).

⁵² ESKRIDGE, EQUALITY PRACTICE, *supra* note 34, at 61–63 (describing the deliberations of the House Vermont Judiciary Committee, including rejection of “civil accord” and “civil domestic partnership” in favor of “civil union”); Johnson, *Vermont Civil Unions*, *supra* note 34, at 43 & nn.159–60 (arguing that “civil union” is a more dignified term than “domestic partnership” and citing to sources involved in the Vermont litigation and subsequent legislative deliberations); MOATS, *supra* note 33, at 197–98 (discussing deliberations of the Vermont House Judiciary Committee rejecting “domestic partnership” as demeaning and “civil accord” because it sounded like a car, and settling on “civil union”).

⁵³ HAW. REV. STAT. §§ 572C-1 to -7; see ESKRIDGE, EQUALITY PRACTICE, *supra* note 34, at 22–25 (describing the politics that resulted in Hawaii’s reciprocal beneficiary statute instead of any of several other alternatives that were considered).

⁵⁴ In fact, Vermont also established a “reciprocal beneficiary” status in 2000, providing that two persons related by blood or adoption could establish a legal relationship resembling that of spouses in certain specified areas. VT. STAT. ANN. tit. 15 §§ 1301–1306. This status survives; it is not addressed by the Vermont marriage equality law. 2009 Vt. Laws 3.

⁵⁵ See Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (interpreting the holding of *Goodridge v. Dept. of Public Health*, 798 N.E. 941 (Mass. 2003), to require the legislature to provide marriage and not just a parallel institution, “civil union,” that might provide all the same legal benefits but under a different name, while reserving “marriage” for the union of one man and one woman).

⁵⁶ *Id.* at 571 (stating that the court in *Goodridge* considered not just the tangible benefits of marriage, but also “whether it was constitutional to create a separate class of citizens by status discrimination and withhold from that class the right to participate in the institution of civil marriage Maintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage is the constitutional infirmity at issue.” (emphasis in original)).

⁵⁷ See *Lewis v. Harris*, 908 A.2d 196, 221–23 (N.J. 2006) (finding that at least at first it is the role of the legislature, and not the court, to determine whether to refer to same-sex relationships as “marriages” or “civil unions”). The court stressed that as a general matter, it “will give . . . deference to

the court in Vermont, allowed the legislature to decide to create an alternate legal form, civil unions. To a basically parallel extent, the California Supreme Court addressed California's "domestic partnership" status during the pendency of *Kerrigan*.⁵⁸ The California court however held that only "marriage," and not "domestic partnership," would satisfy the state constitution's requirements.⁵⁹ All three decisions—Massachusetts, New Jersey, and California—were decided by four votes to three, as was *Kerrigan*.

The Iowa Supreme Court recently required that same-sex couples be allowed to marry under the Iowa constitution, 7-0.⁶⁰ Its opinion cursorily rejected a "civil union" alternative.⁶¹ This decision was handed down in 2009, subsequent to the *Kerrigan* decision.

In 2008, two state commissions weighed in on the "civil union"/"marriage" distinction. In April 2008, the Vermont Commission on Family Recognition and Protection issued a final report after investigating the differences between civil union and marriage in place in Vermont.⁶² While this commission was not charged with making a recommendation on

any legislative enactment unless it is unmistakably shown to run afoul of the constitution," *id.* at 221, that "the State has no experience with a civil union construct", *id.* at 221–22, and that the court "will not presume that a difference in name alone is of constitutional magnitude." *Id.* at 222. This language can fairly be read to say that if a civil union construct is tried and shown not to deliver the equality required by the state constitution, the court may revisit the matter.

⁵⁸ *In re Marriage Cases*, 183 P.3d 384, 398 (Cal. 2008) ("The question we must address is whether . . . the failure to designate the official relationship of same-sex couples as marriage violates the California Constitution."). The court at one point pointed out a few substantive differences between California marriage and California domestic partnership, but treated the two statuses as substantially similar nonetheless. *Id.* at 416 n.24; *see id.* at 418 (comparing the California Domestic Partnership Act to California marriage).

⁵⁹ Only a relatively short part of the California opinion actually addresses the nomenclature issue. Compare *id.* at 434–35 (Part IV.B., explaining why the court need not address whether there is a fundamental right to have the name "marriage" available to same-sex couples, and indicating it would address the issue as an equal protection matter) and *id.* at 444–46 (Part V.C., exploring whether and how the difference in nomenclature imposes upon a fundamental right to equal dignity and respect in the official recognition of the family), with, e.g., *id.* at 419–34 (Part IV.A., addressing the fundamental right to marry under the California constitution) and *id.* at 435–44 (Parts V.A. and V.B., addressing whether the suspect class at issue should be characterized as sex or rather as sexual orientation and, if the latter, what standard of judicial scrutiny should result) and *id.* at 446–52 (Part V.D., considering whether the state's interest is compelling and its method necessary). Much of *In re Marriage Cases* thus seems aimed at established strict scrutiny for statutory distinctions based on sexual orientation and on characterizing the scope of a fundamental right to marry in a way that is important in contexts far beyond the narrow question of nomenclature.

⁶⁰ *Varnum v. Brien*, -- N.W.2d --, 2009 WL 874044 (Iowa Apr. 3, 2009).

⁶¹ *Id.*, 2009 WL 874044 at *29–*30 (considering briefly and rejecting the possibility of allowing the legislature to develop a recognition with a name other than marriage). The court said, "A new distinction based on sexual orientation would be equally suspect and difficult to square with the principles of equal protection embodied in our constitution." *Id.* at *30. It did not elaborate.

⁶² VERMONT 2008 REPORT, *supra* note 16, at 1. This report should not be confused with THE OFFICE OF LEGISLATIVE COUNCIL, REPORT OF THE VERMONT CIVIL UNION COMMISSION (2002), available at <http://www.leg.state.vt.us/baker/Final%20CURC%20Report%20for%202002.htm>. The 2002 Report found that the civil union law was working as intended and effected compliance with *Baker v. State*. *Id.*

whether to enact marriage of same-sex couples and declined to do so,⁶³ it found that there were significant differences between civil union and marriage,⁶⁴ and that a change in the law would remedy those differences to some extent.⁶⁵ In April 2009 Vermont responded to this prompting and to general political pressure by amending its law to recognize marriages by same-sex couples.⁶⁶ In December 2008, the New Jersey Civil Union Review Commission issued its *Final Report*.⁶⁷ This commission found “that the separate categorization established by the Civil Union Act invites and encourages unequal treatment of same-sex couples and their children.”⁶⁸ It unanimously recommended that the legislature expeditiously amend the state law to allow same-sex couples to marry.⁶⁹

B. *The Holding in Kerrigan on Cognizable Injury*

The trial court decision in *Kerrigan v. State* turned on there being no cognizable injury to same-sex couples from the new and different name “civil union,” so long as all the legal rights that the state could deliver had been conferred on same-sex couples.⁷⁰ The trial court noted that after the passage of the Civil Union Act it was faced only with claims based on the “less tangible effects . . . of civil unions.”⁷¹ It listed these alleged injuries⁷² separately from an earlier list of concrete injuries gleaned from the

⁶³ VERMONT 2008 REPORT, *supra* note 16, at 28–29.

⁶⁴ *See id.* at 26 (noting the “significant differences between the benefits, privileges, and responsibilities attached to a civil union versus a heterosexual marriage”).

[T]he Commission finds that . . . a change in the law [recognizing same-sex unions as marriages] would give access to the less tangible incidents of marriage, including its terminology (e.g. marriage, wedding, married, celebration, divorce), and its social, cultural and historical significance. This also would likely enhance the portability of the underlying legal consequences of the status. Further, providing statutory access to marriage would be a clearer and more direct statement of full equality by the state, a statement of full inclusion of its gay and lesbian residents in the bundle of rights, obligations, protections, and responsibilities flowing from the status of civil marriage.

Id. at 27.

⁶⁵ *Id.*

⁶⁶ Vt. S.B. 115 (Apr. 7, 2009) (overriding gubernatorial veto) (effective Sept. 1, 2009) (entitled “An Act to Protect Religious Freedom and Promote Equality in Civil Marriage”).

⁶⁷ NEW JERSEY FINAL REPORT, *supra* note 16. Though the *Final Report* was issued after the *Kerrigan* decision, an Interim Report from February 2008 was available at the time *Kerrigan* was decided. It is appended to the *Final Report*. *Id.* at Appendix A. The California same-sex marriage decision cites the New Jersey Interim Report. *In re Marriage Cases*, 183 P.3d 384, 446 (Cal. 2008).

⁶⁸ NEW JERSEY FINAL REPORT, *supra* note 16, at 1.

⁶⁹ *Id.* at 3.

⁷⁰ *Kerrigan v. State*, 909 A.2d 89, 94–101 (Conn. Super. 2006), *rev’d*, 957 A.2d. 407 (Conn. 2008).

⁷¹ *Kerrigan*, 909 A.2d at 96. It pointedly noted that plaintiffs did not amend their complaint after enactment of the Civil Union Act. *Id.* at 93.

⁷² The effects alleged included a sense of unworthiness or inequality; a sense of second class status; humiliation; a feeling of being inferior and being demeaned; a lack of recognition by others; and a denial of the instant communication that “marriage” allows. *Id.* at 94.

plaintiffs' affidavits⁷³—an implicit contrast of tangible and intangible injuries. After examining several theories propounded by the plaintiffs,⁷⁴ the court denied plaintiffs' motion for summary judgment and granted the state's motion.⁷⁵

The Connecticut Supreme Court disagreed. It held that “the trial court improperly determined that the distinction between civil unions and marriage is constitutionally insignificant merely because a same sex couple who enters into a civil union enjoys the same legal rights as an opposite sex couple who enters into marriage.”⁷⁶ It found, by a four to three majority, that there was a cognizable harm when the distinction between “civil union” and “marriage” was read “in light of the pernicious history of discrimination faced by gay men and lesbians, and because the institution of marriage carries with a status and significance that the newly created classification of civil unions does not embody”⁷⁷ Let us call these the background of stigma and the distinction of status issues. The court then proceeded to determine that the legislative distinction was based on sexual orientation,⁷⁸ that it should be subject to heightened, intermediate scrutiny,⁷⁹ and that the state “had failed to provide sufficient justification for excluding homosexual couples from the institution of marriage.”⁸⁰ The Connecticut Supreme Court therefore reversed the trial court's grant of summary judgment in favor of the state and instead granted summary judgment to plaintiffs.

The *Kerrigan* majority holding on cognizable injury⁸¹ is relatively brief, especially when one looks only to the court's own language and pares away the quotations from other nomenclature cases,⁸² the quotations from the plaintiffs' brief and an amicus brief,⁸³ the quotation from Ronald Dworkin,⁸⁴ and the lengthy footnote disagreeing with the dissents' analyses of cognizable injury.⁸⁵ Indeed, I ultimately find I have to rely on the reasoning in some of these quotations themselves to supplement some of

⁷³ These included refusal of a hospital to allow one partner access to the other or designation as next of kin; denial of a home construction loan; inability of one partner to list the other as a dependant for purposes of employer-provided health insurance; and succession rights for basketball season tickets. *Id.* at 91.

⁷⁴ *Id.* at 96–101.

⁷⁵ *Id.* at 102.

⁷⁶ *Kerrigan*, 957 A.2d at 415.

⁷⁷ *Id.* at 412.

⁷⁸ *Id.* at 412; *see id.* at 431 n.24.

⁷⁹ *Id.* at 412; *see id.* at 431–76.

⁸⁰ *Id.* at 412; *see id.* at 476–81.

⁸¹ *Id.* at 416–20.

⁸² *Id.* at 417.

⁸³ *Id.* at 417 n.14 (quoting brief of Lambda Legal Defense & Education Fund); *id.* at 418 (quoting plaintiffs' brief).

⁸⁴ *Id.* at 418 n.15 (quoting Ronald Dworkin, *Three Questions for America*, N.Y. REVIEW OF BOOKS, Sept. 21, 2006, at 24, 30).

⁸⁵ *Id.* at 419 n.16.

the court's reasoning.

The court's explanation pretty much boils down to the consequences of the indisputable fact that the government has "singled out" a group, "gay persons," for differential treatment.⁸⁶ The legislature thus "declares them to be unworthy of the institution of marriage."⁸⁷ It has given this group "a lesser status,"⁸⁸ a second-class citizen status.⁸⁹ The court cites a Connecticut employment discrimination advertising case for the proposition that differential classification creates a real harm, even though it is symbolic and intangible harm.⁹⁰ The court also invokes *Brown v. Board of Education* for the proposition that separate cannot be equal, at least when the distinction involves a politically disfavored or historically unpopular minority.⁹¹ The court notes that "[i]n such circumstances, the very existence of the classification gives credence to the perception that separate treatment is warranted for the same illegitimate reasons that gave rise to the past discrimination in the first place."⁹² That's about it for the reasons provided. Denying same-sex couples the right to marry effectively signals a continuing lesser status for gay persons as a group, which could fuel the perception that differential treatment of gay persons is warranted, even though similar past discrimination has been deemed illegitimate.

I do not think this reasoning is wrong; but it is awfully terse. And a great deal of the reasoning hinges on how one interprets the differential treatment of gay persons in the Act. Here I think it becomes crucial that the issue is, in significant part, the legal *name* "marriage" (and associated ceremonial and kinship names) as compared to the legal *name* "civil union." And here the court says basically nothing. It compares the two as institutions, without noticing that as those institutions operate in everyday life they depend on iterated instances of naming practices and related kinship-recognizing ceremonies to confer and reproduce relationships of identity, status, and kinship. As I will develop, more focus on the name aspect of the distinction may help us better appreciate the correctness of

⁸⁶ *Id.* at 416 (using the term "differential treatment" twice).

⁸⁷ *Id.* at 417.

⁸⁸ *Id.* at 419.

⁸⁹ *Id.* at 417 (quoting Opinions of the Justices, 802 N.E.2d 565, 570 (Mass. 2004)); *id.* at 418 (quoting plaintiffs' brief).

⁹⁰ *Id.* at 418 (citing *Evening Sentinel v. National Organization for Women*, 357 A.2d 498 (Conn. 1975)). *Evening Sentinel* involved a challenge to the newspaper's practice of separating "help wanted" ads into jobs to men, for women, and for either. *Evening Sentinel*, 357 A.2d at 501. The Connecticut Supreme Court determined that this constituted "aiding and abetting" employment discrimination, which was prohibited under the Connecticut Fair Employment Practices Act. *Evening Sentinel* is not a constitutional case at all, let alone a "cognizable injury" case. Nevertheless, in its focus on how practices of differential categorization can contribute to specific discriminatory practices, it turns out to be relevant, even though the *Kerrigan* did not expressly explore this dimension of *Evening Sentinel*. See *infra* Part IV.B.

⁹¹ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008) (citing *inter alia* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954)).

⁹² *Id.* at 419.

the result.

The *Kerrigan* decision's section on cognizable claim calls for several further comments. To begin with, the court's word "declares" is an overstatement, as the legislature did not, in the statute itself, "declare" in so many words that gay persons were unworthy of marriage. It simply withheld the name (and thus also the identity and status) of marriage, creating a parallel but differently named institution, and it included other language about equality of rights and the equivalence of the different names. As other sentences from the *Kerrigan* majority opinion make clear, the differential status is an inference, not a legislative declaration. "[C]ivil unions *are perceived to be* inferior to marriage."⁹³ "[T]he very existence of the distinction *gives credence to the perception* that separate treatment is warranted"⁹⁴ The operative question is not what the legislature said, or even what it intended, but what inference is to be drawn from the distinction created by the Act. As New Jersey Chief Justice Poritz wrote, in a passage quoted by the *Kerrigan* majority, "the [s]tate declares that it is legitimate to differentiate between [the] commitments [of same-sex couples] and the commitments of heterosexual couples."⁹⁵ And as the California Supreme Court majority wrote, in a passage quoted by the *Kerrigan* majority, drawing this distinction "pose[s] a serious risk of denying the official family relationships of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry."⁹⁶

In assessing how to interpret the Act's distinction of nomenclature, the court notably does not rely on either legislative history or on the kind of fact-finding that Justice Borden, writing in dissent, thinks should be required.⁹⁷ The court instead relies on two social facts:⁹⁸ the vast, multiple, and unique importance of marriage as an institution,⁹⁹ and the history of prejudice and discrimination against gay persons.¹⁰⁰ In two respects then, the neologism "civil union" and the new institution civil union are read in the context of a particular history, tradition, and culture. It is "the exalted status of marriage" that makes civil union, by comparison, interpretable as an "inferior" institution.¹⁰¹ It is "past discrimination"¹⁰² for "illegitimate

⁹³ *Id.* at 418 (emphasis added).

⁹⁴ *Id.* at 419 (emphasis added).

⁹⁵ *Id.* at 417 (quoting *Lewis v. Harris*, 908 A.2d 196, 226 (N.J. 2006) (Poritz, C.J., concurring and dissenting)).

⁹⁶ *Id.* (quoting *In re Marriage Cases*, 183 P.3d 384, 434–35 (Cal. 2008)).

⁹⁷ See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 484–86 (Conn. 2008) (Borden, J., dissenting).

⁹⁸ The term "social fact" actually comes from Justice Borden's dissent. *Id.* at 486.

⁹⁹ *Id.* at 416–18 & nn.14–15 (majority opinion).

¹⁰⁰ *Id.* at 417 (discussing prejudice on its own, and also cross-referencing Section V.A. of the opinion, concerning the history of persecution and disadvantage).

¹⁰¹ *Id.* at 418.

¹⁰² *Id.* at 419.

reasons”¹⁰³ against a “politically unpopular or historically disfavored”¹⁰⁴ minority that triggers the conclusion that separate legal treatment now, standing alone, is constitutionally suspect. Each of these background social facts actually gets considerable attention elsewhere in the opinion, which may help to account for the brevity of the cognizable injury section.

Despite the “fundamental” and “basic” vocabulary deployed by the court when assessing traditional marriage, the court does not, as such, find a fundamental right to marry that extends to same-sex couples.¹⁰⁵ Ultimately its decision turns on equal protection analysis, not due process.¹⁰⁶ Rather, the fundamental right discussion is put to work as part of an analysis about what is withheld in reserving the name “marriage” for opposite-sex couples.

Judge Borden, writing in dissent, agrees that “there is enough of a difference between the new institution of civil union and the ancient institution of marriage to permit a constitutional challenge on equal protection grounds.”¹⁰⁷ But he would put the plaintiffs to evidentiary proof, and disagrees with the majority conclusion that there can be no doubt that this difference is an established fact rather than a fact to be determined later in the case.¹⁰⁸ He also points out that “civil union” is novel.¹⁰⁹ He concludes:

At this point in our history, however, and without any appropriate fact-finding on the issue, I am unable to say that [civil union] is widely considered to be less than or inferior to marriage, or that it does not bring with it the same social recognition as marriage. It is simply too early to know this with any reasonable measure of certitude.¹¹⁰

Thus, while the majority interprets the Act against a backdrop of a history of prejudice directed to GLBT folks, Justice Borden views civil union against a blank backdrop—there is no history to the term, and the history of treatment of GLBT people against which the novel term might be interpreted is not considered.

