(Still) Not Fit To Be Named: Moving Beyond Race To Explain Why 'Separate' Nomenclature for Gay and Straight Relationships Will Never Be 'Equal'

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Courtney Megan Cahill†


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Abstract

This Article provides a novel approach to an issue that has recently assumed national prominence: Whether it is constitutional to extend same-sex couples the substance of marriage but only under a different name, like civil union or domestic partnership. While legal actors have challenged the constitutionality of nominal difference by comparing it to the discredited legal doctrine of separate-but-equal, this Article moves beyond race to show why ‘separate’ names for gay and straight relationships will never be ‘equal,’ namely, because they reflect and perpetuate something that has applied to same-sex intimacy for centuries: a speech or a name taboo.

In supplementing an analogy grounded in race with a history that is unique to homosexuality, this Article provides a model for advocates and courts when challenging and considering, respectively, the constitutionality of nominal difference moving forward, a model that does not rely solely on an analogy (race/sexual orientation) that has invited widespread critique. Beyond its strategic aims, however, this Article uses the recent “name” issue as an occasion to revisit a phenomenon with which legal historians are well familiar but that the legal community more generally tends to ignore, namely, the influence that the past continues to have on an ostensibly more enlightened present.
I. INTRODUCTION

Three months ago, the California Supreme Court considered whether same-sex couples are constitutionally entitled to the name, “marriage,” in addition to the benefits and obligations that flow from that legal status.\(^1\) Although the state of California had previously extended most of the substance of marriage to same-sex couples under the label of “domestic partnership,”\(^2\) the plaintiffs in that case wanted more—they wanted, in short, for the state to recognize their relationships in the traditional and conventional lexicon of marriage.\(^3\) As is likely well known by now, the court there ruled that “reserving the historic designation of ‘marriage’ exclusively for opposite-sex couples” violates state constitutional liberty and equality guarantees.\(^4\) Unless voters overturn that decision and change the name, marriage, back to its opposite-sex roots this November,\(^5\) same-sex

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1 In re: Marriage Cases, 183 P.3d 384 (Cal. 2008).
2 See CAL. FAM. CODE. § 297 (Deering 2007) (defining and providing the requirements for establishing a domestic partnership in California). As the California Supreme Court pointed out in In re: Marriage Cases, California’s Domestic Partner Act was a near mirror image of marriage. Because the differences between those two statuses were relatively inconsequential, the court concluded that the issue in that case was a question of “whether domestic partners have a constitutional right to the name of ‘marriage.’” In re: Marriage Cases, 183 P.3d at 468. For a list of the minor differences between marriage and domestic partnership status, see id. at 401 n.24. The same holds true for the distinction between marriage and civil union status in Vermont, New Jersey, New Hampshire, and Connecticut, and for the distinction between marriage and domestic partnership status in Oregon, states in which those two statuses are nearly identical. See infra note ______.
3 The New Jersey Supreme Court characterized the name issue as “whether committed same-sex partners have a constitutional right to define their relationship by the name of marriage, the word that historically has characterized the union of a man and a woman”). Lewis v. Harris, 908 A.2d 196, 212 (N.J. 2006). Nearly ten years ago, when the push for same-sex marriage was not yet at its height, Michael Warner, a vocal critic of the same-sex marriage movement, noted that “the campaign for gay marriage” has always been more about the language of marriage, or what he calls the “ancient ritual vocabulary of recognition and status,” than about the substantive benefits that flow from that legal status. MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF Queer Life 132, 143 (1999).
4 In re: Marriage Cases, 183 P.3d at 400.
5 In June, California’s Secretary of State certified a ballot initiative (Proposition 8) that would, if passed in November, change the name, marriage, back to its former opposite-sex definition. See www.sos.ca.gov/elections/elections_j.htm#2008/General (Ballot Measure Update as of August 5, 2008).
couples in California can finally say that they are legally “married” rather than simply, or merely, “domestic partnered.”

The name issue, which one jurist has described as a “pitched battle over who gets to use the ‘m’ word,” has recently assumed center stage in marriage equality litigation. In addition to being the focus of the California Supreme Court’s marriage equality decision, it is an issue that the high courts of Massachusetts and New Jersey considered in 2004 and 2006, respectively, that is currently before the high court of Connecticut (and has been for over one year), and that will likely be before several courts in the near future as more and more states decide to offer same-sex couples the substance of marriage but only under a different name, such as “civil union” or “domestic partnership”—a “compromise” approach to the same-sex marriage question that appeals to politicians and to the public alike. While most states, according to a recent Pew Research Center survey, are not ready

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6 Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004). During oral argument in In re: Marriage Cases, Justice Chin deployed that same locution when he asked counsel for the City of San Francisco whether or not the entire issue in that case didn’t “just boil down to the use of the ‘m’ word,” to which she responded, “You’re right.” Audio and video archives of the oral argument in that case are available at www.courtsinfo.ca.gov/courts/supreme/audio-arch.htm.

7 Lewis v. Harris, 908 A.2d 196, 222 (N.J. 2006) (finding that the substantive benefits of marriage must be extended to same-sex couples under New Jersey’s constitution but that those couples did not have a constitutional right to the name, marriage); Opinions of the Justices to the Senate, 802 N.E.2d at 565, 571 n.5 (finding that the name, marriage, must be extended to same-sex couples under Massachusetts’ constitution and stating that “discrimination . . . flows from separate nomenclature”).

8 Kerrigan v. Conn. Dep’t of Pub. Health, 909 A.2d 89 (Conn. Super. 2006) (finding that it was not unconstitutional for the state to extend a separate nominal status to legally-recognized same-sex couples). Plaintiffs appealed the trial court’s decision in Kerrigan to the Connecticut Supreme Court, before whom that case has been fully briefed since February, 2007. Moreover, the high court heard oral arguments in that case in May, 2007. See www.glad.org/marriage/Kerrigan-Mock/kerrigan_documents.html. For recent media coverage of the marriage v. civil union/domestic partnership debate, see Alison Leigh Cowan, Gay Couples Say Civil Unions Aren’t Enough, THE N.Y. TIMES, at A25 (Mar. 18, 2008); NPR, All Things Considered, For Some, Civil Unions Gain Second-Class Stigma, 2007 WL 9368148 (May 17, 2007); Laura Mansnerus, Civil Union or Marriage? A Long Wait in New Jersey, THE N.Y. TIMES, at A25 (Oct. 25, 2006).

9 William N. Eskridge, Jr., How Government Unintentionally Influences Culture (The Case of Same-Sex Marriage), 102 NW. U. L. REV. 495, 496 (2008) (referring to civil unions and other nominally separate statutory schemes as a “compromise” approach to the same-sex marriage question); see also infra notes ______ and accompanying text.
to extend the right to “marry” to same-sex couples,\textsuperscript{10} they are likely, or at least more likely, prepared to offer a parallel institution that affords the same protections and benefits to, and imposes the same obligations and responsibilities on, same-sex couples that are afforded to and imposed on their married opposite-sex counterparts.\textsuperscript{11} Thus, regardless of what happens in Connecticut, the name issue is one that will only increase in national prominence over the next few years.

In analyzing the issue of nominal difference, legal actors have offered several reasons why “names matter”\textsuperscript{12} and why it is unconstitutional for states, like Connecticut, New Hampshire, New Jersey, Oregon, and California until this past May, to extend same-sex couples the substantive benefits and responsibilities of marriage but to call that relationship by another name. They have argued, for instance, that “[t]he words ‘marriage’ and ‘marry’” are an integral part of the fundamental right to marry.\textsuperscript{13} Similarly, they have contended that “[p]rohibiting same-sex couples from using the name, ‘marriage,’ to describe their relationships sends a message ‘that what same-sex couples have is not as important or as significant as ‘real’ marriage.’”\textsuperscript{14} Most often, though, advocates, courts, and commentators have invoked the discredited legal doctrine of separate-but-equal in support of the proposition that the nominal distinction between “marriage” and “civil union” (or “domestic partnership”) “bestow[s] a separate status on people (whatever its tangible ‘equality’),” one that

\textsuperscript{10} Indeed, quite the contrary, given that at the current time thirty-eight states have mini-defense of marriage acts (or mini-DOMAs) that define marriage for state purposes as a union between a man and a woman, and twenty-seven states have constitutional amendments banning same-sex marriage. For an overview of these laws and amendments, see ANDREW KOPPELMAN, SAME-SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES (2006).

\textsuperscript{11} See Pew Forum: A Stable Majority: Most Americans Still Oppose Same-Sex Marriage (Apr. 1, 2008), found at http://pewforum.org/docs/?DocID=290 (stating that 36% of Americans favor allowing marriage for same-sex couples whereas 54% of Americans favor allowing civil unions for the same).

\textsuperscript{12} During oral argument in In re: Marriage Cases, the plaintiffs’ advocates repeatedly stated to the California Supreme Court that “names matter” and that “words matter.” See www.courthinfo.ca.gov/courts/supreme/audio-arch.htm. See also Lewis v. Harris, 908 A.2d 196, 226 (N.J. 2006) (Poritz, J., dissenting) (stating that “[w]hat we name things matters, language matters”).

\textsuperscript{13} Respondents’ Supplemental Brief in In re: Marriage Cases, Case No. S147999, at 47.

\textsuperscript{14} Id. at 37 (citation omitted).
“fundamentally, and impermissibly, diminish[es] their humanity.”¹⁵ This “separate status,” they argue, is no more constitutionally permissible today than it was in 1954, when the Supreme Court ruled in Brown v. Board of Education that the doctrine of separate-but-equal violated the United States Constitution’s Equal Protection Clause.¹⁶

This Article provides a novel way to consider why the use of separate nomenclature to describe gay and straight relationships will never be equal, even if those relationships are substantively identical, as well as why something that looks like a stepping stone to equality (civil unions/domestic partnerships) is, in fact, discriminatory and harmful. While advocates routinely turn to the repudiated legal doctrine of separate-but-equal to support their contention that nominal separation is unconstitutional, they have overlooked the history that best explains why that is so. That is, they have overlooked the most persuasive reason why the nominal separation between “marriage” and “civil union” (or “domestic partnership”) will never satisfy genuine equality: Because it hearkens back in any number of ways to homosexuality’s criminal past, and, in particular, to a time when same-sex intimacy was known simply, and derogatorily, as “a crime not fit to be named.”¹⁷

More specifically, this Article argues that the separate-but-equal analogy to nominal separation is incomplete without an understanding of the issues of naming, language, and representation that historically plagued same-sex intimacy in the law. It submits that the problem with nominal difference, or with the state’s creation of a separate nominal status for same-sex couples, is not just the fact that separation itself connotes inferiority or second-class status, or that the name, “civil union” (or “domestic partnership”), lacks the intangible qualities of the name, “marriage,” as many advocates have suggested.¹⁸ Rather, or in addition, nominal separation is

¹⁵ Id. at 36. For a more complete survey and discussion of the comparison between the nominal separation of gay and straight relationships (or what some advocates have referred to as “nominal segregation”) and the physical separation of individuals on the basis of race, see infra notes _____ and accompanying text.
¹⁶ 347 U.S. 483 (1954) (holding that separate but equal schools for black and white children violated the federal Constitution’s Equal Protection Clause).
¹⁸ See, e.g., Brief of the Plaintiffs-Appellants in Kerrigan v. Conn. Dep’t of Pub. Health, S.C. 17716, at 16 (citing Brown for the proposition that “separation itself ‘generates a feeling of inferiority as to . . . status in the community that may affect . . . hearts and minds’” (citation omitted), and Sweatt v. Painter, 339 U.S. 629 (1950), for the proposition
problematic, constitutionally as well as morally, because it points back to a time when homosexuality was not only criminalized, but also linguistically marginalized—to a time when it was marked by an “economy of silence” or a “practice of silence,” in the words of one commentator.\footnote{19} That is, for centuries, homosexuality was “structured by its unnameable quality,”\footnote{20} as same-sex intimacy was either, or both, not discussed at all or simply referred to as ‘that which should remain unnamed.’\footnote{21} Indeed, at most, legal and non-legal discourse together relegated same-sex intimacy to a mere “quasi-nominative” status in law and culture, something sort of named but not entirely, and certainly not in affirmative terms.\footnote{22}

This Article argues that it is that history that best explains why “names matter” to gays and lesbians and why the nominal separation between legally-recognized gay relationships and legally-recognized straight relationships will never represent true equality, even if the substance of those relationships is identical. It contends that nominal separation will always be a sign not just of sexual minorities’ criminal past, but also, and more important for this Article’s purposes, of their unnameable past—as well as of the repugnance that inspired it and the harms that flowed from it. It ultimately suggests that the nominal separation between “marriage” and “civil union” (or “domestic partnership”) will never be equal because it both reflects and perpetuates something that has applied to same-sex intimacy for centuries: A speech—or, more appropriately, a name—taboo. Indeed, this

\footnote{19} LEslie J. Moran, The Homosexual(ity) of Law 34 (1996) (referring to the “economy of silence” that was “generated” by the law’s injunction to silence with respect to sodomy).
\footnote{21} See Part IV.A, infra, for a more thorough survey of the way in which same-sex sex was either, or both, elided from speech entirely or named only by a disgust-driven language of negation (e.g., an ‘unnamable’ crime or an ‘unspeakable’ offense). Professor Janet Halley has argued that the law’s deployment of the “unnameability trope,” the rhetorical practice of naming sodomy/homosexuality only by unnamning it, both helped to create a “tradition of reticence” and “silence” around homosexuality and led to “definitions of homosexuality that [were] not definitions at all.” Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 U.C.L.A. L. REV. 915, 955 (1989).
\footnote{22} Eve Kosofsky Sedgwick, Epistemology of the Closet 203 (1990) (stating that the rhetorical practice of explicitly not naming same-sex sex/homosexuality had a “quasi-nominative, quasi-obbliterative structure” because it both elided same-sex sex/homosexuality from speech and acknowledged it as an erotic possibility).
Article will demonstrate that when the state refuses to extend “the ‘m’ word” to same-sex couples, as more than one court has tellingly framed the name issue,\(^{23}\) it reminds gays and lesbians that they have always been excluded from names (in one way or another) in the law and that they have suffered, and continue to suffer, a variety of harms on account of that exclusion. It reminds them, in short, that the “gay closet”—or, more specifically, the gay linguistic closet—remains “a shaping presence” in their lives.\(^{24}\)