Justice Borden also refers, more than once, to social flux around

¹⁰³ *Id.* at 484–85 (Borden, J., dissenting).

¹⁰⁴ *Id.* at 418 (majority opinion).

¹⁰⁵ Contrast other opinions on nomenclature, which do find a fundamental right to marry that includes same-sex couples. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 399–400 (Cal. 2008); *Lewis v. Harris*, 908 A.2d 196, 227–29 (N.J. 2006) (Poritz, C.J., concurring in part and dissenting in part).

¹⁰⁶ *Kerrigan*, 957 A.2d at 482 (holding that “equal protection principles” require that same-sex couples be permitted to marry).

¹⁰⁷ *Id.* at 483 (Borden, J., dissenting).

¹⁰⁸ *Id.* at 484–85. He writes, “[T]o the extent that the perceived status of civil unions in this state is factual in nature, the majority has, by making findings regarding that status, exceeded this court’s power.” *Id.* at 485.

¹⁰⁹ *Id.* at 485–86.

¹¹⁰ *Id.* at 486.

norms.¹¹¹ He cites and quotes *Baker v. State*,¹¹² which did leave the choice of remedy to the legislature, but expressly as a matter of remedy and even of political strategy—not because of lack of evidence as to harm.¹¹³ And Borden appears to overlook *In re Marriage Cases*¹¹⁴ and *Goodridge v. Dep't of Public Health*¹¹⁵ as interpreted in *Opinion of the Justices*.¹¹⁶ These cases decided the nomenclature distinction question at the summary judgment stage, without fact-finding. The majority responds to this point of Justice Borden's about improper fact-finding by characterizing it as a "refusal to concede the obvious."¹¹⁷ What is obvious to the majority is that a recently created institution—civil union—cannot possibly "embody the same status as an institution of such long-standing and overriding societal importance as marriage."¹¹⁸

The Connecticut Supreme Court also did not address some of the cognizable claim arguments decided the other way in the opinion below. The Connecticut Superior Court, per Judge Pittman, had noted that the plaintiffs sought to base their civil rights claims on a set of "rather less tangible effects of the status of civil unions."¹¹⁹ These included (1) a claim of a fundamental right to marry under Connecticut law;¹²⁰ (2) a claim of injury because civil union was a "lesser status . . . distinct from the more privileged status of marriage;"¹²¹ (3) an argument that "the statutory scheme is a form of 'separate but equal' segregation;"¹²² (4) a claim of injury because of "the unfamiliarity of civil unions in common social or legal currency, [such] that the plaintiffs must constantly explain their legal status to others;"¹²³ and (5) injury caused by the lack of legal recognition in other jurisdictions of the unfamiliar status of civil union—so-called "portability" of the legal status.¹²⁴ Holding that "[n]one of these [claims] rises to the level of legal harm required to declare judgment in [plaintiffs'] favor,"¹²⁵ the court granted the state's motion for summary judgment and

¹¹¹ *Id.*; see also *id.* at 503–05 (comparing slow social change, legislative change, and judicially mandated change).

¹¹² *Id.* at 486–87 (quoting *Baker v. State*, 744 A.2d 864, 888 (Vt. 1999)).

¹¹³ *Baker*, 744 A.2d at 886–89.

¹¹⁴ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

¹¹⁵ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

¹¹⁶ *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

¹¹⁷ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 419 n.16 (Conn. 2008).

¹¹⁸ *Id.* Here and at an earlier point in this section of the opinion, the majority points out that most married couples would not exchange their marriage for a "civil union," even with all the legal rights and benefits intact. *Id.* at 417 n.14, 419 n.16.

¹¹⁹ *Kerrigan v. State*, 909 A.2d 89, 96 (Conn. Super. 2006).

¹²⁰ *Id.* at 96; see *id.* at 96–97 (discussing this claim).

¹²¹ *Id.* at 96; see *id.* at 97–98 (discussing this claim).

¹²² *Id.* at 96; see *id.* at 98–100 (discussing this claim).

¹²³ *Id.* at 96; see *id.* at 100–01 (discussing this claim).

¹²⁴ *Id.* at 96; see *id.* at 101 (discussing this claim).

¹²⁵ *Id.* at 96. As to the so-called "portability" issue (recognition of a Connecticut same-sex union in other jurisdictions), the lower court did concede that this particular injury from non-recognition was

dismissed the plaintiffs' claims.¹²⁶

The second and third of these claims—lesser status for civil unions and “separate but equal” segregation for gay persons—formed the core of the Connecticut Supreme Court’s analysis. Its opinion did not separately address the fundamental right to marry, nor did it address the two non-recognition injuries—unfamiliarity in everyday life, that is, social non-recognition, and legal non-recognition.

Justice Zarella also very briefly agreed that the plaintiffs had raised a cognizable claim, but thought that was so because civil union, having been created by statute, can be taken away, while marriage, as a fundamental right, may not, in his view, be repealed legislatively.¹²⁷ The majority briefly rebutted this approach, essentially saying that it is speculative:¹²⁸ nothing suggests that the legislature intends to repeal the civil union law.¹²⁹ I think the majority has the better of this one.

III. OF NAMES, NAMING, AND IDENTITIES

Much headway can be made in elaborating the concerns underlying the *Kerrigan* court’s reasoning on cognizable injury by considering several aspects of Thomas Healy’s fine account of stigmatic injury and federal standing¹³⁰ (to be sure, Healy is talking about federal courts and *Kerrigan* is a state court decision) and Charles Lawrence’s project to foreground “cultural meaning” as central to the antidiscrimination project.¹³¹ If we

“real.” *Id.* at 101. But it was “not caused by the nomenclature used in the Connecticut legislation.” *Id.* The court found that that injury was caused by other states’ non-recognition, not Connecticut’s nomenclature. *Id.* (ruling on the portability problem as a cognizable injury). Apparently Judge Pittman thought that the difference between a Connecticut “civil union” and a Connecticut “marriage” would not make a difference to other jurisdictions, a conclusion with which others have disagreed. See ESKRIDGE, EQUALITY PRACTICE, *supra* note 34, at 137 (speculating that a same-sex “marriage” might be more portable than a same-sex “civil union”); Henry Gottlieb, *New Jersey Judge, Citing Comity, Grants Divorce to Gay Couple Married in Canada*, 195:7 N.J.L.J., Feb. 16, 2009 (describing oral opinion in *Hammond v. Hammond*, No. FM-11-905-08 (N.J. Super. 2009), in which a family part judge granted a same-sex couple divorce from a Canadian marriage, even though New Jersey only recognizes civil unions, in order to assure that the New Jersey divorce would be recognized in jurisdictions that recognize marriage by same-sex couples).

¹²⁶ The court also included a short section on the respective roles of legislature and judiciary, tipping its deferential hat to the legislature in matters of public policy. *Id.* at 101–02.

¹²⁷ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 516 (2008) (Zarella, J. dissenting). To the extent that Justice Zarella’s argument suggests, more or less explicitly, that it would be unconstitutional for the state legislature to redefine marriage by giving it a different name, he raises a most interesting issue, but one beyond the scope of this Article.

¹²⁸ *Id.* at 419 n.16 (majority opinion).

¹²⁹ *Id.*

¹³⁰ Healy, *supra* note 35.

¹³¹ Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) [hereinafter Lawrence, *The Id, the Ego*]. Lawrence has recently elaborated on ways in which this project was misunderstood and misapplied. Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Origins and Impact of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931 (2008) [hereinafter Lawrence, *Unconscious Racism*] (explaining the origins and reception of Lawrence’s 1987 article).

supplement these with Kenneth Karst's insights about the overarching constitutional value of inclusive equal citizenship,¹³² especially as applied to religious display cases under the Establishment Clause, we can better discern the underpinnings of the *Kerrigan* majority's succinct argument on cognizable injury. These authorities' insights are brought to bear on the "civil union"/"marriage" distinction in Part IV. First, however, we will benefit by considering that this particular injury is about which legal name(s) to authorize for use for a central social category. This Part presents some insights that can be gleaned from focusing on names, identities, statuses, and the social processes in and through which they interact.

As Elizabeth Emens writes, "Names are peculiarly situated as among our most trivial, and yet most foundational, social practices."¹³³ She is writing about proper names, and particularly about married women taking their husbands' surnames, but her introductory observations are useful to us as well, as a catalog of some of the functions of names for people, including not just proper names but names related to kinship. Names are "constitutive."¹³⁴ They may link us to families and kinship networks.¹³⁵ Having a name at all "is thought to be a fundamental element of identity and dignity."¹³⁶ Emens also notes, in the context of the gender-related naming practices she is exploring, that men keep the honorific prefix "Mr." whether or not married, whereas women may be expected to change from "Miss" to "Mrs."¹³⁷ I will draw on this last example in a subsequent section, in order to illustrate the stakes in the "civil union"/"marriage" distinction and to note some of the strategies of resistance to legally changing kinship names, in terms of trivializing the work that names do.¹³⁸

A. "What's in a Name?"

Massachusetts Supreme Judicial Court Justice Sosman, in her separate opinion in *Opinions of the Justices*, characterizes the issue of the distinction between "civil union" and "marriage" as "a squabble over the name to be used"¹³⁹ and "a pitched battle over who gets to use the 'm'

¹³² See, e.g., KARST, BELONGING TO AMERICA, *supra* note 36; Karst, *Justice O'Connor*, *supra* note 37; Karst, *The First Amendment*, *supra* note 38; Karst, *Foreword: Equal Citizenship*, *supra* note 36.

¹³³ Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 768 (2007).

¹³⁴ *Id.* at 769.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 769–70.

¹³⁸ See *infra* Part III.C.

¹³⁹ *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004) (separate opinion of Sosman, J.).

word.”¹⁴⁰ She cites to Shakespeare’s *Romeo and Juliet* for “[t]he insignificance of according a different name to the same thing”¹⁴¹ Her reading of the scene and the play is seriously wrong. A correct reading will illuminate part of the stakes in names, especially family names and kinship names, and thus will help us with a better description of the stakes in the “civil union”/“marriage” distinction. This is not to say that Justice Sosman is mistaken in identifying the question as whether a separate name for civil union rises to the level of a constitutional injury;¹⁴² but she cannot dismiss the dispute as “insignificant”¹⁴³ just because it is about names.¹⁴⁴

In the famous balcony scene from Shakespeare’s *Romeo and Juliet*, Juliet asks the question “What’s in a name?” She continues, poetically, romantically: “What’s in a name? that which we call a rose, / By any other name would smell as sweet. / So Romeo would, were he not Romeo call’d, / Retain that dear perfection which he owes / Without that title:—Romeo, doff thy name, / and for that name, which is no part of thee, / Take all myself.”¹⁴⁵ The problem of course is that Romeo is a Montague and Juliet is a Capulet. Those are not just the young lovers’ names, but also family names and identities, and those identities are themselves embedded in the society and history of the city-state of Verona. The two families Montague and Capulet are sworn enemies. The names may belong to Romeo and Juliet, among others, but the names also mark Romeo and Juliet and bind them to their families’ feud. Romeo and Juliet are, thus, caught up against their wills because of who they are, as marked by their names. The love between Romeo and Juliet is, thus, a forbidden love.

Indeed, just a moment earlier in the balcony scene, Juliet has said “

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at n.1.

¹⁴² *See, e.g., id.* at 572–73 (framing the issue in the case as one of whether reserving the name “marriage” for different sex couples even presents an issue of constitutional dimension); *see also id.* at 581 (separate opinion of Cordy, J.) (“Assuming . . . that a difference in statutory name would itself have to rest on a rational basis, I would withhold judgment until such time as the Legislature completed its deliberative process before concluding that there was or was not such a basis.”).

¹⁴³ *Id.* at 573 (separate opinion of Sosman, J.).

¹⁴⁴ New Jersey Supreme Court Justice Albin, in his majority opinion, also quotes the “what’s in a name” line, but writes that the question is “perplexing” and that “in the cultural clash over same-sex marriage, the word marriage itself—independent of the rights and benefits of marriage—has an evocative and important meaning to both parties.” *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006). He too concludes that the “civil union”/“marriage” distinction is not of constitutional dimension. *Id.* At least for the time being, though, his opinion is susceptible of allowing marriage equality advocates to return to the court if, in practice, civil union falls short of the underlying principle of equality established in the case. That is, in fact, exactly what the New Jersey Civil Union Commission has just found. NEW JERSEY FINAL REPORT, *supra* note 16, at 1–3. Failing a legislative response one may expect another marriage equality lawsuit in New Jersey.

¹⁴⁵ WILLIAM SHAKESPEARE, *ROMEO & JULIET*, act 2, sc. 2, lines 43–49. Some versions appear to have “a rose by any other *word* would smell as sweet.” (emphasis added). *Compare* THE WORKS OF WILLIAM SHAKESPEARE, COMPLETE 1063, 1074 (Walter J. Black, Inc. 1944) (act 2, sc. 2, line 43) (“name”), *with* THE RIVERSIDE SHAKESPEARE 1114 (G. Blakemore Evans et al. eds., 2d ed. 1997) (act 2, sc. 2, line 43) (“word”). I leave this textual difference to Shakespeare scholars to sort out.

‘Tis but thy name that is my enemy. / Thou art thyself though, not a Montague. / What’s Montague? It is not hand, nor foot, / nor arm, nor face, nor any other part / Belonging to a man. O be some other name!’¹⁴⁶ Then comes the “What’s in a name?” part. Interesting sequence: Juliet fancies Romeo to be no more than hand, foot, arm, face, and unspecified “other parts.” (*What parts? Think about it!*)¹⁴⁷ If that were all Romeo amounted to, he would then be free, or at least freer, to marry her. But Romeo is no more just a body than a rose is just a smell. He has a lineage. “Montague” is not just a name, it is a *family* name. “Montague” and “Capulet” identify who Romeo and Juliet are, their kin, their identity, and whom they may and may not marry. To speak abstractly, the family names carry with them a whole set of entrenched behaviors and associations, calling up social relations and obligations, as recognized and reacted to by braggart kinsmen and meddlesome servants and friars. The inherited tradition that makes up an undeniable part of Romeo’s identity and is called up and fixed by his name cannot be doffed, as he and Juliet would wish.¹⁴⁸ It is not his alone.

In *Romeo and Juliet*, the two young lovers do their best to escape their inherited family enmity, as marked and perpetuated by their names. Things go badly, through happenstance and misunderstanding, and in the end, they die.¹⁴⁹

B. *Interpellation: Names that Call Us*

Meanwhile, a very different tradition offers a similar perspective on the pervasive power of names, especially names that identify and reproduce social relations and the culture and history that those names

¹⁴⁶ SHAKESPEARE, *supra* note 145, at act 2, sc. 2, lines 38–42.

¹⁴⁷ Actually, the more current and respected of the two versions of *Romeo and Juliet* that I consulted shows “nor any other parts” in brackets, suggesting some question about its authenticity; but the critical footnotes do not offer any explanation. RIVERSIDE SHAKESPEARE, *supra* note 145, at 1114 (act 2, sc. 2, line 41). The two editions also exhibit some minor variations in punctuation.

¹⁴⁸ Earlier yet in the scene Juliet has said “O Romeo, Romeo! Wherefore art thou Romeo? / Deny thy father and refuse thy name; / Or, if thou wilt not, be but sworn my love, / and I’ll no longer be a Capulet.” SHAKESPEARE, *supra* note 145, at act 2, sc. 2, lines 33–36.

¹⁴⁹ Shakespeare often portrays young couples embroiled in confusions about who they are and whom they may marry, but these embroglios do not always end in tragedy. *Cf.* WILLIAM SHAKESPEARE, *THE WINTER’S TALE*, acts 4 and 5. The second half of this play turns in part on a struggle of young lovers to wed, seemingly against their names’ destiny. Florizel, Prince of Bohemia, conceals his identity in order to woo and wed Perdita, whom he believes to be a simple village girl. His father King Polixenes discovers the plot and forbids the two ever to see one another again. The couple flees to the court of King Leontes of Sicilia, pursued by Polixenes. It is eventually revealed to all that Perdita (unbeknownst to her and everyone else) is actually the long-lost daughter of King Leontes; she survived abandonment in the wild as an infant. Thus, Florizel’s attempt to marry Perdita by doffing his identity fails, but by happenstance *Perdita* is not what *she* seems. Recovering her lost identity and her kingdom, her true identity now makes the young couple’s marriage fit and possible. By the way, “perdita” is Latin for lost, in the feminine. The discovery of Perdita’s true name and identity fulfills a prophecy that things will be set right only when what was lost is found. Oh Shakespeare!

represent. Louis Althusser, a fervent Marxist theorist,¹⁵⁰ inquires how the relations of production are themselves reproduced, and focuses on ideology as that which keeps people in their social roles in ways that feed the processes of capitalism.¹⁵¹ As part of this inquiry, he introduces the useful concept of interpellation, or hailing.¹⁵² One need not partake of Marxist sentiment to appreciate the usefulness of Althusser's concept.

Althusser posits that individuals live within an ideology, that is, "a determinate (religious, ethical, etc.) representation of the world"¹⁵³ They cannot do otherwise. "Ideology represents the imaginary relationship of individuals to their real conditions of existence."¹⁵⁴ Moreover, ideology is not freestanding in some abstract or ideal sense. "Ideology has a material existence."¹⁵⁵ Althusser has previously identified a set of "Ideological State Apparatuses," which include the religious, the educational, the family, the legal, the political, the trade union, the communications media, and the cultural.¹⁵⁶ Using a different terminology than Althusser's, we might well call these the principal non-governmental mechanisms and institutions of civil society. The material aspects of ideology are manifested through these various apparatuses and their practices as individuals engage them.¹⁵⁷

Ideology sets up the attitudes of individual subjects through material practices.¹⁵⁸ "The individual . . . behaves in such and such a way, adopts such and such a practical attitude, and . . . participates in certain regular practices which are those of the ideological apparatus"¹⁵⁹ These practices take the form of everyday rituals—a mass, a funeral, a sports match, a school day, a political party meeting.¹⁶⁰ The individual's behavior, attitudes, and practices depend on ideological apparatuses, even though the individual believes that s/he "has in all consciousness freely chosen as a subject."¹⁶¹ Ideology and individual practices are thus (my words) mutually dependent. Althusser claims that "there is no practice except by and in an ideology"¹⁶² and at the same time that "there is no

¹⁵⁰ See, e.g., Fredric Jameson, *Introduction, in LOUIS ALTHUSSER, LENIN AND PHILOSOPHY AND OTHER ESSAYS* vii, vii (Ben Brewster trans., Monthly Review Press 2001) (1971) (describing Althusser's lifelong membership in the French Communist Party and his struggles within the party against Stalinist orthodoxy).

¹⁵¹ ALTHUSSER, *Ideology and Ideological State Apparatuses (Notes towards an Investigation)*, in ALTHUSSER, *supra* note 150, at 85, 85, 89 (Ben Brewster trans., Monthly Review Press 2001) (1971).

¹⁵² *Id.* at 117–20.

¹⁵³ *Id.* at 113.

¹⁵⁴ *Id.* at 109 (emphasis omitted). This is Althusser's statement of his first thesis in this essay.