This Article will proceed as follows. Part II will provide an overview of the name issue, including additional information with respect to how and why that issue has arisen and a short summary of its treatment by those courts that have considered it. Part III will then look more closely at the separate-but-equal analogy to nominal separation, the principal doctrinal lens through which advocates, commentators, and courts have analyzed the name issue, and briefly consider what is largely missing from the deployment of that analogy in this context: a sense of history, and, specifically, of the history that will prove exactly why a separate nominal status for same-sex relationships will never be equal but rather always “viewed by both [lesbian and gay people] and by others as a badge of inferiority.”\(^{25}\)

To that end, Parts IV and V will provide a fuller account of why officially-recognized gay and straight relationships will never be equal if they are named differently. Part IV will survey the “economy of silence” that marked homosexuality’s rhetorical past, which this Article understands to include the practice of either, or both, (1) not talking about same-sex intimacy at all, or (2) referring to it in a language of negation, that is, as something so abhorrent and distasteful that it could not, or should not, be named. Moreover, this Part will suggest the principal reason for, or motivation behind, that rhetorical tradition as well as the harmful effects that it produced. Part V will then draw from that history and from Part IV’s analysis of it to argue that the nominal separation between “marriage” and its so-called linguistic equivalents will never be equal, even if the substance of those relationships is identical, because that separation both reflects and perpetuates homosexuality’s disgust-driven rhetorical past and the harms that

\(^{23}\) See supra note _____ and accompanying text.

\(^{24}\) SEDGWICK, supra note _____, at 68 (stating that “for many gay people [the gay closet] is still the fundamental feature of social life” and that “there can be few gay people, however courageous and forthright by habit, however fortunate in the support of their immediate communities, in whose lives the closet is not still a shaping presence”).

\(^{25}\) Respondents’ Opening Brief on the Merits in In re: Marriage Cases, Case No. S147999, at 41.
flowed from it, a past that should no longer play even a residual role in our legal order for reasons discussed below.

The objective of this Article is both narrow and broad. Its first, and more narrow, objective is this: To supplement the principal doctrinal argument on which advocates have relied when challenging the constitutionality of separate names for officially-recognized gay and straight relationships, the separate-but-equal argument, with history, and, specifically, with a history that is unique to homosexuality. In so doing, this Article provides a model on which advocates and jurists might rely when challenging and considering, respectively, the constitutionality of nominal difference moving forward, a highly divisive issue that the country will be confronting with only greater frequency in the years to come for reasons that I set forth in Part II. Moreover, viewing the increasingly litigated “‘m’ word” issue through a historical lens that is unique to sexual minorities offers advocates for marriage equality an opportunity to avoid the charge that they have used race analogies in ineffective, and even inappropriate, ways in the marriage equality context, a criticism that has become more widespread over the past few years and that I will also address in the Parts that follow.

Its second, and more expansive, objective is as follows: To remind the legal community that past forms of discrimination, and their resultant harms, can manifest themselves in the present in ways that might seem innocuous or insignificant, and that deserve our attention all the more so for that very reason. Legal historians have long observed the extent to which the ghosts of our disinherited and disavowed past persevere in contemporary law in such quiet and understated ways that we are likely to miss them altogether—the extent, that is, that past forms of legal discrimination, prejudice, and subordination persist in ‘these enlightened times’ despite, or perhaps because of, our belief that we have moved past them. The name

26 See infra notes _____ and accompanying text.
27 See infra notes _____ and accompanying text.
issue, which has been described by some courts as “new,” “neutral,” “inconsequential,” and merely “nominal,” exemplifies just this phenomenon, as the history that underlies that issue suggests that it is far from any of those things. Quite the contrary, viewing that issue through the lens of history throws into relief just how very old, consequential, and substantive the issue of names is for those who are currently demanding to be legally denominated in the language of “marriage.” More important, viewing the name issue in the way that this Article does reveals just how very much we continue “to drag our disinherited selves behind us,” so to speak, in the law’s regulation of that which it has always been reluctant to name.

II. THE NAME ISSUE: AN OVERVIEW

Part II provides an overview of the name issue. Section A clarifies what that issue is and distinguishes it from the definitional issue that same-sex-couple plaintiffs routinely faced during the early years of marriage equality litigation. Section B then briefly surveys the judicial response to the name issue in those jurisdictions where it has arisen. It should be noted that the purpose of Section B is merely to provide some concrete examples of the way in which courts have so far approached the name issue. In so doing, it offers a few models of the way in which courts are likely to approach it in the future as well.

A. The Name Issue

The name issue, in a nutshell, is this: Is it constitutionally permissible to give same-sex couples all the benefits and responsibilities of marriage—from property and inheritance rights to the obligations, financial and

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30 Kerrigan, 909 A.2d at 98.
31 Id. at 95.
32 Id.
33 This wonderfully precise quotation comes from Professor Martha Ertman of the University of Maryland, School of Law, who used it in a talk before the Roger Williams law faculty in October 2007.
otherwise, imposed on married couples when they divorce—but to officially call that status by another name, such as “civil union” or “domestic partnership”? Assuming that it is unconstitutional to withhold the right to marry from same-sex couples, would a “civil union” or “domestic partnership” status cure or remedy that constitutional violation? Or, does a nominally separate status for legally-recognized gay relationships not only fail to remedy the unconstitutionality of barring same-sex couples from the