¹⁵⁵ *Id.* at 112 (emphasis omitted). This is Althusser's statement of his second thesis in this essay.

¹⁵⁶ *Id.* at 96.

¹⁵⁷ *Id.* at 112–13.

¹⁵⁸ *Id.* at 113.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 114.

¹⁶¹ *Id.* at 113.

¹⁶² *Id.* at 115.

ideology except by the subject and for subjects.”¹⁶³ Elsewhere in the essay he writes that ideology and individual subjects are “doubly specular,”¹⁶⁴ meaning that ideology and individual subjects mirror one another and ensure and perpetuate each others’ functioning.

“Interpellation” is a way of expressing the idea that individuals depend on ideology, which depends on them. Althusser writes, “[i]deology [i]nterpellates [i]ndividuals as [s]ubjects.”¹⁶⁵ The most familiar example of interpellation that Althusser provides is of someone turning around in response to a policeman shouting “Hey, you there!”¹⁶⁶ This person thus becomes the subject who was addressed.¹⁶⁷ He or she recognized that he/she was the person really hailed, and turned around.¹⁶⁸

Althusser’s example is sometimes misunderstood. He himself immediately apologizes for presenting the hailing scenario as a temporal sequence—walking, hailing, turning.¹⁶⁹ “[I]n reality these things happen without any succession. The existence of ideology and the hailing . . . of individuals as subjects are one and the same thing.”¹⁷⁰ As a consequence, Althusser insists that “ideology has always-already interpellated individuals as subjects.”¹⁷¹

This perhaps jargony formulation is illustrated by an example whose relevance to our topic may be clear, as it involves inherited family ideologies and structures. Althusser notes

the ideological ritual that surrounds the expectation of a “birth” Everyone knows how much and in what way an unborn child is expected Before its birth, the child is . . . always-already a subject, appointed as a subject in and by the specific familial ideological configuration in which it is “expected” once it has been conceived . . . [T]his familial ideological configuration is, in its uniqueness, highly structured [I]t is in this implacable and more or less “pathological” . . . structure that the former subject-to-be will have to “find” “its” place, i.e., “become” the sexual subject (boy or girl) which it already is in advance.¹⁷²

We will return in a moment to this characterization of family and gender

¹⁶³ *Id.* Althusser calls this a process of “double constitution,” in which individuals constitute ideology even as ideology constitutes individual subjects. *Id.* at 116.

¹⁶⁴ *Id.* at 122 (emphasis omitted).

¹⁶⁵ *Id.* at 115 (emphasis omitted).

¹⁶⁶ *Id.* at 118.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 119.

¹⁷² *Id.*

structure in particular as already-given and implacable. For the moment let us notice just the idea that we are inevitably born into social structures, which shape our view of ourselves and our culture and world.

Another potential mishap, perhaps, with Althusser's policeman hailing example is that it involves police. In a footnote, Althusser points out that the societal practice of police hailing of suspects "takes a quite 'special' form" ¹⁷³ Thus it is not, in respect of its involving a policeman, a generalizable example. Because the hailer is given concrete form as a policeman, the process of interpellation can be misunderstood as limited to state actors, or as involving the threat of the exercise of force by some legal authority. This is not accurate. Althusser's cataloguing of Ideological State Apparatuses is expressly *not* about the state as a separate and partial force. Althusser is investigating the pervasive operation of ideology throughout society. Moreover, Althusser argues that the legal system is special; it occupies a dual position, both as what he calls a "Repressive State Apparatus" that depends principally on violence, and as an "Ideological State Apparatus" that depends primarily on ideology for its functioning. ¹⁷⁴ Althusser expressly locates the functioning of the legal system in both the Repressive State Apparatus and the Ideological State Apparatus. ¹⁷⁵ The basic mechanism in the hailing and turning process is a recognition each of the other, expressed in action, that constitutes subjects within a social framework. It is ideological and does not depend on the threat of violence.

Fredric Jameson offers a succinct summary of interpellation and of its implications for social change in the direction of social justice. Interpellation is

the way in which the social order speaks to us as individuals and as it were calls us by name. It can best be understood as the system of roles and social positions contained in the impersonal and collective Symbolic Order: the latter furnishes us the options available in our social and historical moment. ¹⁷⁶

Our social and historical order, contingent as it is, furnishes us our options. But we do have a choice, according to Jameson.

We can simply adopt one of these, or we can refuse them all in revolt; or finally we can attempt to invent new ones, for which our society has not yet provided. The constraints of interpellation are simply the possibilities or our own

¹⁷³ *Id.* at 118 n.18.

¹⁷⁴ *Id.* at 97–98.

¹⁷⁵ *Id.* at 90, 96.

¹⁷⁶ Jameson, *supra* note 150, at xiv.

historical situation, the hand we have been dealt by history,
the terms with which we must work.¹⁷⁷

José Gabilondo also provides a useful, succinct summary of interpellation. “In general, interpellation is the notion that systems of ideas are the medium through which a person finds one’s sense of self and comes to recognize oneself as an emotionally and politically sentient subject.”¹⁷⁸ Like Jameson, Gabilondo finds within the broad concept of interpellation room to maneuver. He describes “interpellative advocacy,” a goal of “coming to speech,” as part of a certain homosexual political and cultural project.¹⁷⁹ Gabilondo thus proposes conceiving of certain kinds of cultural and legal moves in support of homosexual recognition and respect as interventions in processes of interpellation.

Althusser’s presentation of interpellation suggests a special relevance of the concept to consideration of the “civil union”/“marriage” distinction. The process of naming and turning is about recognition. Family structures and rituals, and indeed specifically gendered family structures, may be paradigmatic examples of the background processes against which new forms of individual and collective identity must work to emerge and achieve recognition. I will spend a moment more here on ideas of family and recognition as glimpsed in the Althusser essay, as well as on a third topic—the sense of timelessness, obviousness, and naturalness generated by ideological operations of interpellation.

As to family, I have just quoted portions of the most extended treatment in Althusser’s essay. At the moment it is conceived, the as-yet-unborn child is already subject to ideological ritual and expectation. The specific form imposed may vary historically and culturally,¹⁸⁰ but central characteristics of the child’s identity are always predetermined one way or another. This is hardly an exceptionable or solely Marxist point. In a very different idiom, for example, Charles Taylor argues that human life is fundamentally dialogical in character.¹⁸¹ We must acquire language and other modes of expression by which we define ourselves through exchanges with others.¹⁸² This fact is true at the beginning of our lives, and continues throughout our lives.¹⁸³ Taylor’s formulation tends more to

¹⁷⁷ *Id.*

¹⁷⁸ José Gabilondo, *Asking the Straight Question: How to Come to Speech in Spite of Conceptual Liquidation as a Homosexual*, 21 WIS. WOMEN’S L.J. 1, 2–3 (2006).

¹⁷⁹ *Id.* at 3 (referring to DIDIER ERIBON, *INSULT AND THE MAKING OF THE GAY SELF* 9 (Michael Lucey trans., 2004) (1994)).

¹⁸⁰ Althusser says that we can set aside the specifics of the forms for family ideology—there will always be one or another to assign the child an identity. ALTHUSSER, *supra* note 150, at 119.

¹⁸¹ Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 32 (Amy Guttmann ed., 1994).

¹⁸² *Id.*

¹⁸³ *Id.* at 32–33.

the possibility of individual negotiation and change than Althusser's, though I think Jameson's and Gabilondo's versions of interpellation also do suggest the possibility of change. But change must occur against a background ideology that is determined by others and inherited.

Althusser's account also recognizes that the family serves multiple functions, being at one and the same time a source of ideology, a source of labor power, and a focus of consumption.¹⁸⁴ Again this is hardly exceptionable. The family is also a principal source and an important locus of the functioning of sex/gender identity.¹⁸⁵ As Judith Butler has written, the infant is "brought into the domain of language and kinship through the interpellation of gender."¹⁸⁶

As to recognition, interpellation is clearly an ongoing process of mutual and mutually reinforcing recognitions. Again the police hailing example, while it does contain mutual recognition, could be misleading. It could be read as unidirectional. Althusser provides other examples. One is of recognizing a friend through a door (the knock, the voice saying "It's me.", and then the door opening so that recognition is confirmed).¹⁸⁷ Another is of recognizing a previous acquaintance and demonstrating that recognition with "material ritual practice[s] of ideological recognition in everyday life"—in France a greeting and a handshake.¹⁸⁸ The practice of recognition is "incessant,"¹⁸⁹ mutual (if not necessarily symmetrical),¹⁹⁰ and occurs through "concrete" and "everyday life" "practices" and "practical rituals."¹⁹¹ Using my terminology, I might say that interpellation, insofar as it consists of material practices and rituals, is very often about microinteractions in which microperformances are interpreted in mutually reinforcing ways.

Another set of characteristics that Althusser notes concerning interpellation, and which I wish to mention here, involves obviousness, naturalness, and timelessness. These characteristics describe what I would call the phenomenology of interpellation. This discussion could take us far afield, but it is necessary, because these characteristics are highly relevant to the marriage controversy, and in particular, to the evident resistance to changing the name of marriage or its opposite-sex defining characteristic.

¹⁸⁴ ALTHUSSER, *supra* note 151, at 96 & n.8.

¹⁸⁵ *Id.* at 119 (discussing how the unborn child will have to become the sexual subject, boy or girl).

¹⁸⁶ JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX* 7 (1993). As Butler notes, the "founding interpellation is reiterated by various authorities and a various intervals of time" and is thus "the repeated inculcation of a norm." *Id.* at 7–8.

¹⁸⁷ ALTHUSSER, *supra* note 151, at 117.

¹⁸⁸ *Id.* My two years living in France also suggest a "kiss kiss" on both cheeks for family and close friends.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

Many traditionalists perceive marriage as obvious, natural, and timeless, and therefore not legitimately subject to processes of social change or to legislative or judicial redefinition.

Althusser writes, “It is indeed a peculiarity of ideology that it imposes . . . obviousnesses as obviousnesses, which we cannot *fail to recognize* and for which we have the inevitable and natural reaction of crying out (aloud or in the ‘still, small voice of conscience’): ‘That’s obvious! That’s right! That’s true.’”¹⁹² Much of the recognition involved in interpellation is transparent, and not in a good sense. It is the transparency that Barbara Flagg questions in her critique of transparently white decisionmaking, for example.¹⁹³ It is the obviousness that Sandra Bem identifies as one of the three lenses of gender—naturalness or, as she sometimes calls it, essentialization.¹⁹⁴ In a sense, the obviousness or naturalness of many everyday experiences of recognition can lead the subject to misunderstand what is going on as fixed and natural, rather than as specular and in some important sense contingently (re)produced. When that sense of obviousness and naturalness sets in, an attempt to question or change the microprocesses will be resisted as confusing, non-obvious, and unnatural.

Althusser, in exploring an extended example of interpellation, not coincidentally uses a particular version of Christianity as his example.¹⁹⁵ The eternal, universal, timeless claims offered by the version of Christianity that Althusser describes are reflected in some traditionalists’ similar rhetoric (that is, that one-man-one-woman marriage is timeless and is ordained by God) directed specifically at the slow revolution in legislative or judicial redefinition of marriage.¹⁹⁶ But discussion of the

¹⁹² *Id.* at 116.

¹⁹³ Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2029 (1995) (arguing that expectations around workplace behavior are culturally conditioned to express and reproduce white norms in a way that whites are unaware of, in other words, that is transparent to them).

¹⁹⁴ SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY* 2–3, 6–38 (1993). The other two lenses Bem identifies are gender polarization and androcentrism, that is, favoring men over women. *Id.* at 2–3. See generally Marc R. Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 LAW & SEXUALITY 271, 303–06 (2003) [hereinafter Poirier, *Hastening*] (discussing generally and with reference to Bem the political consequences of de-essentializing gender).

¹⁹⁵ ALTHUSSER, *supra* note 151, at 120–22.

¹⁹⁶ Some traditionalists might welcome a sufficiently slow “slow revolution” of law as the recognition of a Burkean evolution of custom. See, e.g., Jonathan Rauch, *Not Whether But How: Gay Marriage and the Revival of Burkean Conservatism*, 50 SO. TEX. L. REV. 1 (2008). In Rauch’s analysis, once the same-sex marriage issue became salient, both the political left advocating marriage equality and the traditionalist and religious right opportunistically took maximalist positions that either pushed for rapid change or sought to foreclose all change. *Id.* at 9–10. Rauch’s version of Burkeanism would favor incrementalism in the recognition of gay marriage, with civil union an important intermediate step. *Id.* at 11–12. See also Amy L. Wax, *The Conservative’s Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059 (2005). Wax asks whether conservatives should resist same-sex marriage. *Id.* at 1097. Referring in part to a book-length argument by Jonathan Rauch, *id.* at 1098–1103 and to the indisputable fact that forms of family life are

way that religion sometimes, as a type of ideology, naturalizes and stabilizes currently existing social structures, takes us too far afield from the topic of the Article, and must await another occasion.

C. *Introducing New Names into Practice*

Thus far in our consideration of names and identities, we have examined inherited family names and the way in which they fixed the identities of Romeo and Juliet; and a general theory of interpellation in which inherited language, culture, and other social structures call out to and in part fix, indeed establish, individual subjects, even as those subjects produce the rituals and practices that establish them. Although we eventually will circle back towards the topic of this Article—the harm in establishing the name “civil union” as compared to the name “marriage”—I want to explore briefly here another theme that will also shed some light on the stakes in the name distinction. That is the attempt to alter identity-conferring and -confirming names (that is, one category of names that interpellate) by replacing them. Where the names are not family names (e.g., Montague and Capulet) but words and customs used in a particular language for identities and social structures, an act of “interpellative advocacy”¹⁹⁷ that attempts to change the implications of identity often involves seeking to introduce new names into a very widespread everyday practice. This is not so easy to do; one cannot change a language, or any other widespread and diffuse social practice, by simple fiat.¹⁹⁸ And yet when addressing a stigma or subordination that is produced and maintained in part by naming practices, the activity of name changing may be called for.

One kind of name-changing process might involve seeking to erase and replace stigmatizing names for subordinated groups. “Nigger” goes to “Negro” goes to “Afro-American” goes to “black” goes to “Black” goes to “African American.” “Faggot/fairy/dyke” goes to “homosexual” goes to “gay and lesbian” goes perhaps to “queer” and perhaps also to mentioning “bisexual” and “transgender” instead of erasing them.¹⁹⁹ There are other

changing, *id.* at 1101–03, Wax concludes that the answer remains elusive. *Id.* at 1103 (discussing JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004)).

¹⁹⁷ Gabilondo, *supra* note 178, at 3.

¹⁹⁸ Robin Tolmach Lakoff, *Language and Woman's Place*, in ROBIN TOLMACH LAKOFF, *LANGUAGE AND WOMAN'S PLACE: TEXT AND COMMENTARIES* 29, 68 (Mary Bucholtz ed., rev. & expanded ed. 2004) (reproducing with commentaries Robin Lakoff's important 1975 book *Language and Women's Place*) (“[S]ocial change must precede lexical change: woman must achieve some measure of greater social independence of men before Ms. can gain wider acceptance.”).

¹⁹⁹ For an account of several such attempts to engineer social positioning through changing the names for stigmatized groups, see Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 *INDIANA L.J.* (forthcoming 2010), available at <http://ssrn.com/abstract>

examples. These processes are complex and occur on many levels, just as does the feminist name- and word-replacing project I will consider in this subpart. In each individual interaction that might call for the old name, once the participant(s) are aware of their new choices, they will have to consider more deliberately what name to use. They will have to stop and think. Indeed, for those seeking to get the naming practice changed, part of the purpose is to “raise consciousness” of those who have unthinkingly used names that carried and reproduced insult and subordination.²⁰⁰

In some cases, the traces of stigmatized identity lurk in many places within a language and related social practices, and a progressive critique and name replacement project needs to hunt them out quite broadly.²⁰¹ The feminist critique of language is an example. Beginning at least as early as the 1970s and continuing to this day, feminists have examined and challenged a number of ways in which accepted words, proper naming practices, and forms of address reflected and perpetuated gender stereotypes.²⁰² Precisely because of the apparent transparency and objectivity of language and related social interactions, the stereotypes produced by linguistic usages and simultaneously reproducing these usages then to retain their legitimacy; the naming practices that perpetuate them appear to be neutral or at most of trivial import. Feminists have made a significant effort to identify and reform these seemingly trivial gendered usages. Some of this effort has involved theoretical work and consciousness-raising within the feminist movement, some has involved legal changes of various kinds. Much of this work has occurred in individual interactions and confrontations. I will never forget the vehement challenge of a graduate student when a professor addressed her as “Miss” in a seminar at Yale in 1973. She wanted to be addressed as

=1351133. On failure to mention bisexuality in discussions of gay men and lesbians, see generally Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

²⁰⁰ Rusty Barrett, *As Much As We Use Language: Lakoff's Queer Augury*, in LAKOFF, *supra* note 198, at 296, 301 (“Although language change does not create social change, the examination of inequalities in language structure may become an important tool in struggles for social change by stimulating symbolic discussions of social injustice.”). As an opponent of the feminist language project fulminates, “Women’s Lib is succeeding in making everybody self-conscious about his use of language.” Michael Levin, *Vs. Ms.*, in SEX EQUALITY 216, 217 (Jane English ed., 1974). Levin considers the feminist language project an “imposition on our thinking process.” *Id.* Well, yes. Levin’s viewpoint is discussed *infra*.

²⁰¹ See, e.g., Marc R. Poirier, *Gender Stereotypes at Work*, 65 BROOKLYN L. REV. 1073, 1086–90 (1999) [hereinafter Poirier, *Gender Stereotypes*] (discussing gender schemata).

²⁰² See generally LAKOFF, *supra* note 198; Pat K. Chew & Lauren K. Kelley-Chew, *Subtly Sexist Language*, 16 COLUM. J. GENDER & L. 643 (2007) (documenting and critiquing the continuing use of male-gendered pronouns in legal discourse); Emens, *supra* note 133; Kim, *supra* note 199; Omi [Morgenstern Leissner], *The Problem That Has No Name*, 4 CARDOZO WOMEN’S L.J. 321 (1997–1998). The author Omi uses only her/his first name in the title, disclosing surnames in the asterisk footnote. *Id.* at 321 n.*. Ironically, I cannot even tell which pronoun, “he” or “she”, to use in this footnote, as this Israeli given name does not convey gender to me, a non-Hebrew speaker, and English requires third person singular pronouns to correspond to the sex/gender of the persons referred to. No name indeed.

“Ms.”

The feminist critique of language has addressed many different kinds of words and naming practices, including “girl”/“woman”, gender-tags on names for occupations and other social categories, the loss of women’s surnames at marriage, the conferral of the father’s surname rather than the mother’s on children, the gendering of given names, and in more recent times various naming practices involving same-sex couples and their children. The “Miss”/“Mrs.”/“Ms.” controversy that I explore briefly below is only one. I am confident that an exploration of the decades of feminist literature on names, gendered words, and related social practices would shed more light on the “civil union”/“marriage” distinction than I have the resources to do here.

There are many levels to naming practices. Individual uses of a name, form of address, or gendered word are of course also instantiations of that word in a language. They are small and specific microperformances and broader social habits at the same time.²⁰³ Moreover, insofar as they are shared (which they must be to be understood), they may well become ritualized, for example in forms of address, such as “Mr.”/“Mrs.”/“Miss.” Ritualized practices of naming may in turn be embedded in various spheres of interaction—a specific school, church, union, or ethnic community, for example.²⁰⁴ The naming practices are also likely to be fixed and authorized in dictionaries and, if a cultural policing organization exists, in the decrees of something like the Académie Française.²⁰⁵ Some naming practices may be expected or required on forms and on their modern avatar, computerized forms.²⁰⁶ They may also be reinforced by what Elizabeth Emens has cogently called “desk-clerk law.”²⁰⁷

²⁰³ As I have argued, “A ‘language’ does not exist (except as an abstraction) apart from a very large series of individual acts and practices. There is no higher entity that ‘sources’ or ‘authorizes’ one particular language for all of us.” Poirier, *Gender Stereotypes*, *supra* note 201, at 1107.

²⁰⁴ The astute reader may notice that my insistence on the primacy of local and specific instances of language and of naming practices is remarkably similar to the often-missed point that Althusser grounds his account of ideology in specific individuals’ specific rituals within specific practices and specific civic institutions (a.k.a. Ideological State Apparatuses).

²⁰⁵ See Poirier, *Gender Stereotypes*, *supra* note 201, at 1112 (discussing the Académie Française as a political referee of linguistic usage).

²⁰⁶ For example, I might have to supply one of a limited set of honorifics, or a first and last name, or only one and not two last names, on a computerized form in order for it to be accepted by the computer program. Kerry Abrams recently described to me in conversation how a computerized form categorically refused to accept hyphenated last names such as those of her children, so that she could not buy airline tickets for them that showed their legal names. In an insightful article on the marriage controversy as a question of language, Mae Kuykendall describes the cultural importance of forms. “Printed forms continually reinforce the significance of the marriage status, while communicating a deceptive simplicity and uniformity relating to the underlying marital narratives.” Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story about Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385, 416–17 (1999) [hereinafter Kuykendall, *Resistance*]. Kuykendall describes forms as a kind of coerced speech with a set vocabulary. *Id.* at 417.

²⁰⁷ See Emens, *supra* note 133, at 824–27 (describing resistance by low-level functionaries to legal but socially untraditional naming choices). Desk-clerk law occurs “not through any official grant

One particularly significant kind of fixity involves legally required names. These take considerable effort to establish through a legislative or regulatory process,²⁰⁸ and then subsequently to expunge through a similar process. Also, once established, they become embedded in those printed and computerized forms, which are costly to alter. As for getting clerks to change their ways once they have learned a set of rules, that may be even more complicated. Legally recognizing certain identity names establishes them, to the detriment of alternatives that might be brought forward in practice. The alternatives will not be used as often and will suffer by comparison to the official recognition of the preferred name, form, address, etc. Occasionally there may be consequences to improperly filling out forms with unauthorized names and titles, as in the case we are about to consider. And last but not least, when a naming practice is legally authorized, that authorization confers legitimacy on the name. The name is either permitted or required by the state, and therefore those who read ill into the name and naming practice have a more difficult argument to make in all those others spheres of social interaction—theoretical discussion, within-group discourse, and individual interactions of all types.

It is with this set of concerns in mind that we approach, briefly, the feminist attempt to challenge the practice and expectation that adult women would be addressed as “Miss” if unmarried and “Mrs.” if married. Feminists offered a neologism, “Ms.,” which continued the gender differentiation from “Mr.” (unlike for example “Comrade” in certain societies in certain languages²⁰⁹ at certain times) but no longer specified women’s marital status.²¹⁰ In one jurisdiction the issue got to court. At the time of *Allyn v. Allison*,²¹¹ California required women who desired to register to vote to designate themselves as either “Miss” or “Mrs.” There was no opting out. There existed no parallel requirement for men. Indeed, the forms of address in English did not make such a distinction for men.

of discretion, but through . . . ignorance, impatience, or normative views.” *Id.* at 810. *Cf.* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000) (describing as “the sticky norms problem” deliberate resistance to carrying out changes in a law intended to change a social norm when decision makers disagree with the change).

²⁰⁸ For example, Robin Lakoff reports that Representative Bella Abzug and others introduced a bill in Congress to abolish “Mrs.” and “Miss” in favor of “Ms.,” but it failed. Lakoff, *supra* note 198, at 64.

²⁰⁹ I am thinking of languages that do not have masculine and feminine grammatical forms, which likely would be expected to correlate with the gender of the person addressed. In a language with masculine and feminine forms I’m not sure one could get away from gender in forms of address.

²¹⁰ *See, e.g.*, Lakoff, *supra* note 198, at 64, 67–69. All three forms—“Mrs.,” “Miss,” and “Ms.”—are contractions of “mistress”. “Ms.” was used sporadically as early as the 1700s. Its modern use in preference to other appellations originated in 1961. Wikipedia, *Ms.*, available at [http://en.wikipedia.org/wiki/Ms.](http://en.wikipedia.org/wiki/Ms) (last visited Feb. 18, 2009).

²¹¹ *Allyn v. Allison*, 110 Cal. Rptr. 77 (Cal. App. 1973). Although Shepard’s does not provide any indication of further history to the case, I take the notation at the end of the *Allyn* opinion to mean that the California Supreme Court denied certiorari, since three Justices of that court dissented from a denial of a hearing. *Id.* at 81.

Two women sought to register to vote as “Ms.” Their applications were denied. They sought a writ of mandamus. The trial court granted the state’s demurrer. An appeal ensued. The appellants argued that requiring them to designate themselves “Miss” or “Mrs.” required them to disclose marital status, which was (1) unnecessary to ensure accurate voter representation, thus a violation of the statute’s provisions for voter registration; (2) a burden imposed on women but not men, thus a violation of equal protection; and (3) a burden on women’s right to vote pursuant to the Nineteenth Amendment of the United States Constitution.²¹²

The court rejected these challenges. Justice Compton accepted the state’s argument that the indication of “Mrs.” would tell the state that the applicant was or had been married, and thus might have previously been registered under a different name.²¹³ So the requirement plausibly helped to prevent voter registration fraud. At that time, a woman married in California was expected or perhaps required to change her surname to that of her husband.²¹⁴ Even though another requirement, the listing of all prior registrations, might have achieved the same objective, Justice Compton held that the court would not inquire into whether the agency’s method was the best one, so long as the justification it proffered was a reasonable one.²¹⁵ Nor was the incidental disclosure of marital status for women found to be in any way burdensome, especially since marital status was in no way private; indeed marital status was a matter of public record.²¹⁶

Presiding Justice Roth, concurring, acknowledged that the challenged statutory section “without apparent solid reason, seeks and requires specific information from female voter registrants in respect of marital status which males are not required to give.”²¹⁷ Nevertheless, Justice Roth did not discern any injury from the practice, even though it was of long standing. The “discrimination [was] so trivial”²¹⁸ that “even though it could be probably whipped and beaten into constitutional proportions”²¹⁹ he was inclined to allow the legislature to address the issue first.²²⁰ As

²¹² *Id.* at 78.

²¹³ *Id.* at 79–80.

²¹⁴ *Id.* at 80. *But cf.* Kenneth L. Karst, “A Discrimination So Trivial”: A Note on Law and the Symbolism of Women’s Dependency, 35 OHIO ST. L.J. 546, 547 n.5 (1974) [hereinafter Karst, “A Discrimination so Trivial”] (discussing the common law of name changing upon marriage and whether it applied in California at the time of the *Allyn* opinion).

²¹⁵ *Allyn*, 110 Cal. Rptr. at 79–80.

²¹⁶ *Id.* at 80.

²¹⁷ *Id.* at 80 (Roth, J., concurring). He pointed out that driver’s license applications requested marital status for both sexes, directly, rather than relying on women’s honorific. *Id.* He also noted that although the voter registration statute required social security numbers and phone numbers, voter registration would not be denied if that information was withheld, in contrast to the unwaivable requirement that “Miss” or “Mrs.” be provided in order for a woman to register. *Id.* at 81.

²¹⁸ *Id.* at 80.

²¹⁹ *Id.*

²²⁰ *Id.* at 80–81.

Kenneth Karst's consideration of the case points out, the Equal Rights Amendment was in the air,²²¹ and in any event the California legislature repealed the "Miss"/"Mrs." provision the following year.²²²

Justice Fleming's brief concurrence pointed out that the usages of women's honorific titles had shifted over time²²³ and that in fact the plaintiffs were free to call themselves either "Miss" or "Mrs.," just not a third term such as "Ms."²²⁴ Kenneth Karst characterizes the tone of this concurrence as humorous.²²⁵

Professor Karst provides a helpful place to start in analyzing *Allyn*. He focuses on the tension between what seems a trivial matter and the weightier symbolic injury behind it.²²⁶ Karst writes that "the justices thought they were dealing with a constitutional trifle" and thus failed to take it seriously.²²⁷ Karst argues that the injury complained of (1) is not paltry and (2) should not have been left to the legislature to remedy or not.²²⁸ By requiring women to disclose marital status (more or less) before registering to vote, the state embedded in the voter registration process a symbolic acknowledgement of women's historical dependency upon men.²²⁹ The "Miss"/"Mrs." requirement was an affront to women's dignity; it could have wide-ranging consequences,²³⁰ and would in particular be psychologically debilitating.²³¹ Karst argued that "one's self-perception is enormously influential in determining choices"²³²—especially major life choices. In telling women that a facet of their personal life symbolic of their past dependency still mattered to the state and had to be disclosed before they could vote, the "Miss"/"Mrs." requirement denied them their right to "first-class citizenship".²³³ This injury *was* in fact of constitutional scope, because in Karst's view the Fourteenth Amendment's equal protection guarantee is first and foremost about the dignity of

²²¹ Karst, "A Discrimination So Trivial," *supra* note 214, at 555–57.

²²² *Id.* at 546–47 & n.4, 554.

²²³ *Allyn v. Allison*, 110 Cal. Rptr. 77, 81 (Cal. Ct. App. 1973) (Fleming, J., concurring).

²²⁴ *Id.*

²²⁵ Karst, "A Discrimination So Trivial," *supra* note 214, at 548 (describing Justice Fleming's opinions as having "a wink here or a knowing chuckle there.").

²²⁶ *Id.* at 546.

²²⁷ *Id.*

²²⁸ *Id.* at 549. Karst points out that the California Supreme Court had already held sex, like race, to be a suspect class. *Id.* at 550 & n.14 (citing *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971)).

²²⁹ Karst discerned women's dependency on men to be a central issue of the women's movement, as it was emerging in the 1970s time frame. *Id.* at 552 & n.26.

²³⁰ *Id.* at 551.

²³¹ *Id.* at 550 ("Once a certain subsistence level is attained, what really matters about inequality is something that happens inside our heads . . .").

²³² *Id.* at 551. Karst writes, "[T]he most destructive dependency of all is psychological, the dependency that limits a woman's sense of who she is and what she can do." *Id.* at 552.

²³³ *Id.* at 553. It did not matter that many or most women might still choose to use "Miss" or "Mrs." *Id.* Making "Ms." available would provide the ability for women to send a different message about themselves. *Id.* at 552 n.26. It opened other possibilities for women's self-definition. *Id.*

citizenship.²³⁴ The judicial approval of the legislature's "Miss"/"Mrs." requirement was "particularly destructive,"²³⁵ and the opinion's tone of triviality and levity only added insult to injury.²³⁶

In a footnote, Karst observes that "The title 'Ms.' is designed . . . both for the woman's own consumption and for the edification of the outside world[.]"²³⁷ In designating herself "Ms." a woman sends a message that she does not wish to be defined by marital status, and calls into question a world view that makes that important.²³⁸ This footnote contains a germ of the insight that the appellations "Miss", "Mrs.", and "Ms." constitute the woman and those who interpret her, and that at stake is the choice about how to present oneself in the face of a subordinating naming tradition. ("Ms." is for all that not so neutral; it carries its own message, but a different one.)²³⁹ Using a term discussed earlier, in the consideration of Althusser, insisting on "Ms." is a kind of "interpellative advocacy."²⁴⁰

The "Miss"/"Mrs." distinction is not just about women's dependency, at least in some people's view, but is specifically about recognizing the different sexual roles of men and women, and indicating the sexual availability of women. Michael Levin, for example, offers an evolutionary biology justification of "Miss"/"Mrs.": it is necessary to facilitate the genetic variety that is accomplished by sexual intercourse.²⁴¹ Man is the natural "aggressor,"²⁴² Levin argues, and the distinction

signals the male immediately as to the potentials for his future relations with [a] new female. The possibility of sexual awareness always exists between man and woman, and Miss/Mrs. is one of the many ways of accommodating

²³⁴ *Id.* Karst's expansive view of equal citizenship under the fourteenth amendment was expressed at length in an important article a short time later. Karst, *Foreword: Equal Citizenship*, *supra* note 36. Moreover Karst wrote in anticipation of the adoption of the federal Equal Rights Amendment, which would have granted women equal rights under law in broad terms, parallel to the fourteenth amendment's provision of equal rights for all races. Karst, "A Discrimination So Trivial," *supra* note 214, at 555–57.

²³⁵ Karst, "A Discrimination So Trivial," *supra* note 214, at 552.

²³⁶ *Id.* at 553.

²³⁷ *Id.* at 552 n.26.

²³⁸ *Id.* (quoting B. Sonka, *Language, Self-Concept, and Social Change* (1973) (unpublished manuscript)).

²³⁹ *Cf.* Emens, *supra* note 133, at 766–67 (arguing that none of the choices women face in deciding what to do with their surname upon marriage is particularly good, and that any choice will elicit disapproval from someone). I would also point out that the fact that men have only one honorific, "Mr.," does not mean "Mr." is neutral. Instead, the fact that "Mr." is not expected to change upon a man's marriage reflects a particular position about male identity vis-à-vis marriage. If "Mr." seems neutral, that is because it is transparent, in the sense Barbara Flagg uses the word to describe interactions whose structure of dominance and subordination is masked and appears natural. *See* Flagg, *supra* note 193.

²⁴⁰ *See supra* notes 178–79 and accompanying text (noting that Gabilondo coined the term "interpellative advocacy").

²⁴¹ Levin, *supra* note 200, at 200.

²⁴² *Id.*

this. . . . Miss/Mrs. has come about through its evolutionary value and consilience with human nature.²⁴³

So *this* is the “spontaneity” that would be destroyed by self-consciousness about sexism in language!²⁴⁴ No wonder Levin objects to the way the feminist critique of language would interfere with his communication. Shades of Catharine MacKinnon!

I find Levin’s interpretation of “Miss”/“Mrs.” obnoxious, as well as degrading to women. What ought the state to do, faced with an interpretation such as Levin’s? If his interpretation is anomalous, held only by an outlier here and there, then it could be ignored. If it is widespread it might need to be addressed. But how? The state can hardly go in and legislate and enforce different usages in all the realms and instances where honorifics are deployed.²⁴⁵ However, one place where the state does have control is in official requirements, such as the voter registration law at issue in *Allyn v. Allison*.²⁴⁶ Here the state might note that in perpetuating the distinction, and in giving it legitimacy by making its use a prerequisite to voter registration, the state gives credence to the fact that the “Miss”/ “Mrs.” distinction must mean something—that it is in fact not so trivial a distinction. And where an interpretation as obnoxious as Levin’s of a linguistic usage is likely widely held, the state might well decide to move from requiring that usage to at least making it an optional, personal decision, not only enhancing individual choice, but removing the imprimatur for potentially obnoxious and harmful interpretations of identity due to the state’s linguistic endorsement of a particular naming practice. Further change could then be addressed in non-legal spheres, via a social dialogue over a period of time.²⁴⁷

²⁴³ *Id.* at 219.

²⁴⁴ *Id.*

²⁴⁵ This point was acknowledged by Robin Lakoff. Lakoff, *supra* note 198, at 68. When language reflects a social practice, a good deal of social change has to occur before one can expect the law to change, and in any event the law will not be the prime source of change. *Id.*

²⁴⁶ *Allyn v. Allison*, 110 Cal. Rptr. 77 (Cal. Ct. App. 1973).

²⁴⁷ In their considerations of marital naming practices, both Elizabeth Emens and Suzanne Kim observe that despite the removal of any legal constraints, the behavior of men and women around surname change upon marriage is quite different, suggesting that in this area of social naming practice the constraints are primarily social and not legal. Emens, *supra* note 133, at 763 (suggesting that social convention rather than law is driving behavior, at least for women); Kim, *supra* note 199, text before note 150 (arguing that social forces construct women’s name-changing options, and that women are operating within a structure of gender hierarchy that initially limits women’s choices). The constraints around names for same-sex couples are similar.

As Jack Balkin points out, “Large-scale changes in social structure require social transformation over long periods of time, and law forms only a part of that phenomenon.” J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2315 (1997). But this observation does not mean that change in the direction of equality and autonomy is unavailable. Speaking generally, Robert Leckey observes that “Social conduct and cultural forces not characterizable as direct emanations of the state . . . limit the freedoms associated with liberal constitutional democracies.” Leckey, *supra* note 14, at 457. There is a “discriminatory remainder that survives change” and is “beyond the purview of constitutional law.” *Id.* at 458. Nevertheless, referring to Kenji Yoshino’s important work on

Moreover, in considering what to do about an obnoxious and harmful interpretation of a linguistic usage, the state ought to take into account its history. The “Miss”/“Mrs.” distinction was not on the books by accident. It likely reflected the worldview that Mr. Levin articulated, once more widely held than in the 1970s, but undoubtedly persisting—if somewhat muted—given the short time frame in which the background culture around sex/gender had begun to change. Thus both the history of the “Miss”/“Mrs.” distinction and the possibility that continuing to require it legally would encourage the continuation of obnoxious and harmful understandings of it are relevant. Conversely, derequiring the usage might in fact force Mr. Levin and his ilk to do what they do not want to do, viz., consider what lies behind their transparent choice of words. And it would certainly also send a message to and empower those who otherwise might be demoralized by the state’s endorsement of the distinction, as Karst points out.

Let us take a moment now to compare the “Miss”/“Mrs.”/“Ms.” distinction to the “civil union”/“marriage” distinction. In both, progressive forces seek to squelch the official recognition of a set of terms that forces a distinction (“Miss”/“Mrs.” or “civil union”/“marriage”) in favor of a term that obscures the underlying social fact highlighted by the distinction (“Ms.” for all women regardless of marital status, and “marriage” or some as-yet-undeveloped name for all legally recognized couples and their families regardless of the sex of the members of the couple). The underlying social movement is unlikely to succeed in replacing the old terms altogether in a short or intermediate time frame. But legally derequiring the naming distinction makes it more often possible legally and socially to deploy the more inclusive usage, facilitates personal choice about how to present oneself, and slowly allows change in the diffuse social naming practices that might otherwise function to reproduce the distinction. Moreover, both distinctions are harmful in significant part because of their history, which deployed, reflected, and reinforced stereotypes and related prejudices and dominant/subordinate relationships in ways which the unexamined naming practices helped to naturalize.

There are differences, to be sure. In the one case “Ms.,” the neologism, is preferred. In the other, “civil union,” the neologism, is attacked. It is attacked because it perpetuates the distinction, while the new word “Ms.” obscures a distinction perpetuated by “Mrs.”/“Miss”.