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34 Currently, Connecticut, New Hampshire, New Jersey, and Vermont have “civil union” status for same-sex couples, and Oregon has “domestic partnership” status for the same. In these states, civil unions and domestic partnerships are the mirror image of marriage for purposes of state law. See CONN. GEN. STAT. ANN. §§ 46b-38bb (West 2005); N.H. REV. STAT. T. I, Ch. 5-C, Prec. 5-C: 41 (West 2008); N.J. STAT. ANN. § 37:1-1 (West 2007); O.R.S.T. 11, Ch. 106, Prec. 107.005 (West 2007); VT. STAT. ANN. Tit. 15 § (West 2005). Only same-sex couples may enter into a civil union/domestic partnership status in these states. Moreover, the District of Columbia, Hawaii, Maine, and Washington have domestic partner laws that provide a range of health care benefits and other protections to same-sex couples, but that are not the mirror image of marriage. See D.C. CODE § 32-701(3) (2006) (defining domestic partner); HAW. REV. STAT. § 572C-1 (2006) (defining and providing the requirements for reciprocal beneficiary status); ME. REV. STAT. ANN. Tit. 18, § 1-201 (2006) (extending inheritance rights to domestic partners); 2007 WASH. LEGIS. SERV. Ch. 156 (S.S.B. 5336) (West 2007). With few exceptions, only same-sex couples may enter into a domestic partnership in these states. The two exceptions are Hawaii and Washington. In Hawaii, any two adults can enter into a reciprocal beneficiary status, and in Washington, any two individuals over the age of 62, of the same or opposite sex, can enter into a domestic partnership. The name issue has been litigated only in California, Connecticut, New Jersey, and Massachusetts, those states that offer (or, in the case of California and Massachusetts, that did offer or proposed offering, respectively) a status to same-sex couples that is substantively equal to marriage but nominally different from it. No court in New Hampshire, Oregon, or Vermont has considered the constitutionality of nominal distinctions between “marriage” and “civil union/domestic partnership.” Vermont was the first state to pass civil union legislation in 2000, following the Vermont Supreme Court’s holding in Baker v. State that same-sex couples must be extended the same benefits and responsibilities afforded to, and impose on, married opposite-sex couples under that state’s constitution. Baker v. State, 744 A.2d 864 (Vt. 1999). While the Baker court directly considered the issue of substantive equality for same-sex couples under the law, it never squarely considered whether the name, marriage, was also required under Vermont’s constitution, explicitly refusing to rule on “whether the denial of a marriage license operates per se to deny constitutionally-protected rights.” Id. at 886. Instead, it reserved that question for “some future case,” id., thereby limiting its decision to the more narrow—and, in its view, more critical—question of whether substantive, as opposed to substantive as well as nominal, equality was a constitutional requirement.
tangible benefits of marriage, but itself constitute an independent constitutional violation?\textsuperscript{35}

The name issue is an enormously relevant one for the entire country for more than a few reasons. First, and as mentioned in the Introduction, it is likely that states contemplating the now proverbial same-sex marriage question will increasingly opt for a compromise approach that extends same-sex couples substantive equality but only under a different name, as did New Hampshire earlier this year.\textsuperscript{36} Second, the presumptive Democratic presidential nominee, Senator Barack Obama, publicly supports civil unions for same-sex couples rather than marriage for the same, thus suggesting that at the very most the next president of the United States will support substantive, but not nominal, equality for sexual minorities.\textsuperscript{37} Third, the issue of nominal equality has become the focal point for same-sex marriage advocates, whose marriage equality efforts have recently centered on getting the name, marriage, in states like California, Connecticut, and New Jersey, each of which already gives, or gave, same-sex couples the substantive benefits and responsibilities of marriage but only under a different name. Fourth and last, the issue of names, and of sexual minorities’ exclusion from them, is one that has very deep roots in American law; indeed, the issue of nominal separation is but the most recent chapter in a much longer, and

\textsuperscript{35} The Supreme Judicial Court of Massachusetts suggested as much in \textit{Opinions of the Justices to the Senate} when it stated that “[m]aintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage is the constitutional infirmity at issue.” \textit{Opinions of the Justices to the Senate}, 802 N.E.2d 565, 570 (Mass. 2004).

\textsuperscript{36} As mentioned above, \textit{supra} note _____, recent Pew Research Center surveys suggest that significantly more Americans support civil unions (or domestic partnerships) for same-sex couples than they do marriage for the same. \textit{See also} Jennifer Parker, \textit{Jersey Revives Same-Sex Marriage Debate, found at http://abcnews.go.com/Politics/Story?id+28873429page=1} (Feb. 19, 2007) (stating that while Americans might not be ready for same-sex marriage, they do “believe that same-sex couples should be granted rights and benefits”); Joshua Lynsen, \textit{Lawmakers Debating Civil Unions, Marriage Across U.S., WASHINGTON BLADE} (Mar. 9, 2007); Todd Simmons, \textit{Civil Compromise: In Connecticut and Oregon, Lawmakers who Oppose Same-Sex Marriage Back Civil Unions, THE ADVOCATE} (May 24, 2005).

\textsuperscript{37} Senator John McCain, the presumptive Republican presidential nominee, does not support same-sex marriage; quite the contrary, he supports amendments to state constitutions that explicitly ban that relationship. \textit{See} Michael Falcone, \textit{McCain and Obama Differ on Same-Sex Marriage Initiative, N.Y. TIMES, at A1} (July 3, 2008) (stating that Senator McCain supports the ballot initiative in California that would change the name, marriage, back to its opposite-sex roots and that while Senator Obama opposes that initiative, he does not support marriage for same-sex couples but rather civil unions and domestic partnerships for the same).
much older, narrative about homosexuality, naming practices, and the law, as this Article will later show. For these reasons, sustained attention to what this “perplexing” name issue, in the words of one court,\(^{38}\) is all about is both warranted and wise.

Deceptively simple, the name issue has confounded courts, which have recently described it as “challenging,”\(^{39}\) “philosophical,”\(^ {40}\) and, as mentioned above, “perplexing.”\(^ {41}\) Moreover, and likely for those reasons, the name issue has not lent itself to a quick and easy disposition or resolution. For instance, that issue has been before the Connecticut Supreme Court for over one year.\(^ {42}\) Similarly, the California Supreme Court, which recently found that “the failure to designate the official relationship of same-sex couples as marriage violates the California Constitution,”\(^ {43}\) needed 121 pages to justify why that was so—an opinion that never definitively resolves whether “the name, ‘marriage,’ in the abstract, is considered a core element of the state constitutional right to marry.”\(^ {44}\) Finally, the New Jersey Supreme Court, which considered the name issue in 2006, at once stated that names were not an issue of “constitutional magnitude”\(^ {45}\) and that names were so important that something close to chaos would ensue were the court to mandate that gays and lesbians be given the name, marriage, as the official designation of their relationships.\(^ {46}\)

In one sense, the fact that courts appear to be struggling with the name issue is surprising, particularly given its similarities to the old definitional issue that early on confronted courts during the first wave of marriage equality litigation in the 1970s and 1980s. In those cases, courts were called upon to consider the constitutionality of opposite-sex marriage definitions, which, at the time, withheld all of the substance of marriage, as

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\(^{38}\) Lewis v. Harris, 908 A.2d 196, 221 (N.J. 2006) (stating that “[r]aised here is the perplexing question—‘what’s in a name?’”)


\(^{40}\) Id.; see also Kerrigan v. Conn. Dep’t of Pub. Health, 909 A.2d 89, 97 (Conn. Super. 2006) (stating that plaintiffs’ argument that same-sex couples’ nominally separate institution, civil unions, was “nonnormative and, thus, less privileged under the law,” was “an interesting philosophical point”—although one with which the court ultimately disagreed).

\(^{41}\) Lewis, 908 A.2d at 221.

\(^{42}\) See supra note \___.

\(^{43}\) In re: Marriage Cases, 183 P.3d 384, 398 (Cal. 2008).

\(^{44}\) Id. at 434.

\(^{45}\) Lewis, 908 A.2d at 222.

\(^{46}\) See id. (stating that to extend the name, marriage, to same-sex couples “would render a profound change in the public consciousness of a social institution of ancient origin”).
well as its name, from same-sex couples. Courts reviewing those definitions often held that they were constitutional because same-sex marriage was a definitional impossibility: Lacking a foundation in language, same-sex marriage could not exist in law, either.\(^{47}\) This sort of reasoning came to be known as the “definitional” rationale,\(^{48}\) and was one on which courts routinely relied when finding that opposite-sex marriage definitions did not offend state and federal constitutional guarantees.\(^{49}\)

In another sense, however, it is not a complete surprise that the contemporary name issue does not sit so comfortably with those courts which have considered, or are considering, it. That issue, unlike the old definitional one, is just about names, nomenclature, language, and pure nominal difference. Whereas the old definitional issue arose in the context of laws that withheld all the rights of marriage—including, but surely not limited to, its lexicon—from same-sex couples, the new name issue is more narrow, more rarified, and, for those reasons, more “philosophical” than its definitional ancestor. In fact, the new name issue hearkens back not so much to the old definitional issue, but to an even older philosophical question

\(^{47}\) See, e.g., Adams v. Howerton, 486 F. Supp. 1119, 1123 n.2 (C.D. Cal. 1980) (stating that “[t]he dictionary definition of the term ‘spouse’ is a husband or wife”), aff’d, 673 F.2d 1036 (9th Cir. 1982); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971) (stating that “Black’s Law Dictionary furnishes three definitions of marriage, all of which recognize that it is a union or contract between a man and a woman”); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) (citing various dictionary definitions of marriage as a union between a man and a woman).

\(^{48}\) WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 89 (1996) (stating that as of 1996, “the most popular argument to deny a right of same-sex marriage is definitional”).

\(^{49}\) Most courts no longer rely on the definitional rationale in support of same-sex marriage prohibitions; indeed, the Maryland Supreme Court, which recently upheld that state’s opposite-sex marriage definition, referred to that rationale as impermissibly “circular.” Conaway v. Deane, 932 A.2d 571, 633 (Md. 2007). That said, some state courts have still adverted to the traditional definition of marriage in closely-related contexts. For instance, in Chambers v. Ormiston, the Rhode Island Supreme Court held last December that Rhode Island’s family court could not grant a divorce to two women who were married in Massachusetts, but who were residents of Rhode Island, because that state’s definition of “marriage” was an opposite-sex one in 1961, the year that Rhode Island’s statute authorizing the family court to hear and determine all petitions for divorce was written. Chambers v. Ormiston, 935 A.2d 956 (R.I. 2007).
taken up by Plato in the *Cratylus* dialogue: What is the relationship between names and the essences that they are meant (or thought) to represent?\(^{50}\)

In that foundational text on names and naming, Plato considers, although never fully resolves, whether language is a system of largely arbitrary signs or whether names are naturally related to an essence that they signify.\(^{51}\) While what takes place in the dialogue that ensues is well beyond the scope of this Article, suffice it to say that the recent name issue has challenged and confounded courts precisely because it relates to a philosophical tradition which itself is indeterminate. If names are nothing more than conventional and largely arbitrary signs, one side of the *Cratylus* dialogue, then presumably Shakespeare’s Juliet is correct—a relationship by any other name is just as sweet\(^{52}\)—and it would not matter if the state used different names to describe the same thing. However, if names convey the essence or substance of that which they signify, the other side of the *Cratylus* dialogue, and the essence or substance of marriage and its nominal equivalents is the same, then presumably the same name should—indeed, must—be given to each. Put more simply, if names naturally follow from the essences that they describe, and the essences are the same, then shouldn’t the names be the same also?

Of those courts that have considered, at some length, that more “challenging” and “philosophical” question, two have answered it in the negative and two in the affirmative. Section B will now briefly summarize those courts’ disposition of the name issue. Part V will return to some of the reasoning and rhetoric from the opinions just touched on here in order to illuminate the extent to which nominal separation not only reflects, but also

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\(^{50}\) *Plato, Cratylus*, The Loeb Classical Library, Vol. IV (trans. H.N. Fowler 1970). It also hearkens back, as this Article will later show, to the name taboo that surrounded homosexuality for centuries in Western society. *See infra* Parts IV & V.

\(^{51}\) Whereas Cratylus maintains that names follow naturally from the essences that they signify, Hermogenes contends that names are nothing more than a product of social convention. As one commentator has pointed out, “Socrates destabilizes both positions.” *The Anthropology of Names and Naming* 5 (Gabrielle Vom Bruck & Barbara Bodenborn, eds.) (2006).

\(^{52}\) I am referring, of course, to Juliet’s soliloquy from Shakespeare’s *Romeo and Juliet*, where the heroine muses: “What’s in a name? That which we call a rose/By any other name would smell as sweet.” *The Complete Works of William Shakespeare, Vol. II, Romeo and Juliet*, act 2, sc. ii., verses 1-2 (Bantam Books 1980). A dissenting justice in *Opinions of the Justices to the Senate* invoked Juliet’s famous “What’s in a name” soliloquy in support of the proposition that “[t]he insignificance of according a different name to the same thing has long been recognized.” *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 n.1 (Mass. 2004) (Sosman, J., dissenting).
perpetuates homosexuality’s centuries-old speech or name taboo and the harms that flowed from it, a taboo that, this Article contends, should no longer play even a residual role in the law for reasons discussed in greater depth below.

B. Judicial Response

The two courts that have not found that nominal difference violates state constitutional guarantees include the New Jersey Supreme Court, which considered the name issue in 2006, and a trial court in Connecticut, which considered the name issue that same year and whose ruling is currently on appeal before the Connecticut Supreme Court. In *Lewis v. Harris*, the New Jersey Supreme Court framed the name issue in the following way: “Raised here is the perplexing question—‘what’s in a name?’—and is a name itself of constitutional magnitude after the State is required to provide full statutory rights and benefits to same-sex couples?” While the court in that case held that it was unconstitutional to withhold all the benefits and responsibilities of marriage from same-sex couples, it refused to find that the lexicon of marriage was required under New Jersey’s constitution. Rather, *Lewis* strongly suggested that it would be entirely permissible for the New Jersey legislature to cure the constitutional violation that the court found in that case by extending a status to same-sex couples that was nominally different from marriage, as long as that status was substantively identical to it—which is exactly what the state legislature did in December 2006, when it passed New Jersey’s civil union bill, which names legally-recognized same-sex relationships “civil unions” (instead of “marriage”) and legally-recognized same-sex partners “parties” (instead of “spouses”).