We should proceed carefully here. State recognition of “civil union” is

covering, Leckey argues that social change ultimately is forwarded by “conversations” that “force the demands made of members of minorities groups to come into view.” *Id.* (discussing KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 193–95 (2006)). That “conversation” strategy is being explicitly implemented by marriage equality groups and by LGBTQ groups more generally. See *infra* Part III.D. And changes in the law around names for families can free up the possibility of those conversations.

in significant respects an advance over no legal recognition and no name. Indeed, in many parts of the country, a local or state legal recognition of a same-sex relationship even with a different name would be significant progress for marriage equality and for the GLBTQ movement generally. If one were to average out the country as a whole instead of determining the issue state by state, “civil union,” or some such novel terminology for the legal recognition of same-sex couples, while retaining the name of “marriage” for different-sex couples, might well be the current point of dynamic equilibrium. But we are talking about Connecticut here. And in Connecticut—which is the social background community relevant to the naming practices at issue in the *Kerrigan* case²⁴⁸—“civil union” can be understood to do more harm than good. “Civil union” represents progress compared to no name, but retards progress when compared to “marriage” in a state where the partial recognition of GLBTQ normal status, marked and forwarded by civil union, is already well underway.

The “Miss”/“Mrs.”/“Ms.” comparison also serves to remind us that one might seek to defuse the cultural tension over “marriage” and same-sex couples by getting rid of legal endorsement for marriage altogether, having states grant the benefits and confer the responsibilities on same-sex and different-sex couples alike, but with a different term altogether.²⁴⁹ Former Vermont Chief Justice Amestoy, for example, has proposed “marriage unions.”²⁵⁰ This new third term would correspond to the feminist “Ms.” Such a change in terminology is unlikely, however. The partisans on both

²⁴⁸ Doctrinally, one might link this assertion of the relevance of local social context to the *Geisler* factors invoked and considered by the *Kerrigan* court, especially the sixth factor. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 421 (Conn. 2008) (listing six additional factors to be considered when construing the state constitution; the sixth of the *Geisler* factors is “contemporary economic and sociological considerations, including relevant public policies”) (citing *State v. Geisler*, 610 A.2d 1225, 1232 (Conn. 1992)). The portion of the *Kerrigan* opinion that applies the sixth *Geisler* factor addresses four points, including the fact that marriage is an elevated and central status while civil union is novel, and that there is a history of discrimination against gay persons against which the distinction must be read. *Id.* at 474–75. As in the earlier portion of the opinion on cognizable injury, much of the court’s reasoning here is lengthy direct quotations, from *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) and *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

²⁴⁹ Proposals to this effect seem to be increasingly common. See, e.g., Stephen L. Carter, “Defending” Marriage: A Modest Proposal, 41 *HOW. L.J.* 215, 216 (1998) (recommending exploration of the question why the state is in the marriage business at all); Stephanie Coontz, *Taking Marriage Private*, N.Y. TIMES, Nov. 26, 2007, at A23, available at LEXIS, News Library, NYT File (recommending that we leave churches to “decide what marriages they deem ‘licit,’” but allow both gay and straight couples access to “the legal protections and obligations of a committed relationship”); Poirier, *Cultural Property*, *supra* note 4, at 411–14 (discussing the potential merits of disestablishment, whereby states would relinquish control over marriage altogether and “would no longer marry anyone”); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 *CARDOZO L. REV.* 1161, 1163 (2006) (opining that “it is time to abolish civil marriage,” and that marriage “should become solely a religious and cultural institution with no legal definition or status”).

²⁵⁰ Jeff Amestoy, *Ending the Gay-Marriage War: California’s Ruling May Point Toward ‘Marriage Unions’ as a Solution*, CHRISTIAN SCI. MONITOR, May 22, 2008, at 9, available at LEXIS, News Library, CSM File.

sides of the marriage controversy seek to retain the word “marriage” precisely because of all its history and connotations. Neither traditionalists nor marriage equality advocates would willingly let it go as part of a compromise. Indeed, the point is made in the hypothetical that finds its way into the *Kerrigan* opinion: would married couples willingly accept that their relationships be denominated “civil unions?”²⁵¹ For most married couples, the answer is clearly not.²⁵²

D. *Naming Practices and Questions of Scale: The Local, the Universal, the Social, the Legal, Storytelling, and Change from the Bottom Up*

In order to appreciate the mechanism of the harm of the “civil union”/“marriage” distinction, we must keep in mind that larger structures of discrimination and stigmatizing social identification do not exist separately from the microinteractions that are produced by them and that reproduce and reinscribe them. Status and identity here, as always, must be thought through from the bottom up.

I will let Kenneth Karst introduce this issue. He writes in *Local Discourse and the Social Issues*²⁵³ that while we may engage important social issues at larger levels, through attempts at universal discourse and in the mass media, “[T]he life of every individual citizen goes on here and now—in the ‘here’ of home, neighborhood, social circle, religious congregation, work, or school; in the ‘now’ of day-to-day activities that provide continuous streams of talk and meaning-laden behavior.”²⁵⁴ Karst calls this stream of communicative interaction “local discourse.”²⁵⁵ He specifically identifies several arenas of local discourse: household, friends, and relations,²⁵⁶ schools,²⁵⁷ the religious congregation,²⁵⁸ and the workplace.²⁵⁹ Sounds like Althusser.

Karst emphasizes that local discourse is “a powerful source of belief and conduct,”²⁶⁰ and moreover “behavior shapes meanings (as well as reflects them).”²⁶¹ He stresses this point: behavior “is not just a reaction to speech: behavior has its own acculturating—causal—consequences for speech and for further action: ‘people act themselves into a way of

²⁵¹ *Kerrigan*, 957 A.2d at 417 n.14.

²⁵² *Id.*

²⁵³ Kenneth L. Karst, *Local Discourse and the Social Issues*, 12 CARDOZO STUD. L. & LIT. 1 (2000) [hereinafter Karst, *Local Discourse*].

²⁵⁴ *Id.* at 2.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 5–7.

²⁵⁷ *Id.* at 7–9.

²⁵⁸ *Id.* at 9–10.

²⁵⁹ *Id.* at 10–11.

²⁶⁰ *Id.* at 2–3.

²⁶¹ *Id.* at 3.

believing as readily as they believe themselves into a way of acting.”²⁶² It is not wholly accurate to say that culture is the assignment of meaning to behavior; behavior “has its own role in creating, reinforcing, or undermining meanings.”²⁶³

Local discourse “leads us to believe not only in the identity labels we apply to ourselves, but also in those we apply to others.”²⁶⁴ Local discourse “is particularly influential on self-definition, and thus on the formation of perceptions and beliefs about gender, about race, and about religion. So both local discourse-as-talk and discourse-as-behavior have powerful implications for the politics and the law of the social issues.”²⁶⁵ At other points in the essay Karst adds sexual orientation to this list,²⁶⁶ and he examines the local workings of behavior around sexual orientation and local discourse.²⁶⁷ Coming out, for example, can be understood as a process of local discourse: when George comes out to Bob, “George’s whole life becomes part of the local discourse that adds to Bob’s acculturation” and affects his mental image of gay people.²⁶⁸ Moreover, when this happens millions of times on the local level, “local discourse is well on its way to deciding another of the social issues.”²⁶⁹

How can we understand the “civil union”/“marriage” distinction in the Connecticut Civil Union Act as it addresses and affects local practice? The act is an intervention, made possible by several decades of progressive moves towards recognition of gay and lesbian individuals and couples in Connecticut (and elsewhere) individually piecemeal and then in larger doctrinal leaps. In offering the name “civil union” along with the rights and responsibilities equivalent to marriage, the Act does move forward, bestowing an official name and an official recognition on same-sex couples, where they had not had one before. It moves beyond tolerance and beyond a limited recognition in those specific instances where a couple provides a sufficiently compelling performance, as assessed by reference to an idealized heterosexual married couple.²⁷⁰

²⁶² *Id.* at 13 (quoting JEROME BRUNER: ON KNOWING: ESSAYS FOR THE LEFT HAND 132–33 (1979)).

²⁶³ *Id.* at 24.

²⁶⁴ *Id.* at 12.

²⁶⁵ *Id.* at 3. Karst expands on the way in which local discourse creates and recreates group identities. *Id.* at 12–13.

²⁶⁶ *Id.* at 12 (including sexual orientation in the list along with race, gender, and religion).

²⁶⁷ *Id.* at 21–23 (discussing the powerful community-forming influence of the Stonewall Riot in 1969 and of gay bars throughout the 1960s).

²⁶⁸ *Id.* at 23.

²⁶⁹ *Id.*

²⁷⁰ See, e.g., Marc R. Poirier, *Piecemeal and Wholesale Approaches Towards Marriage Equality in New Jersey: Is Lewis v. Harris a Dead End or Just a Detour?*, 59 RUTGERS L. REV. 291, 308–10, 318–20, 347–48 (2007) [hereinafter Poirier, *Piecemeal and Wholesale*] (explaining first the beginnings of the functional equivalence doctrine in New Jersey, and subsequently the New Jersey Domestic Partnership Act, which followed the initiation of the *Lewis v. Harris* litigation).

But at the same time it withholds another name, “marriage,” and all its correlated kinship words and ceremonial words and practices. Same-sex couples may still get “married” and have “weddings” and call themselves “husbands” or “wives,” but the state has made the official and public statement that that set of words is social only, and not official. In a society where civil recognition of the state carries such weight, this statement maintains a distinction between same-sex and opposite-sex couples in the law, even as it confers legal rights, benefits, and responsibilities on same-sex couples. This distinction is reflected in the name distinction.

Much of my own work in the gender area has insisted on always keeping in mind the ways in which the issues of the sex/gender *Kulturkampf* are local, specific, and material, as well as more abstract, legal, and sometimes argued about in universal categories.²⁷¹ In one recent formulation, I called this “asking the place/space question,” in homage to Katharine Bartlett’s formulation of feminist inquiry as “asking the woman question.”²⁷² The place/space question will typically allow us “to develop a tiered description of the praxis of challenging various exclusions that create and maintain a sense of second-class citizenship.”²⁷³

In the context of the “civil union”/“marriage” distinction, two of my articles are particularly relevant. Ten years ago, in *Gender Stereotyping at*

²⁷¹ For more detailed analysis of this issue, see Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. C.R. & SOC. JUST. 3 (2008) [hereinafter Poirier, *Microperformances of Identity*] (applying some of the insights of Erving Goffman, Joseph Gusfield, Kenji Yoshino, and Judith Butler to the ways in which visible microperformances of same-sex couples as couples trouble traditional notions of marriage and family); Marc R. Poirier, *Gender, Place, Discursive Space: Where Is Same-Sex Marriage?*, 3 FLA. INT’L U. L. REV. 307, 317–34 (2008) [hereinafter Poirier, *Gender, Place*] (answering the “Where is same-sex marriage?” question in terms of territorial legal jurisdiction, aterritorial communities of shared meaning, metonymic conflicts where a small performance invokes larger concepts, and everyday interactions); Marc R. Poirier, *Same-Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism Is Not the Main Event*, 17 TEMP. POL. & CIV. RTS. L. REV. 387, 387–92 (2008) [hereinafter Poirier, *Identity Processes*] (arguing that the contemporary *Kulturkampf* over sex, gender, sexual orientation, marriage, and family occurs primarily at the level of local interaction and at the level of large discursive space, so that the state-by-state patchwork of different rules is incidental rather than central to an appreciation of the controversy); Poirier, *Cultural Property*, *supra* note 4, at 359–401 (analyzing the traditionalist sense of injury from same-sex marriage both in terms of the institution’s meaning and in the everyday visible practices of same-sex couples as married couples); Poirier, *Piecemeal and Wholesale*, *supra* note 270 (analyzing the progress towards marriage equality in New Jersey in terms of the transgressive visibility of gay men and lesbians first as individuals and then as couples; this visibility eventually facilitated claims of legal rights, first piecemeal and then wholesale); Poirier, *Hastening*, *supra* note 194, at 271 (analyzing the conflicts of openly gay men serving in the Boy Scouts in terms of an attempt to control adult role models of masculinity in everyday interactions, to prevent boys from being influenced by sissies); Poirier, *Cognitive Bias*, *supra* note 13, at 459 (analyzing discrimination in the workplace in terms of specific interactions that are caused by and reproducing unconscious biases; and arguing that intent is irrelevant to liability, on the model of liability for dangerous natural conditions).

²⁷² Poirier, *Gender, Place*, *supra* note 271, at 334–35 (discussing Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831, 837–49 (1990) (arguing that repeatedly “asking the woman question” becomes a method that furthers important feminist political goals)).

²⁷³ *Id.* at 338.

Work,²⁷⁴ I undertook a broad description of the workings of categorization and stereotyping at the micro level, relying on earlier and germinal work in the field of cognitive bias.²⁷⁵ I suggested that important social categories were tagged for gender, and that everyday processes of recognition implemented unconscious gender stereotypes, simultaneously (re)producing important social categories and the practices and experiences of dominance and subordination.²⁷⁶ I argued that this “system of social categories constitutes a rich feedback system that will tend to maintain itself in homeostasis.”²⁷⁷ This homeostatic process involved an ongoing interplay between (1) real world instances of the social categories and each individual’s specific cognitive version of the categories; (2) among each individual’s mutually reinforcing cognitively-held categories; and (3) among different mutually-reinforcing real-world exemplars of the cognitive categories.²⁷⁸ These interlocking micropractices form “a truly diffuse system of unconscious prejudice. . . . which is not intentionally reformed easily over a short period of time.”²⁷⁹

I suggested that this analysis of gender schemas as they occur in practice paralleled similar analyses of ideology and language: all are diffuse systems of social interaction, all rely on representation, all produce systems of dominance and subordination, and all share similar homeostatic processes and are therefore difficult to change.²⁸⁰ Martha Fineman, whom I relied on extensively in this section of that article, provides a helpful summary. She writes, “One way to understand the concept of ideology is to consider it as an information processing system. An ideology is constituted by a complementary collection of symbols, beliefs, and assumptions that, in combination, rationalize and give meaning to

²⁷⁴ Poirier, *Gender Stereotypes*, *supra* note 201, at 1073–79. This article was part of a symposium panel on VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN (1998), and in particular developed Dr. Valian’s discussion of gender schemas.

²⁷⁵ For some classic analyses of this issue, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Lawrence, *The Id, The Ego*, *supra* note 131. The social science literature on implicit bias grows apace, as does the legal academic literature seeking to apply it. Basically, at this juncture, “[t]here is . . . overwhelming evidence that mental constructs that are cognitively accessible influence how the perceiver evaluates and judges others.” Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CAL. L. REV. 1063, 1083 (2006). Samuel Bagenstos responds to critics of the science of implicit bias by arguing that their criticism is really not about the science, but instead about what the goal of antidiscrimination law should be. Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477, 479–80 (2007).

²⁷⁶ Poirier, *Gender Stereotypes*, *supra* note 201, at 1086–90; *cf.* Steven L. Winter, *The “Power” Thing*, 82 VA. L. REV. 721, 805–09 (1996) (discussing the diffuse replication of gender roles).

²⁷⁷ Poirier, *Gender Stereotypes*, *supra* note 201, at 1101.

²⁷⁸ *Id.* at 1101–06.

²⁷⁹ *Id.* at 1106. We should contrast the essentially unconscious homeostatic process that I described with the deliberate undermining of legislative change, which Dan Kahan described as the “sticky norms” problem. *See* Kahan, *supra* note 207.

²⁸⁰ Poirier, *Gender Stereotypes*, *supra* note 201, at 1106–13.

discourses.”²⁸¹ Moreover,

[D]ominant ideology is more likely to operate as a conservative force, serving to tame or domesticate discourses by exerting a confining pressure on their initial development, ultimately channeling even the most radical ideas into categories approved by the existing conceptual system. . . . Dominant ideologies are subtly and conclusively expressed and repressed in the very creation and recreation of social norms and conventions. . . . A dominant ideology is transmitted through everyday discourse—through language, symbols, and images as well as through the operations of formal institutions and structures of power.²⁸²

With this appreciation of the mechanism of reproduction of stereotypes in mind, I suggested that it might be possible to disrupt the cultural and cognitive reproduction of gendered social categories by shifting the examples encountered in the real world and by introducing counter-images in the media, so as to change the content of these categories bit by bit.²⁸³ This idea to conceive of reform of social practices of prejudice and discrimination as the cumulative effect of many small interventions at the local level is found in current scholarship on discrimination that takes cognitive processes into account. For example, Tristin Green’s most recent account of appearance discrimination in the workplace understands personal appearance choices sometimes to be connected to microperformances working against race and gender stereotypes; Green would allow those acts of transgressive appearance to operate against a contrary employer code of dress and behavior, so long as the employee asserted that s/he was in fact expressing a particular trait for an identity category that had been historically the subject of processes of dominance and subordination.²⁸⁴ Jerry Kang’s appreciation of the microprocesses by which racial subordination is perpetuated through the recurrence of images that sustain cognitive categories leads to his proposal to introduce “Trojan horses of race” into various social settings via “debiasing public service

²⁸¹ MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH-CENTURY TRAGEDIES* 20 (1995).

²⁸² *Id.* at 21–22.

²⁸³ Poirier, *Gender Stereotypes*, *supra* note 201, at 1097–98, 1120–21.

²⁸⁴ Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 418–20 (2008). Similarly, Tristin Green and Alexandra Kalev, noting that many of the sources of discrimination are relational, have proposed a series of structural approaches in the work place that would reorient it from “stereotype reinforcing” to “stereotype challenging.” Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435, 1436 (2008). Thus for example they recommend structuring work through cooperative interdependence rather than rigid hierarchy, *id.* at 1449, and relying on network collaboration in which higher and lower status workers are placed on collaborative teams. *Id.* at 1449–53.

announcements,” so as to disrupt and shift the processes that (re)produce stereotypes on the level of everyday interaction.²⁸⁵ A small section of an article of mine on cognitive bias reiterated the role of visibility of workplace performances of gendered occupational roles in creating and maintaining gender stereotypes, and argued that the owners of workplaces should be held responsible in some measure to control the sites of reproduction of disadvantageous gender stereotypes.²⁸⁶

One can appreciate the brave forays into transgressive visibility undertaken in the past by lone individuals; they have made possible the current broader challenges to traditionalist views on homosexuality.²⁸⁷ Recently, in *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, I juxtaposed some of Erving Goffman’s scrupulous descriptions of small personal interactions around identity performance, Kenji Yoshino’s consideration of passing and covering, and some of Judith Butler’s writings about transgressive identity performance.²⁸⁸ In different ways, all these authors link the cumulative effect of microperformances to the larger identity categories, including normal and stigmatized identity categories, that are at stake in a certain kind of social movement.

In this regard, I also bring to bear, in *Microperformances*, an essay on new social movements by sociologist Joseph Gusfield.²⁸⁹ He argues that where traditional social movements typically had concrete economic and legislative goals in mind, a certain kind of newer and diffuse social

²⁸⁵ Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1579–84 (2005). See generally Kang & Banaji, *supra* note 275, at 1080 (arguing that “we need a new model of discrimination for implicit bias—one based on a more accurate model of human cognition and emotions. This new model must promote proactive structural interventions that minimize harm without relying solely on potential individual litigation.”).