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53 908 A.2d 196 (N.J. 2006).
54 Id. at 221.
55 Id. at 220-21 (finding that “committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples” under “the equal protection guarantee” of New Jersey’s constitution).
56 Id. at 221 (stating that “[u]nder our equal protection jurisprudence . . . plaintiffs’ 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”).
57 N.J. STAT. ANN. § 37:1-1 (West 2007). In this respect, New Jersey’s civil union law is unlike Vermont’s civil union law, which explicitly provides that civil unions include “any definition or use of the terms ‘spouse,’ ‘family,’ ‘immediate family,’ ‘dependent,’ ‘next of kin.’” VT. STAT. ANN. Tit. 15 § (West 2005).
In the Lewis court’s estimation, the New Jersey constitution required substantive, but not nominal, equality; as the court there stated: “We will not presume that a difference in name alone [between “marriage” and “civil union”] is of constitutional magnitude.” Indeed, because same-sex relationships were ostensibly “new,” the court continued, it would be better for it to “exercise forbearance” and allow a “[n]ew language” to develop around them rather than to “overthrow” the meaning of marriage by “judicial fiat,” an act that “would render a profound change in the public consciousness of a social institution of ancient origin.” How the New Jersey Supreme Court could possibly conceptualize same-sex relationships, which have existed for millennia, as “new,” and therefore as undeserving of the language of “marriage,” is something that Part V will take up in greater detail.

Similarly, in Kerrigan v. Connecticut Department of Public Health, a Connecticut trial court refused to find that that state’s civil union legislation for same-sex couples violated state constitutional equality, liberty, and free speech guarantees. Much like the Lewis court, the Kerrigan court found that nominally separate statutory schemes for legally-recognized gay and straight relationships did not even trigger Connecticut’s constitutional protections, and therefore a constitutional analysis by the court, because the “effects of the classification” by the state “were, quite literally, nominal,” and therefore “inconsequential” from a constitutional perspective. Among other arguments, the plaintiffs there contended that Connecticut’s nominally separate statutory scheme was a “form of ‘separate but equal’ segregation,” and that “the use of two different terms—marriage and civil union—is a

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58 Lewis, 908 A.2d at 222.
59 Id. at 223.
60 One need not look far to find evidence pointing to the quite old history of same-sex relationships throughout the world, social and familial structures that are by no means new—even if, as this Article later suggests, the silence that long surrounded them make them appear so. See, e.g., Eskridge, supra note ______, at 15-51 (providing a detailed history of same-sex marriages both in and beyond the United States); John Boswell, Same-Sex Unions in Premodern Europe (1994) [hereinafter SAME-SEX UNIONS]; John Boswell, Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century (1980) [hereinafter CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY].
61 See infra Part V at ______.
62 909 A.2d 89 (Conn. Super. 2006).
63 Id. at 95.
64 Id. at 96.
form of separation or segregation that is unconstitutional regardless of whether the state treats the two unions differently.\textsuperscript{65}  

The Kerrigan court sharply disagreed. Specifically, the court drew a clear distinction between “separate facilities or actual physical separation,”\textsuperscript{66} of the kind at issue in \textit{Brown v. Board of Education},\textsuperscript{67} and separate names or “the rhetorical separation of marriage vs. civil union.”\textsuperscript{68} The latter form of separation, the court emphasized, represented a “mere difference in nomenclature,” one that was by no means “worthy of a comprehensive constitutional analysis” under Connecticut’s constitution.\textsuperscript{69} As mentioned above, the trial court’s decision in that case is currently on appeal before the Connecticut Supreme Court and has been for over one year.  

The two courts that have agreed with plaintiffs who maintain that “names matter” and that nominal difference is unconstitutional include the Supreme Judicial Court of Massachusetts, which considered the name issue shortly after \textit{Goodridge v. Department of Public Health} was decided in 2003,\textsuperscript{70} and the California Supreme Court, which considered that issue just three months ago.\textsuperscript{71} In 2004, the Massachusetts legislature sought the Supreme Judicial Court’s advice with respect to the following question: Whether it would be constitutionally permissible, under that state’s constitution and in light of \textit{Goodridge}, to extend same-sex couples the same benefits as married opposite-sex couples but only under the name, civil union.\textsuperscript{72} In \textit{Opinions of the Justices to the Senate}, a majority of the high court answered that question in the negative. Specifically, it found that the creation of a nominally separate statutory scheme for same-sex couples not only failed to cure the constitutional violation that the court found to exist in \textit{Goodridge}, but also represented an independent constitutional violation in itself.\textsuperscript{73}  

\textsuperscript{65} Id. at 98.  
\textsuperscript{66} Id. at 99.  
\textsuperscript{67} 347 U.S. 483 (1954).  
\textsuperscript{68} Kerrigan v. Conn. Dep’t of Pub. Health, 909 A.2d 89, 100 (Conn. Super. 2006).  
\textsuperscript{69} Id. at 99.  
\textsuperscript{70} 798 N.E.2d 941 (Mass. 2003) (finding that Massachusetts’ opposite-sex definition of marriage violated the due process and equal protection guarantees of that state’s constitution).  
\textsuperscript{71} In re: Marriage Cases, 183 P.3d 384 (Cal. 2008).  
\textsuperscript{72} Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).  
\textsuperscript{73} See id. at 570 (stating that “[m]aintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage is the constitutional infirmity at issue”).
Contrary to the dissent, for which the name issue represented a silly “squabble over the name to be used”\textsuperscript{74} and certainly not “a dispute of any constitutional dimension whatsoever,”\textsuperscript{75} the majority in \emph{Opinions} reasoned that “discrimination . . . flows from separate nomenclature.”\textsuperscript{76} Noting that “[t]he history of our nation has demonstrated that separate is seldom, if ever, equal,”\textsuperscript{77} the majority invoked \textit{Brown} for the proposition that “[t]he dissimilitude between the names ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.”\textsuperscript{78} Much like the court in \textit{Kerrigan}, the dissent balked at this idea that nominal separation was tantamount to the sort of invidious discrimination at issue in \textit{Brown} and to the doctrine of separate-but-equal that the Supreme Court declared unconstitutional in that landmark case.\textsuperscript{79}

Finally, and most recently, in \textit{In re: Marriage Cases}, the California Supreme Court found that same-sex couples were entitled to the name, marriage, under that state’s constitution, in addition to the substantive benefits that ordinarily flow from that legal status.\textsuperscript{80} Not unlike Massachusetts’ high court, which four years earlier conceptualized nominal separation as a kind of separate-and-unequal status, the California court reasoned that “retaining the name of marriage exclusively for opposite-sex couples and providing only a separate and distinct name for same-sex couples may have the effect of perpetuating a more general premise—now emphatically rejected by this state—that gay individuals and same-sex couples are in some respects ‘second-class citizens.’”\textsuperscript{81} Noting that California’s statutes drew “a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples,” the court

\textsuperscript{74} Id. at 572 (Sosman, J., dissenting).
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 571 n.5.
\textsuperscript{77} Id. at 569.
\textsuperscript{78} Id. at 570.
\textsuperscript{79} See id. at 580 n.6 (stating that the majority’s invocation of \textit{Brown} was misplaced because “that landmark case involved a classification (and resulting separation) based on race, . . . [one that] has long been recognized as a ‘suspect’ classification,” whereas the nominal separation between “marriage” and “civil union” involves a classification based on sexual orientation, one that triggers only rational basis review).
\textsuperscript{80} In re: Marriage Cases, 183 P.3d 384 (Cal. 2008).
\textsuperscript{81} Id. at 401.
concluded that such nominal difference violated that state’s constitution.\textsuperscript{82} “The new and unfamiliar designation of domestic partnership,” it observed, not only represents “a mark of second-class citizenship,”\textsuperscript{83} for same-sex couples specifically and for gays and lesbians generally, but also poses a “serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry.”\textsuperscript{84}