²⁸⁶ Poirier, *Cognitive Bias*, *supra* note 13, at 464, 486, 491. Authors typically conceive of these proposed interventions in terms of visibility. Mae Kuykendall, however, uses aural and linguistic imagery to describe this emergence of same-sex relationships towards acceptability. See Kuykendall, *Gay Marriage*, *supra* note 34, at 1027 (discerning an increasing “willingness to listen to the lives of gay people” and an obligation of the state “to provide structures that address spoken lives”); *id.* at 1028 (describing “a program of rhetorical silencing”); *id.* at 1009 (arguing that same-sex marriage litigation “assigns to [courts] a historic role in exploding the vacuum of public speech voiced to celebrate gay marriage”; see also Kuykendall, *Resistance*, *supra* note 206, at 388 (describing the federal Defense of Marriage Act as a project of “de-authorization of a subset of marriage speech that a significant number of citizens deploy for self-definition and that a significant number of other citizens respect and adopt”); *id.* at 391 (arguing that “the critical fact about gay marriage is the reality of its being spoken, and the accompanying ordinary expectation that the state will absorb the expanded meaning”). The two vocabularies—visible and linguistic/aural—are entirely compatible. Nor are they metaphors. Both describe important, concrete ways in which LGBT individuals and couples are either recognized and acknowledged socially and legally, or in which recognition is withheld.

²⁸⁷ See, e.g., Poirier, *Piecemeal and Wholesale*, *supra* note 270, at 297–300 (describing the piecemeal progress of early gay and lesbian rights movements).

²⁸⁸ See Poirier, *Microperformances of Identity*, *supra* note 271.

²⁸⁹ *Id.* at 23–25, 67 (discussing Joseph R. Gusfield, *The Reflexivity of Social Movements: Collective Behavior and Mass Society Revisited*, in *NEW SOCIAL MOVEMENTS: FROM IDEOLOGY TO IDENTITY* 58 (Enrique Laraña, Hank Johnston, & Joseph R. Gusfield eds., 1994)).

movement is also about meaning and identity.²⁹⁰ As such, one may participate in the sense of realizing that things are not necessarily as they were in everyday life, without being corralled and organized by the leaders of the movement.²⁹¹ The potential shift in diffuse social meaning that is effected by these movements is available to everyone, at the level of small-scale everyday life. Indeed, as Gusfield and his co-authors argue in another essay, “many contemporary movements are ‘acted out’ in individual actions rather than through or among mobilized groups.”²⁹²

Thus, we can appreciate small and personal interactions to be not the tail-end of identity-based social movements, but their fundamental building block. And the insertion of a differential naming practice into these everyday interactions can be appreciated as a potential disruption of the basic mechanism of seeking to change social and legal mechanisms of identity recognition. To be sure, the marriage equality movement, like other identity-based social movements, has specific and significant legal goals in mind too, but it also contains very important elements of retooling microinteractions around family recognition, normal and stigmatized status, and increased dignity and freedom. It is both local and larger than local at the same time.

One can discern both kinds of concern in skillful articulations of the marriage equality movement’s politics. This is evident in a recent articulation of strategy sent out by all the major LGBT litigation and advocacy groups in June 2008, in the wake of the California marriage equality victory. In a document entitled *Make Change, Not Lawsuits*,²⁹³ same-sex couples were encouraged to get married in California if they wished, but not to sue in their home states, and not to sue the federal government or their employers. Instead, once they got married, they should “call themselves married, and ask (sometimes demand) that family, friends, neighbors, businesses, employers and the community treat their marriages with respect.”²⁹⁴ Why? “Making the marriages of same-sex

²⁹⁰ Gusfield, *supra* note 289, at 64 (arguing that social movements typically involve both formal associational structures with specific goals and a more diffuse challenge to cultural meanings, including everyday interactions and understandings of identity). In one example, he argues that “Homosexuals attempt to change discriminatory laws but also become more open about their identity. Interaction between homosexuals and heterosexuals takes on a new tone.” *Id.* at 66. See also Reed, *supra* note 34, at 895–900 (discussing the production of “identity goods” by social movements, and the way in which state constitutional politics may be shaped by struggles over identity goods).

²⁹¹ Gusfield, *supra* note 289, at 62 (arguing that being a member of the women’s movement is about ideational commitment rather than formal membership, and “has its locus in a multiplicity of events, often that of individuals”).

²⁹² Hank Johnston et al., *Identities, Grievances, and New Social Movements*, in *NEW SOCIAL MOVEMENTS: FROM IDEOLOGY TO IDENTITY* 3, 7 (Enrique Laraña, Hank Johnston, & Joseph R. Gusfield eds., 1994).

²⁹³ AMERICAN CIVIL LIBERTIES UNION ET AL., *MAKE CHANGE, NOT LAWSUITS* (2008), available at http://www.nclrights.org/site/DocServer/Joint_Advisory_-_Final.pdf?docID=3241 [hereinafter *MAKE CHANGE*].

²⁹⁴ *Id.* at 1.

couples a conspicuous part of American society will help us get something we'll need to win ultimately: public acceptance of equal treatment for lesbian and gay families."²⁹⁵ It is these diffuse "conversations"²⁹⁶ that will "make the changes in law enduring and real at a day-to-day level."²⁹⁷ I analyzed the *Make Change* strategy—which I call a "conversation" strategy—in a section of my *Microperformances* article.²⁹⁸

The conversation strategy develops apace. In late February, 2009, in the wake of the November, 2008, Proposition 8 reversal by referendum of the California marriage equality decision, a new effort within the "conversation" strategy was unveiled.²⁹⁹ The American Civil Liberties Union LGBT & AIDS Project argued that

Research has shown that the single most effective way to change people's minds on LGBT issues is through one-to-one conversations, between either gay people or solid allies and their friends and family. Knowing someone gay, it turns out, is not enough. People have to talk with someone they trust about what it is like to be gay—ways in which it poses special challenges, ways in which it is quite ordinary.³⁰⁰

This strategy is now not just about coming out; it is about contact, conversation, and interaction with visibly LGTBQ folk. So a website has been created, as part of a coordinated conversation project, to encourage LGBTQ people to talk to three friends or acquaintances, not just about coming out, but about what it is like to be gay.³⁰¹ There are apparently several similar sites, and no copyright, so the whole project is expected to evolve.³⁰² The "conversation" strategy has come of age.³⁰³

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 5.

²⁹⁷ *Id.*

²⁹⁸ Poirier, *Microperformances of Identity*, *supra* note 271, at 59–72 (discussing the "conversation" strategy).

²⁹⁹ See Matt Coles, *Prop 8: Let's Not Make the Same Mistake Next Time*, HUFFINGTON POST, Feb. 26, 2009, http://www.huffingtonpost.com/matt-coles/prop-8-lets-not-make-the_b_170271.html (discussing the election loss and how to garner more votes in the future).

³⁰⁰ *Id.* See Fowler, *supra* note 23 (describing what is essentially a conversation strategy being deployed in view of the anticipated loss in the California Supreme Court on the challenge to proposition 8); Jesse McKinley, *Group Renews Fight for Same-Sex Marriage in California*, N.Y. TIMES, May 7, 2009, at A21 (same).

³⁰¹ Tell3, <http://www.tell-three.org> (last visited Apr. 12, 2009).

³⁰² Coles, *supra* note 299.

³⁰³ Compare MAKE CHANGE, *supra* note 293, at 1–5 (suggesting that conversation will help make change), and Coles, *supra* note 299 (promoting one-on-one conversation as the most effective way to change people's minds about gay marriage), with Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 610–13 (1994–95) (explaining that gay persons should share what it means to them to be married). Wolfson was a Senior Staff Attorney of Lambda Legal Defense and Education Fund at the time of this publication. *Id.* at 567 n.*. The essay includes a section on "what is to be done" to further the cause of marriage equality. *Id.* at 610–14. While acknowledging that the battles to achieve

Now consider what the insertion of a novel and unfamiliar term for a key family form into those conversations might do. As I have suggested, the “conversation” strategy around marriage equality relies on the fact that everyone involved already has a pretty good appreciation of what “marriage” means.³⁰⁴ Then we get a law that tells same-sex couples their relationships are legally recognized, but as “civil unions.” Now what? In Connecticut, if individuals and couples converse in terms of “civil union” the whole “conversation” strategy will be denatured and confusing. How can one talk about what it feels like to be a partner in a civil union? It just will not have the effect that the leaders of the marriage equality movement are counting on. It is less intelligible in a wide variety of microinteractions. One important point here: the smallest of details in interactions around “marriage” and “civil union” matter. They matter not just in a personal sense, but in a political sense as well. The name “marriage” and what it automatically conveys to those engaged in conversations are central to the marriage equality movement at this juncture. And that is because the local instances of naming practices and what they communicate are integral to the larger structures of identity and meaning that it is the goal of the political movement to change.

A final point for this section is fittingly both narrow and broad. We have a name for a certain social practice or device that cuts through the local and the universal, communicating persuasively in a way that can change minds: storytelling, or narrative. Narrative is concrete and is persuasive in its concreteness. Yet it also contains and conveys exemplars that appear to be generalizable. It is a vehicle for moral conversation from time immemorial. Narrative can be deceptive and also can be misused.³⁰⁵ But narrative is essential to the politics of marriage equality.

This is true only in part because narrative forms the basis of the current “conversation” strategy, as I am calling it. This idea about the narrative edge came to me while I was reviewing the affidavits in the *Kerrigan* case.³⁰⁶ They are extraordinarily gracious, articulate, compelling vignettes.

access to marriage for same-sex couples would involve other fora in addition to the courts, the role of individuals as articulated in this essay was to do local organization work or write letters. *Id.* at 612–13. Even though Wolfson’s strategy here involved “explaining why gay people should share, and be allowed to share, in the rights and responsibilities of marriage,” he situated this activity within the projects and goals of more organized social movements, not in dispersed families and neighborhoods; and it is not portrayed as the basis of change but as just one, ancillary part of it.

³⁰⁴ Poirier, *Microperformances of Identity*, *supra* note 271, at 62 (discussing the already-known quality of the scripts about marriage deployed in the conversation strategy).

³⁰⁵ See generally Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (enumerating some helpful aspects of legal storytelling, then critiquing its misuse); Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845 (1994) (responding to critics of legal storytelling, including Farber and Sherry).

³⁰⁶ Thanks to Bennett Klein of Gay and Lesbian Advocates and Defenders for providing the plaintiffs’ affidavits to me.

They are typically quite brief, and they convey effectively the personal sense of urgency and intangible injury around marriage equality in a way that is compelling—compelling in a different and perhaps stronger way than abstract argument ever could be. The *Kerrigan* opinions cite to the affidavits, as do various opinions to similar affidavits, in practically all the marriage equality cases. It is the stories of the plaintiffs that shape the more abstract debate.

The same is true in the Vermont and New Jersey investigations of the effectiveness of civil unions.³⁰⁷ Those reports are also replete with individual stories. The short documentary film *Freeheld* also comes to mind.³⁰⁸ It told the story of police detective Lieutenant Laurel Hester of Ocean County, New Jersey, dying of cancer, who fought to have the Ocean County Board of Freeholders exercise its option under the New Jersey domestic partnership law then in force so that Hester's long-time partner in life, Stacie André, could receive benefits upon Hester's death. Not only did personalization of the effects of the Board's decision whether to accept domestic partnerships work for Hester and André—the film won an Oscar for best short documentary. Professional advocates for marriage equality also are often especially effective and persuasive when they are narrating their own stories.³⁰⁹

Recently Nancy Levit, in a speech assessing Martha Nussbaum's recent work, pointed out the tension in the LGBT rights movement—the difficulty of telling stories about LGBT plaintiffs that will appeal to middle America without succumbing to a heteronormative bias.³¹⁰ A follow-up conversation with Levit convinced me that the whole topic of the storytelling strategy of the marriage equality movement is worthy of academic study;³¹¹ and that the skillfully told stories like those in the

³⁰⁷ NEW JERSEY FINAL REPORT, *supra* note 16; VERMONT 2008 REPORT, *supra* note 16.

³⁰⁸ FREEHELD: THE LAUREL HESTER STORY (Lieutenant Films 2006); *see also* Freeheld: The Laurel Hester Story, www.freeheld.com (last visited Apr. 12, 2009) (providing information about *Freeheld*).

³⁰⁹ *See, e.g.*, Barbara J. Cox, *Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships*, 13 WIDENER L.J. 699, 702–06 (2004) (narrating the effect of Professor Cox's marriage); Andrew Sullivan, *My Big Fat Straight Wedding*, THE ATLANTIC, Sept. 2008, at 17 (narrating the effect of Mr. Sullivan's marriage).

³¹⁰ Nancy Levit, Comments at the Columbia Law School Symposium in Honor of Martha Nussbaum (Feb. 13, 2009). *See* Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 18 COLUM. J. GENDER & L. (forthcoming 2009), available at <http://ssrn.com/abstract=1348687>, at 10–13.

³¹¹ *See, e.g.*, Melissa Murray, *Marriage Rights and Parental Rights: Parents, The State and Proposition 8*, STAN. J. C.R. C.L. (forthcoming 2009) (analyzing the rhetoric in the Yes on 8 media spots in fall 2008), available at <http://ssrn.com/abstract=1381702>. A classic use of storytelling theory to describe a range of LGBT issues and politics is Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992). Levit's remarks encouraged the presentation of more transgressive or queer stories as part of contemporary LGBTQ advocacy. Fajer, writing a generation ago, when the overall political balance was quite different, recommended using stories of love, relationship, and

Kerrigan affidavits could profitably be published and shared widely with a general audience.

A generation ago, Gerald Lopez pointed out that stock stories form a repertoire that a good lawyer needs to use to persuade.³¹² The “conversation” strategy is nothing but lay lawyering and choice among stock stories, top to bottom. The names we use for ourselves in these stories are key, particularly names charged with history and honor, or names that are empty and susceptible of interpretation as a code for other names, bad names, or dishonorable names. We need to consider seriously how the name “civil union” messes with our stock stories.

IV. THE “CIVIL UNION”/“MARRIAGE” DISTINCTION FOSTERS HARM WHEN APPLIED IN EVERYDAY SOCIAL PRACTICES OF NAMING AND RECOGNIZING FAMILIES

A. *Once It Is Time to Give Same-Sex Relationships an Official Name*

Having said so much about naming as a diffuse social practice, we can now be somewhat briefer about the harm created by the Act. It is a naming harm.

The Civil Union Act sought to correct a prior practice of refusing to recognize same-sex relationships legally at all. The legislature therefore had to decide what name to use for the same-sex couple status it sought legally to recognize. Same-sex couples could no longer remain legally nameless. To be sure, a certain kind of piecemeal recognition in Connecticut prior to 2005 had allowed the creation of rights regarding property, health care proxy, inheritance, children, etc., all without giving a unifying name to same-sex couples’ committed relationships. At some point that kind of approach becomes awkward and seems to point towards a more wholesale recognition.³¹³ The gestalt can change from a series of unconnected rights and obligations to a series of points which, understood to be connected, delineate a more organic view of the rights and obligations that inhere in LGBT identity. Moreover, inasmuch as part of the wholesale recognition process would likely involve some kind of formal ceremonial recognition of status, same-sex couples recognized by the state simply had to have a name.

But what name? The legislature could have established legal

family to counter a “sex-as-lifestyle” pre-understanding and stigma attached to gay men and lesbians. *Id.* at 546–70. That is certainly what the marriage equality movement has tended to do, but to the exclusion from visibility and respectability of the more queer among us.

³¹² Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984).

³¹³ See Poirier, *Piecemeal and Wholesale*, *supra* note 270, at 297–323 (discussing the piecemeal evolution of GLBT rights in New Jersey as a predicate to the potential for wholesale acceptance of such rights).

recognition by allowing same-sex couples to “marry.”³¹⁴ Instead, the legislature decided to recognize same-sex couples by a different name.

B. *The Problem of the Naming Distinction: Categorizing Couples as “Same-Sex” or “Opposite-Sex” is Widely Understood as “Gay” or “Straight,” and This Distinction, Against a Cultural Background of Stereotyping and Prejudice, Results in an Implied Stigma*

The point intuited by the *Kerrigan* court and other nomenclature opinions, though not always very clearly expressed, is that this official difference in naming works an ongoing harm, often trivial in any one instance but cumulatively problematic, because of the way that the new name, alongside the old one, will have effect in practice in everyday life. The availability of two different names will tend to force anyone involved in identifying or even thinking about a couple or family relationship to perform the distinction between same-sex and different-sex couples. In any everyday interaction involving a couple (or one member of a couple or another family member), a person naming the couple or member will have to ask: “What name am I to use? Is this one a ‘civil union’ or a ‘marriage?’”³¹⁵ They will have to consciously speak or write one way or another, acting on their knowledge about whether the couple is same-sex or different-sex. (Or perhaps they will have to acknowledge, confronted with the choice of names, that they do not know but ought to, or perhaps the two-name structure will make them inquire.) The diffuse naming behavior called for by the two-name structure will often, probably most of the time, remind the speaker, as well as everyone involved in recognizing the name, that a same-sex couple is likely gay or lesbian. Moreover, that silent invocation of “gay or lesbian” will, more often than not, prompt the person doing the naming and anyone who hears the name to rehearse cognitively, often unconsciously, whatever associations they may have with “gay or lesbian.”³¹⁶ These associations may be good or bad in any individual

³¹⁴ To be sure, this would also have been a political stance. No neutral position is available in the choice of names for a same-sex couple.

³¹⁵ In certain legal circumstances that question will be legally required. In a much larger set of social circumstances, knowing that the couple may be legally recognized, it will likely be thought appropriate to ask, although there would be no legal penalty for using the same terminology for all couple relationships.

³¹⁶ As Kang & Banaji describe the process generally:

Unconscious stereotypes, rooted in social categorization, are ubiquitous and chronically accessible. They are automatically prompted by the mere presence of a target mapped into a particular social category. Thus, when we see a Black (or a White) person, the attitude and stereotypes associated with that racial category automatically activate. Further, these attitudes and stereotypes influence our judgments, as well as inhibit countertypical associations.

Kang & Banaji, *supra* note 275, at 1084 (citations omitted). Associations to LGBT folks may trigger a number of negative stereotypes and prejudices. In the context of same-sex couples, one can anticipate additional associations around sexual activity, often understood as non-normative or illicit or immoral;

instance. But one can presume that, even in a relatively enlightened population like the citizens and residents of Connecticut,³¹⁷ there will often be negative associations with the category of gay or lesbian, given the recent and widespread history of stereotyping, prejudice, and discrimination. Stereotyping and prejudice undoubtedly continue to exist in the cognitive associations of many, many individuals within the state, and can be manifested in interactions that are as a practical matter beyond the purview of the state's legal power.