\section*{III. Toward a More Persuasive ‘Separate-And-Unequal’ Argument}

As with the high courts of Massachusetts and California, advocates for marriage equality have largely framed the issue of nominal separation as an unconstitutional case of separate-but-equal.\textsuperscript{85} In so doing, they have consistently turned to Supreme Court precedent concerning the constitutionality of physical segregation on the basis of race to argue that nominal segregation on the basis of sexual orientation, or the establishment of a separate nominal status for officially-recognized gay relationships, will

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\textsuperscript{82} \textit{Id.} at 433.
\textsuperscript{83} \textit{Id.} at 434.
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} For instance, David Buckel, Senior Counsel and Marriage Project Director at Lambda Legal in New York, and the attorney who argued \textit{Lewis v. Harris} before the New Jersey Supreme Court in 2006, has widely argued that civil unions are a flagrant example of the doctrine of ‘separate but equal’ redux. A nominally separate institution for same-sex couples, he has contended, has the same stigmatizing effect for those excluded from “marriage” as officially separate schools had for racial minorities prior to \textit{Brown}. In both instances, he has noted, “the separation ‘generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone.’” David S. Buckel, \textit{Government Affixes a Label of Inferiority When it Imposes Civil Unions & Denies Access to Marriage}, 16 \textit{Stan. L. \\& Pol’y Rev.} 73, 78 (2005) (quoting \textit{Brown v. Board of Education}, 347 U.S. 483, 493-94 (1954)); see also David S. Buckel, Lewis v. Harris: \textit{Article on a Settled Question and an Open Question}, 59 \textit{Rutgers L. Rev.} 221, 226-32 (2007) (invoking the separate-but-equal analogy to describe the constitutional infirmities with civil unions); Evan Wolfson, \textit{Just Say No To Civil Union}, the Stranger (Oct. 26, 2005), found at http://www.thestranger.com/seattle/Content?oid=23780 (stating that civil union and domestic partnership status would “take our nation, again, down the path of separate and unequal treatment for some. Not to say to some couples and their kids . . . ‘You come in the front,’ while telling others to go around back”). The separate-but-equal analogy has also resonated strongly with the public more generally. \textit{See, e.g., John Cloud, Viewpoint: A Separate But Equal Ruling for Gay Marriage, TIME Magazine} (Oct. 25, 2006), found at http://www.time.com/time/nation/article/0,8599,1550838,00.html.
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never be equal. To date, though, advocates and courts have overlooked what this Article contends is the best or most persuasive reason why a separate nominal status for officially-recognized same-sex relationships will never be equal, even if the substance of those relationships is exactly the same.

For instance, advocates and courts have argued and reasoned, respectively, that a separate nominal status for same-sex couples who seek the imprimatur of the state will never be equal because no name—be it “civil union,” “domestic partnership,” or anything else—will ever measure up to the lexicon of “marriage,” particularly in light of the latter’s “longevity, tradition and prestige.” In support of that proposition, they have adverted to *Sweatt v. Painter*, where the United States Supreme Court held that the state of Texas’ separate law school for blacks violated the federal Constitution’s equality guarantees because it lacked not only “substantial equality” to the University of Texas Law School, which categorically denied admittance to black students, but also “those [intangible] qualities which are incapable of objective measurement but which make for greatness in a law school,” qualities such as “reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.” Under this view, a separate name for officially-recognized same-sex relationships will never be equal because it will never approximate the intangible qualities of the name, “marriage,” in much the same way that a separate law school for black students in Texas would never be equal because it would never approximate the intangible qualities of the University of Texas Law School. Even if “marriage” and “civil unions/domestic partnerships” were substantively identical or substantively equal, which they are in a few jurisdictions, they would still remain unequal simply by virtue of the fact that the former has a certain

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86 Respondents’ Opening Brief on the Merits in In re: Marriage Cases, Case No. S147999, at 21.
88 Id. at 633-34 (stating that “[i]n terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior”).
89 Id. at 634.
90 See, e.g., Respondents’ Opening Brief on the Merits in In re: Marriage Cases, Case No. S147999, at 21; Brief of the Plaintiffs-Appellants With Separate Appendix in Kerrigan v. Conn. Dep’t of Pub. Health, S.C. 17716, at 16 (citing *Sweatt* for the proposition that “[o]ur courts have fully recognized the manifest advantage that comes from an institution’s longevity, tradition and prestige as compared to a new institution created solely for a minority group”).
91 *See supra* note _____. 
currency that the latter undeniably lack. As Professor Ronald Dworkin has recently argued, “[w]e can no more now create an alternate mode of commitment carrying a parallel intensity of meaning [to marriage] than we can now create a substitute for poetry or for love. The status of marriage is . . . a social resource of irreplaceable value to those to whom it is offered.”

Similarly, advocates and courts have argued and reasoned, respectively, that a separate nominal status for same-sex couples who seek the imprimatur of the state will never be equal because discrimination necessarily “flows from separate nomenclature,” in the words of the Massachusetts Supreme Judicial Court—that is, because the mere fact of nominal separation between “marriage” and “civil union” (or “domestic partnership”) alone signifies that the latter is somehow less than, or inferior to, the former. In support of that proposition, advocates and jurists have widely adverted to Brown v. Board of Education, where the Supreme Court of course held that the physical separation of black and white schoolchildren in public schools was “inherently unequal.” As the plaintiffs in In re: Marriage Cases argued to the California Supreme Court, “the [Brown] Court found that the essence of a ‘separate’ status was its implicit declaration that those relegated to it were, in some fundamental sense, lesser citizens—lesser human beings.” Under this view, a separate name for officially-recognized same-sex relationships will never be equal simply because separation itself “generates a feeling of inferiority as to . . . status in the community that may affect . . . hearts and minds forever.” In the words of one plaintiff: “‘Separate but equal’ is never equal; we all know that.”

While sound, advocates’ and jurists’ deployment of the Sweatt and the Brown analogies alone fail to capture the full range of reasons why a separate nominal status for officially-recognized same-sex relationships will never satisfy true equality. Whereas the deployment of the Sweatt analogy

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92 Ronald Dworkin, Three Questions For America, 53 THE N.Y. REV. OF BOOKS (Sept. 21, 2006); see also id. (stating that “[c]ivil union status may provide many of the legal and material benefits of marriage, but it does not provide the social and personal meaning of that institution because marriage has a spiritual dimension that civil union does not”).
95 Respondents’ Supplemental Brief in In re: Marriage Cases, Case No. S147999, at 27 (emphasis added).
97 Respondents’ Opening Brief on the Merits in In re: Marriage Cases, Case No. S147999, at 23.
ends up placing exclusive emphasis on the prestige of the lexicon of “marriage” (to explain why no other name will ever be equal to it), the deployment of the Brown analogy ends up placing exclusive emphasis on the idea of separation itself (to explain why nominal separation will always signify inequality). In so doing, the deployment of neither analogy focuses all that much, if at all, on the history that underlies separate nomenclature, the same history which throws into stark relief precisely why even substantively identical institutions will never be equal if they are named differently.