Put another way, establishing the separate name "civil union" interpellates in a certain way. For one thing, it interpellates the members of a same-sex couple as gay or lesbian, with all that that identification may entail. It does so indirectly, without using those names, simply because as a matter of social fact the separate name "civil union" will be understood as a proxy for gay or lesbian. "Civil union" interpellates indirectly in another sense, and does so even when the members of a same-sex couple (or their relatives and friends) are not themselves immediately responding to a "hail." In the web of social understandings and relationships, the separate category "gay and lesbian" will be reinforced in all who must name family structures. That means everyone. Inserting the term "civil union" into social discourse interpellates everyone to continue to perform distinctions between heterosexual and gay/lesbian families, by naming and recognizing them differently.

The state can well say, as it did in the Civil Union Act, that "civil union" is to be deemed the equivalent of "marriage" and that the other cognate kinship and ceremonial terms include civil union.³¹⁸ That disclaimer is simply ineffective, given the way diffuse social practice works. Establishing the distinction legally, so as to force everyone to recognize and maintain the distinction, will in itself reinforce pre-existing everyday social practices of categorization, and the cognitive structures

as well as around parenting stereotypes.

³¹⁷ These groups overlap, but not entirely. I am getting at the ongoing cumulative and shared semiotic field produced by many microinteractions. A more accurate description of the relevant category, were it not so cumbersome and jargony, would be "all those who interact with one another around the process of identifying couples qua couples, and who collectively constitute and produce the ongoing cultural semiotic field of the State of Connecticut." As I wrote recently elsewhere, "The core dynamics [of the *Kulturkampf*] are either local and place-based, or are universal and aterritorial, occurring at diffuse . . . levels of scale; and they all involve the discursive spaces within which we produce and reproduce tradition and identity." Poirier, *Identity Processes*, *supra* note 271, at 391 (footnote omitted). Communities like Connecticut are imagined, though they are no less real because of that fact. See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 2006).

³¹⁸ CONN. GEN. STAT. § 46b-380o (2005) ("[W]herever in the general statutes the term 'spouse', 'family', 'immediate family', 'dependent family', 'next of kin' or any other term that denotes the spousal relationship are used or defined, a party to a civil union relationship shall be included in such use or definition, and wherever in the general statutes . . . the term 'marriage' is used or defined, a civil union shall be included in such use or definition."), *held unconstitutional*, *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407 (Conn. 2008).

that underlie them, including those harmful ones that are against the policy of the state and plausibly unconstitutional.

Thomas Healy's account of the working of stigmatic injury is helpful here in the mechanism it discerns for stigmatic injury.³¹⁹ As a general background point, Healy argues that law both reflects and helps to shape social norms about stigmatized identity.³²⁰ "[I]t signals what behavior is appropriate toward certain groups."³²¹ There are several other effects as well. Where the law results in physical segregation, it can make overcoming stigma more difficult.³²² And the law can create categories that are used as the "basis for stigmatization."³²³ Importantly, though, "law can also be used to combat stigma[.]" because "when law removes its stamp of inferiority from stigmatized groups, society is likely to do the same."³²⁴

Healy identifies several types of harm from stigma, including the threat of discrimination,³²⁵ the actual experience of discrimination,³²⁶ the threat of loss of self-esteem,³²⁷ and the internalization of negative stereotypes by the stigmatized, who then behave differently—the so-called "stereotype threat."³²⁸ Summarizing these types of injury, Healy argues that those who are in a stigmatized identity category are injured "because the government's action brands them with a mark of disgrace that invites discrimination and prejudice against them, threatens their self-esteem, and makes them vulnerable to stereotype threats and self-fulfilling prophecies."³²⁹

Healy also argues persuasively that where a group is already stigmatized government action can add to the injury:

³¹⁹ Healy, *supra* note 35.

³²⁰ See, e.g., *id.* at 451 (discussing the interplay of law and stigma).

³²¹ *Id.* at 452.

³²² E.g., *id.* ("[W]hen law requires or permits segregation of stigmatized groups, it makes it more difficult for those groups to overcome the stereotypes that help to generate their stigma.")

³²³ *Id.*

³²⁴ *Id.* at 452–53.

³²⁵ *Id.* at 453–54 ("[B]ecause the stigmatized are marked as less than fully human, they face the 'ever-present possibility' that they will be the targets of prejudice and discrimination.") (internal citations omitted).

³²⁶ *Id.* at 454 ("[D]iscrimination makes it harder for the stigmatized to obtain employment, housing, education, and to develop lasting relationships with others.")

³²⁷ *Id.* at 454–56 (discussing the mechanisms of loss of self-esteem).

³²⁸ *Id.* at 456–58 (discussing the internalization and self-fulfilling prophecy victims of stigmatization may experience). On stereotype threat and intellectual performance, see, for example, Kang & Banaji, *supra* note 275, at 1087–90 (discussing evidence of stereotype threat as well as "stereotype boost" to positively-stereotyped minorities and "stereotype lift" to those in competition with negatively stereotyped minorities). Basically, "arbitrary environmental cues can trigger implicit cognitive processes that interfere or facilitate performance on seemingly objective measures." *Id.* at 1089.

³²⁹ Healy, *supra* note 35, at 461. Healy's discussion is informed by the work of Erving Goffman on stigma and interactions. *Id.* at 422 & n.29, 449, 454 (citing ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963)).

By reinforcing the social belief that those with a particular trait are discredited, the government adds to the prejudice and discrimination against them, creates additional threats to their self-esteem, and reaffirms the stereotypes that lead to self-fulfilling prophecies. The government's role also likely increases the intensity of these harms, particularly the threat to self-esteem.³³⁰

Healy contends that the Supreme Court in *Lawrence v. Texas*,³³¹ in deciding to reach the due process issue presented to it and to overrule *Bowers v. Hardwick*,³³² indicated the availability of stigmatic harm as a constitutionally cognizable injury.³³³ Healy's point about *Lawrence* is correct, though it requires some fine-tuning when the stigmatizing law is a naming statute rather than a criminal one. It is not enough to note that *Lawrence* and the "civil union"/"marriage" distinction both involve homosexuality, though historic stereotyping and prejudice around homosexuality is the underlying context for the stigmatic injury in both instances. The *Lawrence* opinion defines the stigmatic harm in terms of a kind of penumbra from the moral taint of criminalization.³³⁴ Moreover, the Court points out, the stigmatic harm from criminalization "is not trivial."³³⁵ In the context of "civil union" the argument is slightly more complex. The mere fact of a nomenclature distinction allows the underlying stigmatized category of homosexual to remain more active in social and legal microinteractions than if the name "marriage" had been adopted for all couples. And because the name for the family unit must be deployed day in and day out, the reactivation of underlying cognitive biases is likely to be constant.³³⁶

³³⁰ *Id.* at 464.

³³¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

³³² *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled*, *Lawrence v. Texas*, 539 U.S. 558 (2003).

³³³ Healy, *supra* note 35, at 438–41.

³³⁴ *See Lawrence*, 539 U.S. at 575:

If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.

³³⁵ *Id.*

³³⁶ The practice of routinely categorizing individuals and couples in daily life according to whether they are in same-sex or different-sex relationships seems to me somewhat different from the notion that criminalization conveys a message of stigma. The naming process occurs more frequently and in a wider variety of contexts than the act of identifying sodomy as criminal. To be sure, scholars have argued that identifying same-sex couples qua couples will often trigger associations to same-sex sex. *See, e.g.,* Mary Ann Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1643–45, 1658–63 (1993) (discussing associations between same-sex couples and same-sex sex and the negative implications of this association in different social contexts); Fajer, *supra* note 311, at 516, 538–46 (discussing what he

Healy's analysis of stigmatic injury resonates with a germinal work by Charles Lawrence, the important 1987 article *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*.³³⁷ Lawrence's article was a response to the doctrine of discriminatory purpose established for purposes of federal constitutional civil rights law in *Washington v. Davis*.³³⁸ Lawrence argued that "the injury of racial inequality exists irrespective of the decision maker's motives."³³⁹ He proposed a different way of thinking about racism, one "that more accurately describes both its origins and the nature of the injury that it inflicts."³⁴⁰ Lawrence focused on shared ideas, attitudes, and beliefs, the racist content of which we may well be unaware.³⁴¹ These ideas are part of the culture which we inherit³⁴² and which we in turn reproduce. Lawrence argued that racism is culturally "transmitted by tacit understandings."³⁴³ Focusing on intent thus ignores much of what we know about the workings of racism. If we wish to eradicate racism, Lawrence argued, we must "recognize racism's primary source."³⁴⁴ Focusing on "cultural symbols that have racial meaning," Lawrence recommended a "cultural meaning" test for government action—governmental action should be evaluated "to determine whether it conveys a symbolic message to which the culture attaches racial significance."³⁴⁵ If so, it would receive strict scrutiny in the courts.

Professor Lawrence also elaborated on a theory of equal protection as a right to be free from stigma.³⁴⁶ Stigma involves labeling a group as inferior in a way that shames and degrades that group's members.³⁴⁷ Stigma involves a whole "social system of laws, practices, and cultural mores"³⁴⁸ It injures in two ways, according to Lawrence: by inflicting psychological injury on the individual's dignity and self-respect, and by branding the individual in a way that affects others' respect for and

calls the "sex-as-lifestyle assumption," which reduces gay men and lesbians to an imputed focus on sexual activity). Criminalization for sexual conduct conveys stigma, as does an attribution of obsessive focus on sexuality. The two stigmatic insults are related, but not quite the same.

³³⁷ Lawrence, *The Id, the Ego*, *supra* note 131, at 318. Indeed, Healy relies on Lawrence's work. Healy, *supra* note 35, at 467–68.

³³⁸ Lawrence, *The Id, the Ego*, *supra* note 131, at 318 (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

³³⁹ *Id.* at 319.

³⁴⁰ *Id.* at 321.

³⁴¹ *Id.* at 322.

³⁴² *Id.* at 323.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 324.

³⁴⁶ *Id.* at 349–55. Lawrence relied expressly on Kenneth Karst's theory of equal protection. *Id.* at 350 n.141 (citing inter alia Karst, *Foreword: Equal Citizenship*, *supra* note 36, and Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983)). He also expressly noted Karst's acknowledgement of Erving Goffman's work on stigma. *Id.* at 350 n.143 (noting Karst's reliance on GOFFMAN, *supra* note 329, at 1–9)).

³⁴⁷ *Id.* at 350.

³⁴⁸ *Id.*

interaction with her.³⁴⁹ The injury of stigmatization is cumulative.³⁵⁰ Moreover, stigma is “self-perpetuating.”³⁵¹

Stigma is at its heart a symbolic injury.³⁵² But symbols usually don’t have inherent meaning. They are interpreted only in light of a cultural tradition which gives them their negative understanding and thus creates the injury. As Lawrence explains: “[I]n most cases the symbol is not inherently pejorative. Rather, the message obtains its shameful meaning from the historical and cultural context in which it is used and, ultimately, from the way it is interpreted by those who witness it.”³⁵³ “[S]tigmatizing actions injure by virtue of the meaning society gives them”³⁵⁴ Intent is not necessary to infliction of the injury.³⁵⁵ But an understanding of the cultural meaning of symbols attached by law to groups *is* essential.

The symbolic action at issue in one classic pronouncement of stigmatic injury was school segregation. *Brown v. Board of Education* held that even where physical facilities and other tangible factors are equal, segregating schoolchildren “solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”³⁵⁶ Therefore, the Court held, “Separate educational facilities are inherently unequal.”³⁵⁷ This holding was limited to public education in the *Brown* case itself,³⁵⁸ but it has been applied to other kinds of segregation, and is the basis for a sense of equal citizenship that some argue is of constitutional scope under the Equal Protection Clause.³⁵⁹ The harm—or at least the intangible harm,

³⁴⁹ *Id.* at 351.

³⁵⁰ “[S]eparate incidents of racial stigmatization do not inflict isolated injuries but are part of a mutually reinforcing and pervasive pattern of stigmatizing actions that cumulate to compose an injurious whole that is greater than the sum of its parts.” *Id.* at 351.

³⁵¹ *Id.*

³⁵² “The injury of stigmatization consists of forcing the injured individual to wear a badge or symbol that degrades him in the eyes of society.” *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

³⁵⁷ *Id.* at 495.

³⁵⁸ *Id.*

³⁵⁹ See, e.g., KARST, *BELONGING TO AMERICA*, *supra* note 36 (developing a theory of equal citizenship that is protected by the equal protection clause of the fourteenth amendment); Karst, *Foreword: Equal Citizenship*, *supra* note 36 (same).

One of the classic follow-on statements about the stigma of separate categories apart from any tangible harm may not help as much as its frequent citation might suggest. *Heckler v. Mathews* contains broad language about the stigma of categorization; the Court wrote:

[D]iscrimination itself, by perpetuating “archaic and stereotypic notions” or by stigmatizing members of a disfavored group as “innately inferior” and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in the disfavored group.

Heckler v. Mathews, 465 U.S. 728, 739–40 (1984) (citations and footnote omitted). But this case was about economic discrimination against men in the context of government retirement benefits. Not

where it coexists with tangible harm—of segregation comes not from the physical separation but from the act of separating folks into two classes based on race.

Now consider the *Kerrigan* case. The naming or labeling at stake in the “civil union”/“marriage” distinction has nothing of physical segregation about it in the sense of the placing of live bodies in one location versus another. But it involves an important, if intangible institution—the family and its name—and authorizes (and in legal contexts requires) a linguistic sorting of couples and their families. The labeling distinction is about exclusion from the use of an important intangible institution.³⁶⁰ Underneath the ostensibly neutral label of “civil union” lies another category, which will be widely understood.

The *Kerrigan* court cites *Brown v. Board*, as it should have.³⁶¹ Equally important, in my view, is the court’s citation to a Connecticut case, *Evening Sentinel v. National Organization for Women*.³⁶² That case involved help-wanted advertisements that had been sorted by the publishing newspapers into men only, women only, and either men or women.³⁶³ Citing to the “no such thing as separate but equal” principle of *Brown v. Board*, the court in *Evening Sentinel* held that “segregating employment opportunities advertisements into racial, religious, age, national origin or ancestry or sex classifications constitutes discrimination.”³⁶⁴ The newspaper therefore could not, acting on its own, engage in this kind of impermissible sorting; to do so was “aiding and abetting” advertisers and employers, prohibited under the statute.³⁶⁵ Actual physical segregation or exclusion was not at issue; moreover, no job was actually denied on account of sex. This case was about a classification harm. It was a matter of “[s]ymbolic discrimination.”³⁶⁶ The separately labeled help-wanted ads could reinforce the actions of others in separating jobs into different kinds for men and women and, concurrently, reinforce conceptions of men and women as suitable for different kinds of job

exactly your typical stigmatized group. Healy argues that the problem in the case was really one of an underinclusive statute, as to which Congress had provided in advance that any attempt to challenge the underinclusiveness would be remedied by leveling down. Thus it would appear that any lawsuit for underinclusiveness could be met with a standing challenge, as no remedy would be available under the terms of the statute itself. The statement about intangible stigmatic injury was, according to Healy, a way of getting the plaintiff standing to challenge a statute that otherwise might have been unreviewable. Healy, *supra* note 35, at 433.

³⁶⁰ See generally Poirier, *Cultural Property*, *supra* note 4, at 362–66 (using language of access and exclusion and similar property rhetoric as an entry into discussion of traditionalist concern about misuse of the institution of marriage by same-sex couples).

³⁶¹ *Kerrigan v. Comm’r of Public Health*, 957 A.2d 407, 418 (Conn. 2008) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

³⁶² *Id.* (citing *Evening Sentinel v. Nat’l Org. for Women*, 357 A.2d 498 (Conn. 1975)).

³⁶³ *Evening Sentinel*, 357 A.2d at 501.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 502.

³⁶⁶ *Id.* at 504.

opportunities—thus perpetuating stereotypes as well as limiting actual opportunities for women.³⁶⁷ Although the court in *Evening Sentinel* did not use this language, the case was about a kind of stigmatic injury. The court also had to interpret the exclusionary classification against a cultural and historical background. It noted a contemporary policy in the state of Connecticut to eliminate all forms of discrimination against women,³⁶⁸ and noted that the act at issue addressed “subtle” as well as overt discrimination.³⁶⁹ The statute therefore prohibited not only exclusion from jobs but “practices leading to and facilitating such discrimination.”³⁷⁰

The establishment of two separate names for a basic family structure is very much like the establishment of separate listings for jobs for men and women. It does not in itself say anything explicitly prejudicial. But it will be read against a history of prejudice. Also, it forces those seeking to alter the underlying important social structure (families or jobs, as the case may be) to proceed through the use of categories that have pernicious effects that the state is clearly committed to countering. Just as the separate job listings were read by the Connecticut Supreme Court to cause harm through symbolic discrimination, the “civil union”/“marriage” distinction read in context aids and abets a cognizable constitutional injury. *Evening Sentinel*, then, should be taken not just as part of a string cite, but as a helpful gloss on the Connecticut Supreme Court’s reasoning on cognizable injury in *Kerrigan*.

Once a distinction is established, the processes of stereotyping and prejudice unfold as of themselves. For this reason, it seems to me, impact rather than intent is key in understanding the injury in the Civil Union Act. Inquiring into what the legislature intended by establishing a distinct term “civil union” is not relevant. Once the legislature establishes the term “civil union,” it is how the term will work in everyday life that matters. This insight may help us address the concern that no invidious intent had been shown (the concern voiced by the dissenting justices in *Kerrigan*), and that only discriminatory purpose would rise to the level of constitutional injury.³⁷¹ The *Kerrigan* majority did not explain this as

³⁶⁷ As the court wrote, “The very act of classifying individuals by means of criteria irrelevant to the ultimate end sought to be accomplished operates in a discriminatory manner. Such discrimination is destructive to society as a whole in that it eliminates a class of individuals who otherwise could have made vital and fresh contributions.” *Id.*

³⁶⁸ *Id.* at 503–04.

³⁶⁹ *Id.* at 504. Interestingly, Professor Lawrence provides an example of physical segregation of men and women in which the cultural background meaning would be exculpatory. Whereas racial segregation of restrooms would be read in a context of stigma, segregation of restrooms by sex would not. See Lawrence, *The Id, the Ego, supra* note 131, at 351–52 (noting that segregation of men and women in the restroom context is socially acceptable while segregating individuals by race is not); see also Healy, *supra* note 35, at 467–68 (discussing Lawrence’s restroom example).

³⁷⁰ *Evening Sentinel v. Nat’l Org. for Women*, 357 A.2d 498, 504 (Conn. 1975).

³⁷¹ Justice Borden objects that there has been no intent to discriminate or stigmatize. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 514 (Conn. 2008) (Borden, J., dissenting). Justice Zarella

clearly as it could have.³⁷²

Nor does the fact that the term “civil union” has no history mean it cannot possibly be a source of harm, as Justice Borden would have it.³⁷³ It is inserted into a rich history of family and kinship naming, a cipher that must be spoken in conjunction with a distinction (gay-straight) with widespread and harmful associations in the recent past. It simply is not neutral. The distinction itself will reinforce underlying stereotypes associated with gay and lesbian individuals and couples. No factual inquiry is needed here.

Some courts addressing the nomenclature issue have discerned an injury in “civil union” or “domestic partner” because its use forces members of such a relationship to disclose that they are gay or lesbian when they would prefer not to.³⁷⁴ That is certainly a harm of the information privacy sort (though not one addressed separately by the *Kerrigan* court). But that separate issue of control of disclosure of personal information does not address the generic harm that is perpetrated by the establishment of differential legal kinship names society-wide. Consider the “Miss”/“Mrs.” harm. It is not about disclosure of private fact as such—marital status is always public somewhere.³⁷⁵ The concern is rather that the “Miss”/“Mrs.” distinction reinforces and makes more

makes a similar argument. *See id.* at 521–23 (Zarella, J., dissenting) (noting that the “driving force behind the development of traditional marriage” between a man and a woman was not intentionally discriminatory toward gay and lesbian individuals). The *Kerrigan* majority looks at disparate treatment alone. *Id.* at 412. The Act “directly classif[ies] and prescrib[es] distinct treatment on the basis of sexual orientation” and “operate[s] clearly and directly to impose different treatment on gay individuals because of their sexual orientation.” *Id.* at 431 n.24.

³⁷² It is centrally relevant that gay persons are “a minority group that continues to suffer the enduring effects of centuries of legally sanctioned discrimination” *Id.* at 432. But it is not quite accurate to say that “laws singling [gay persons] out for disparate treatment are subject to heightened judicial scrutiny to ensure that those laws are not the product of such historical prejudice and stereotyping.” *Id.* This is a vestigial intent theory reemerging. Here, the court seems to think that it should be looking to what produced the law, rather than to what kind of effects the law is likely to produce, based on social fact and cultural meaning.

³⁷³ “At this point in our state’s history . . . and without appropriate fact-finding on the issue, I am unable to say that [civil union] is widely considered to be less than or inferior to marriage, or that it does not bring with it the same social recognition as marriage. It is simply too early to know this with any reasonable measure of certitude.” *Id.* at 486 (Borden, J., dissenting).

³⁷⁴ *See, e.g., In re Marriage Cases*, 183 P.3d 384, 446 (Cal. 2008) (discussing an additional privacy harm in forcing disclosure of same-sex couple status, without linking this harm to the opinion’s underlying analysis of constitutional injury).

³⁷⁵ To be sure, in contrast to public records of marriages, we do not maintain an official register of who is gay or lesbian. But there is widespread disclosure where same-sex couples are concerned. Inevitably, various visible or linguistic markers for those in a same-sex relationship make likely homosexuality evident, regardless of whether a speaker ever uses the terms “civil union” or “marriage.” These might include the visible presence of a same-sex partner, or a pronoun reference to “he” or “she,” or other indicators such as photographs or clothing, which will disclose same-sex couple status and thus allow others to infer homosexuality. *See generally* Fajer, *supra* note 311; Poirier, *Microperformances of Identity*, *supra* note 271, at 14–15 (discussing the way in which visible same-sex couples communicate identity traits around sex, gender, and sexual orientation and disrupt normal performances of these categories).

legitimate in everyday life the distinction between married and unmarried women, as well as problematic cognitive associations related to that distinction. The “Miss”/“Mrs.” distinction reproduces a sorting and labeling of women.

Consider the alternatives that a legislature must address when it reaches the point of deciding to legally recognize same-sex couples. If a state eschews “civil union” or some other word, and uses “marriage” and its cognates in a way that encompasses same-sex couples, that will not immediately change most of everyday practice. On various social levels many people and civic institutions (some churches, for example) will still withhold the name marriage. Moreover, given that same-sex couples will still be visible as same-sex couples in everyday life (and identifiable audibly/linguistically too, as soon as a same-gender pronoun is used), the inference of homosexuality will still occur in many circumstances even if the legal relationship is called “marriage.”³⁷⁶ But if the name “marriage” also applies to same-sex couples, inquiring into same-sex/different sex and speaking differentially in light of that fact will not be legally required. On a social level, if the different name “civil union” is not authorized, the name “marriage” for same-sex unions is likely to gain hold significantly more quickly in common parlance. Even though resistance to it is likely to persist for a long time (especially given the fierce adherence of some traditionalists and civic institutions to a particular conception of “marriage”), naming practices will tend to change faster overall. Also, the intangible harm of social non-recognition (an intangible harm which I have not addressed in this Article) is likely to be addressed more quickly where a new term “civil union” does not stand in the way of changing the everyday usages of “marriage” to include legally recognized same-sex couples. And that in turn may facilitate more widespread legal recognition, as a matter of interstate comity or eventually in formal change at higher levels of government.

C. Constitutional Injury through Exclusion When the Government Recognizes One Group with Special Honor

So far, I have focused on the fact that the differential naming approach will result in categorization, which will which cause individuals to associate “civil union” with “gay or lesbian” and whatever else that may be

³⁷⁶ In fact, that is one reason why I think that allowing same-sex couples to marry probably will, in the long run, alter the gendered nature of traditional marriage. The everyday microperformances of married status by same-gender couples will consistently trouble the diffuse expectation that a prototypical married couple will be opposite gender. Compare Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 18–19 (1991) (arguing that gay and lesbian marriage will alter the gendered structure of marriage), with Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage will Not “Dismantle the Legal Structure of Gender in Every Marriage”*, 79 VA. L. REV. 1535, 1536–37 (1993) (disagreeing with Hunter).

associated with in each individual's cognitive structures. The other half of the equation in the *Kerrigan* opinion is the fact that "marriage," in all its splendor, has a long and honored history. Calling a same-sex couple's relationship by the name "civil union" withholds that traditionally honored and recognized status from those couples and their families. Is this a separate kind of stigmatic injury, and if so, is it of constitutional dimension? Thomas Healy discerns, among the indicia of standing for stigmatic injury in federal court cases, that this kind of honor/no recognition pair has been understood to be of constitutional dimension, in particular in the subset of Establishment Clause cases involving religious displays.³⁷⁷ But what, after all, is the harm in honoring one religion's tradition in a public display, and not another religion's tradition in the same way?

In her concurrence in *Lynch v. Donnelly*, a religious display case involving a Nativity crèche, Justice O'Connor wrote that governmentally-sponsored religious displays would make nonadherents feel that they are outsiders, not full members of the political community, and would send a message to adherents that they are insiders and favored members of the community.³⁷⁸ We can generalize this principle of non-endorsement, and see the underlying structure of such an injury in governmental action that gives special recognition to one group and not to another, particularly in centrally important and status-conferring social categories.³⁷⁹ The injury concerns the use of what Kenneth Karst calls "symbols of inclusion and exclusion."³⁸⁰ The religious display cases involve one basic identity category—religion—and hold that the government may not endorse one religion and withhold endorsement from another.³⁸¹ Arguably, the identification as a legitimate family is equally central to social status, and the elevation of different-sex families and implicit lesser status of same-sex families in that arena is an injury of the same kind. As Karst writes, "the government's message of exclusion is itself a stigmatic harm, and an

³⁷⁷ Healy, *supra* note 35, at 436–38.

³⁷⁸ *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring) (involving the display of a Nativity scene by the City of Pawtucket, Rhode Island). Justice O'Connor reiterated this analysis the following term in *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring) (involving a "moment of silence" in public schools). This endorsement test was essentially adopted by a majority of justices in *County of Allegheny v. ACLU*, 492 U.S. 573, 595–99 (1989) (applying to public displays of a crèche and of a menorah next to a Christmas tree the endorsement test from O'Connor's concurrence in *Lynch*); *id.* at 623–32 (O'Connor, J., concurring) (articulating and applying the endorsement test from her *Lynch* concurrence).

³⁷⁹ Jack Balkin observes that Justice O'Connor's "endorsement" test is about status categories; it "prohibit[s] certain government actions that raise the status of some social groups at the expense of others." Balkin, *supra* note 247, at 2349 n.109. Balkin also notes that the injury here is a communication by the state of inferior group status, and bears a close relationship to Charles Lawrence's argument about "cultural meaning". *Id.* (discussing the O'Connor endorsement test in light of Lawrence, *The Id, the Ego, supra* note 131).

³⁸⁰ Karst, *The First Amendment, supra* note 38, at 512, 519.

³⁸¹ *Id.* at 512.

unconstitutional denial of full membership in the community.”³⁸² In the one instance, the problem is displaying a religious symbol, which conveys honor to one group above others. In the other, the problem is reserving the name marriage for opposite-sex couples, which effectively conveys the honored status of marriage on one group above the other. In its analysis of the difference between “marriage” and “civil union,” the Massachusetts Supreme Judicial Court specifically called it a “stigma of exclusion.”³⁸³

Professor Karst has developed this idea of the stigmatic injury of symbolic exclusion into a broad theory of equal citizenship and belonging rooted in the Fourteenth Amendment.³⁸⁴ He describes the principle of equal citizenship as follows:

Each individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member. Stated negatively, the principle forbids the organized society to treat an individual as a member of an inferior or dependent caste or as a nonparticipant. The principle thus centers on those aspects of equality that are most closely bound to the sense of self and the sense of

³⁸² Karst, *Justice O'Connor*, *supra* note 37, at 371.

This type of injury has also come to be known as “expressive harm”. See, e.g., Rachel D. Godsil, *Expressivism, Empathy, and Equality*, 36 MICH. J. L. REF. 247, 252–53, 254–75 (2003) (tracing the doctrinal and theoretical history from early stigma cases, through reliance on intent, through the reemergence of stigma and expressive harm tests and theories). In a major theoretical article on expressive harm, Elizabeth Anderson and Richard Pildes argue that Equal Protection and Establishment Clause cases are the most often discussed bases for a constitutional theory of expressive harm. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1532 (2000). Equal Protection may be concerned with the expression of “contempt, hostility, or inappropriate paternalism towards racial, ethnic, gender, and certain other classifications, or that constitute them as social inferiors or as a stigmatized pariah class.” *Id.* at 1533. But it may also address inappropriate recognition—“laws that, by giving too much weight to a suspect class, express a divisive conception of citizens—a conception that represents their racial, ethnic, religious, or other parochial identities as more important than their common identity as citizens of the United States.” *Id.* at 1533–34. Moreover, while there are multiple functions to Establishment Clause doctrine, Anderson and Pildes conclude that “[e]xpressivist analysis properly dominates the parts of Establishment doctrine that perform the same function for religious differences among citizens that Equal Protection doctrine performs for racial and ethnic differences among citizens.” *Id.* at 1550.

³⁸³ The court writes: “The bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits. It would deny to same-sex spouses only a status that is specially recognized in society and has significant social and other advantages.” *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004).

³⁸⁴ See, e.g., KARST, *BELONGING TO AMERICA*, *supra* note 36; Karst, *Why Equality Matters*, *supra* note 346; Karst, *Foreword: Equal Citizenship*, *supra* note 36; see also Balkin, *supra* note 247, at 2343–44 (arguing that “[t]he constitution has an egalitarian demand . . . for equality of social status. . . that exists even though it cannot be achieved by legal means alone[.]” and that this demand is “the deep meaning of the American political experience.”); Poirier, *Gender, Place*, *supra* note 271, at 336–39 (discussing the notion of equal citizenship in the context of a tiered account of the praxis of exclusion and inclusion, with specific incidents of exclusion at the bottom level, broad concepts of inclusion and citizenship at the top, and specific legal doctrines of various sorts mediating between them).

inclusion in a community.³⁸⁵

The school desegregation cases and public accommodation desegregation cases were about claims to equal citizenship, Karst asserts.³⁸⁶ But “neither the [Fourteenth A]mendment’s declaration of citizenship nor its equal protection clause is limited to the subject of race.”³⁸⁷ “It was the claim of equal citizenship that informed the first manifesto to issue from the American women’s movement”³⁸⁸ Karst also argues that *Bowers v. Hardwick* should have approached the issue of the constitutionality of sodomy laws as one of stigma and exclusion.³⁸⁹ One of the five “illustrative cases” Karst uses to introduce his idea of equal citizenship as belonging is, precisely, the crèche display in Pawtucket, Rhode Island, that was the subject of *Lynch v. Donnelly*.³⁹⁰

The “endorsement” test from the religious display cases is helpful in elucidating the status harm in the “civil union”/“marriage” distinction. For these cases depend entirely on whether the state has acted to elevate one group, and not at all on whether the state has acted to disparage another group. As Jack Balkin points out, “the test does not require any deliberate attempt to degrade or harm; the mere effect of endorsement as judged by a reasonable observer is sufficient.”³⁹¹ Justice Borden’s concern in his *Kerrigan* dissent about what “civil union” means simple drops out as part of the analysis. The Civil Union Act grants the honored name, status, and

³⁸⁵ KARST, BELONGING TO AMERICA, *supra* note 36, at 3. In this broad reading of the Fourteenth Amendment, Karst expressly disagrees with the central cases of the second half of the nineteenth century which limited the scope of the Fourteenth Amendment. *Id.* at 57–61. Jack Balkin, making a parallel argument about a broad concept of equal citizenship, relies on a number of “status-disestablishing clauses” in the constitution. Balkin, *supra* note 247, at 2346–53.

Anderson & Pildes identify the same broad underlying issues of citizen respect, participation, and membership as Karst does. Under the principle of expressive harm, “State action must express ‘equal concern and respect’ for all persons. . . .” Anderson & Pildes, *supra* note 382, at 1520 (quoting RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977)). And state action “must express a collective understanding of all citizens as equal members of the State . . . notwithstanding their racial, ethnic, or religious differences.” *Id.*

³⁸⁶ KARST, BELONGING TO AMERICA, *supra* note 36, at 4. *Brown v. Board of Education*, 374 U.S. 483 (1954), is a “leitmotif” in Karst’s book. *Id.* at 14. *Brown v. Board* depended on identifying the harm of a sense of inferiority created by state-sponsored exclusion, and Karst asserts that within a few years this case became the key citation for this principle, although often without explanation. *Id.* at 18–19. Indeed, Karst describes instances of segregation as effectively “degradation ceremonies.” *Id.* at 4 (referring to Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOCIOLOGY 420 (1956)).

³⁸⁷ *Id.* at 4.

³⁸⁸ *Id.* at 111 (discussing the Declaration of Sentiments adopted in Seneca Falls, New York, in 1848).

³⁸⁹ *Id.* at 204–06 (discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled*, *Lawrence v. Texas*, 539 U.S. 558 (2003)). In addition to criminalization of sodomy, Karst identifies the other principal form of exclusion from citizenship of gays and lesbians as the issue of military service and security clearance. *Id.* at 208. Karst was writing before the political developments of the 1990s opened up the possibility of same-sex couple and family recognition and made the longstanding practices of exclusion in those areas widely visible and contestable.

³⁹⁰ *Id.* at 8–9 (discussing *Lynch v. Donnelly*, 468 U.S. 668 (1984)).

³⁹¹ Balkin, *supra* note 247, at 2349 n.109.

kinship of “marriage” to some legally-recognized couples but not to all of them. To be sure, what constitutes an endorsement, as opposed to say an instructive historical display, is the subject of ongoing controversy and sometimes fine distinctions.³⁹² But in the case of a legislature reserving “marriage” for opposite-sex couples, the intentional elevation of these couples through use of the name “marriage” and the simultaneous exclusion of same-sex couples from similar honor through the use of some other name, couldn’t be clearer. Karst offers a theory of the Fourteenth Amendment that elaborates from our country’s cultural underpinnings as well as case law, in just the way Robert Leckey recommends.³⁹³ It expresses well a set of constitutional values that focus on equal citizenship and belonging. The Connecticut Supreme Court, interpreting the state constitution, can be understood to apply the same touchstone of constitutional principle to the elevation of one group but not another.

V. RECAPITULATION: NAME CALLING AND IDENTIFYING STIGMA

The title of this Article is deliberately ambiguous, in fact doubly so. It relies on ambiguities in English grammar around verb forms ending in “ing.” “Name calling” could be about someone calling out bad names—in this case, possibly, the implicit stigma associated with the Connecticut legislature’s refusal to use the word “marriage” officially for same-sex couples, prescribing “civil union” instead. “Civil union” does not explicitly insult same sex couples, to be sure. But the Civil Union Act deliberately withholds the unique name “marriage,” which confers favored identity, normal status, and easily recognized kinship forms. This withholding could be understood as an insult from the legislature, albeit a discreet one.

“Name calling” is also potentially a shorthand for the phenomenon of interpellation.³⁹⁴ Against a background of a history of stigma, discrimination, and second-class (or worse) treatment of gay and lesbian folk, the withholding of “marriage” and its replacement by a neologism—“civil union”—facilitate the continued interpellation of gay and lesbian couples, their families and, in a different way, all those who must interact

³⁹² Compare *McCreary County, Ky. v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005) (finding display of Ten Commandments at county courthouses, as part of a larger display, to be an unconstitutional establishment of religion, in light of past history of the county’s attempts to display Ten Commandments, which indicated a religious purpose to the display), with *Van Orden v. Perry*, 545 U.S. 677 (2005) (finding display of Ten Commandments on the Texas State Capitol grounds not to be an establishment of religion). As Balkin points out, the endorsement test, like Charles Lawrence’s cultural meaning test, requires courts “to investigate the cultural meaning of government action to determine if an injury to status has occurred;” disagreements will be inevitable. Balkin, *supra* note 247, at 2349 n.109.

³⁹³ Leckey, *supra* note 14, at 465–74.

³⁹⁴ See *supra* Part III.B (discussing Althusser’s theory of interpellation and its relation to name-calling).

with them as couples. This interpellation occurs because of preexisting, stigmatizing practices and names, which persist to some considerable extent in Connecticut—the territorial jurisdiction at issue—as well as in wider society. Because “marriage” has a tradition, history, and culture, and “civil union” does not, the diffuse social practices around identifying and stigmatizing gays and lesbians (singly and as couples) are allowed more room to perpetuate themselves than if legal same-sex unions had been formally legally labeled “marriage.” “Civil union” is effectively a blank slate, and in the absence of a name that will call up our inherited associations to “marriage” for same-sex couples—and only “marriage” will do that—we are able to hear other names, other insults, still calling.

“Identifying stigma” in the Article’s title is also ambiguous. The Article agrees with and expands upon what the Connecticut Supreme Court majority did: it identified stigma lurking behind the neologism “civil union.” Justice Borden, arguing in dissent that a word without history could not be an insult, is just wrong, though other judges have said the same. The *Kerrigan* majority was justified here by relying on obvious cultural meaning and social fact to recognize the persistent vestiges of a longstanding practice of subordination and prejudice.

This Article has suggested that the reason the court is able to identify stigma in “civil union” is precisely because the distinction will evoke stigma in the process of everyday identifications—the repeated naming—of a fundamental kinship form. The “civil union”/“marriage” distinction forces or encourages everyone, across a wide spectrum of interpersonal interactions, to engage in repeated acts of cognitively identifying same-sex couples as distinct from married different-sex couples. In these interactions, traditional stigmatization and second-class (or worse) views of homosexuals will inevitably come to mind. These may or may not be reenacted in any given instance, but they will be recalled, often unconsciously, and sometimes they will be reenacted. Requiring same-sex couples to be named differently thus tends to perpetuate some of the historical practice of stigmatizing them. The Act’s purported guarantee of equal treatment legally is well and good, but it simply fails to come to terms with the everyday social and cultural practices and the cognitive mechanisms underlying them, in which names for kinship categories are applied and identities are recognized and (re)produced. Requiring a different name for same-sex couples produces an identifying stigma.