Admittedly, advocates have at times argued, and courts have at times recognized, that a nominally separate status for legally-recognized gay and straight relationships will never be equal because of the history of discrimination that nominal separation reflects. For instance, in In re: Marriage Cases, the plaintiffs not only made a separate-but-equal argument, but also supported that argument with history—and, specifically, with the same history of legal discrimination against gays and lesbians that would guarantee that separate names would never be equal:

Where a group has suffered a long history of legal discrimination and social stigma, the State’s decision to create a separate legal status for that group inevitably will be viewed both by the group and by others as a badge of inferiority. Lesbian and gay men have been labeled as mentally ill, deviants, and sexual perverts; they have been fired from jobs, barred from employment in the federal government, excluded from entry into the country under our immigration laws, banned from service in our nation’s armed forces, and subjected to violence and harassment. Their intimacy has been criminalized and, until very recently, their relationships completely unrecognized.

The State’s decision to require same-sex couples to enter “domestic partnerships” rather than “marriage” must be seen in this historical context. Because gay people have been subjected to a long history of discrimination, excluding them from marriage and assigning them to a separate class created just for them is stigmatizing and injurious. It is both a remnant and a reaffirmation of the unequal,
outsider status that lesbians and gay people have
eexperienced as a historically disfavored minority.98

Similarly, at least one court has looked to the history of discrimination
against sexual minorities in support of the proposition that a separate name
for gay relationships is unconstitutional. Perhaps persuaded by the
plaintiffs’ use of history in support of the separate-but-equal analogy in In
re: Marriage Cases, as summarized above, the California Supreme Court in
that case observed that

particularly in light of the historic disparagement of
and discrimination against gay persons, there is a
very significant risk that retaining a distinction in
nomenclature with regard to this most fundamental of
relationships whereby the term “marriage” is denied
only to same-sex couples inevitably will cause the
new parallel institution that has been made available
to those couples to be viewed as of a lesser stature
than marriage and, in effect, as a mark of second-
class citizenship.99

That court then favorably cited the Canada Supreme Court, which in a
similar context declared that “[o]ne factor which may demonstrate that
legislation that treats a claimant differently has the effect of demeaning the
claimant’s dignity is the existence of pre-existing disadvantage, stereotyping,
prejudice, or vulnerability experienced by the individual or group at
issue.”100

These few notable exceptions aside, most actors who have compared
nominal separation to Jim Crow have failed to use the history of
discrimination that lay behind a distinction in nomenclature between gay and
straight relationships to support the proposition that nominal separation is
injurious and will therefore never be equal. More important, no one to date
has made the connection between nominal separation, or the current name
issue, and the nominal issues that have long confronted gays and lesbians.
That is, no one has argued that giving gays and lesbians substantive equality

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98 Respondents’ Opening Brief on the Merits in In re: Marriage Cases, Case No. S147999, at
23 (emphasis added).
but only under a different name \textit{injures} them because that separate nominal status points back in a variety of ways to a speech, or a name, taboo that historically surrounded sodomy (and, through it, homosexuality), a variety of ways that collectively indicate that nominal separation is “both a remnant and a reaffirmation”\footnote{Respondents’ Opening Brief on the Merits in In re: Marriage Cases, Case No. S147999, at 23.} of the following: (1) homosexuality’s rhetorical tradition, (2) the sentiment of disgust that gave rise to that tradition, and (3) the harms that flowed or resulted from it. No one, in short, has looked to the history that best supports the doctrinal argument that separate names will never satisfy the demands of genuine equality.

To that end, the following two Parts will view the recent name issue through the lens of history, and, specifically, homosexuality’s rhetorical history. Their strategic purpose in so doing is (1) to provide the best and most persuasive argument why “discrimination . . . flows from separate nomenclature,”\footnote{Opinions of the Justices to the Senate, 802 N.E.2d 565, 571 n.5 (Mass. 2004).} and (2) to attempt to explain just what it is about nominal separation that so many gays and lesbians find to be objectionable—and even “putrid,” in the words of one advocate fighting for nominal equality.\footnote{Ann Rostow, \textit{Crab State Crawls Towards Equality}, \textit{San Francisco Bay Times} (Dec. 7, 2006) (referring to the statement of Steven Goldstein, executive director of the New Jersey advocacy group, Garden State Equality).} In addition, their goal to sway those jurists who believe that a relationship by any other name is just as sweet,\footnote{Opinions of the Justices, 802 N.E.2d at 572 n.1 (Sosman, J., dissenting) (citing to Juliet’s ‘what’s in a name’ soliloquy in support of the proposition that names are “insignificant”).} and who argue that it places “rhetoric over reality” to say that “[t]he name, marriage, matters.”\footnote{Statement of Justice Chin, California Supreme Court, from oral argument in \textit{In re: Marriage Cases}. Audio and video archives of the oral argument in that case are available at \texttt{www.courtinfo.ca.gov/courts/supreme/audio-arch.htm}.}

Beyond its strategic objectives, however, the approach undertaken in the Parts that follow has the normative advantage of using a history that is unique to homosexuality in order to develop a coherent legal argument as to why nominal difference is morally and constitutionally problematic. That is, it offers a way to supplement a doctrinal argument that is historically grounded in race discrimination, or the separate-but-equal analogy, with a historical narrative that resonates specifically with those who claim to be most adversely affected by nominal difference. This, in turn, has the benefit of convincing those who have looked upon the deployment of the separate-but-equal analogy in this context with skepticism, and even with disdain, that
names do matter to gays and lesbians in particular and that not naming them in the officially-recognized language of law is damaging or harmful to that class, as it has been for a very long time.

For instance, some courts and commentators have criticized the notion that withholding the name, marriage, from same-sex couples is anything like Jim Crow and the systemic discrimination that was legally in place at the time that the Supreme Court decided Brown. When considering the name issue, for example, California’s appeals court remarked that “the facile comparison of California’s marriage statutes to racial segregation is inappropriate.”106 “Quite the opposite of the Jim Crow laws,” it continued, “the Domestic Partner Act was enacted not to perpetuate discrimination but to remedy it.”107 One of the dissenting justices from the California Supreme Court echoed these sentiments, stating that “[t]he analogy” between racial discrimination and nominal separation simply “does not hold.”108 Similarly, in responding to the claim that the New Jersey Supreme Court allowed a separate-and-unequal regime to stand in Lewis v. Harris by not requiring that the state extend the lexicon of marriage to same-sex couples, one commentator has stated that “[i]t’s time for pundits to stop picking up this simplistic (though emotionally powerful) analogy and think about what the New Jersey decision really means – and what an important step toward equality it really is.”109

By using a history that is unique to homosexuality to argue that separate names for gay and straight relationships will never be equal, this Article provides a way for skeptics of the separate-but-equal analogy to see more clearly how not naming same-sex relationships in the same way as their opposite-sex counterparts might be viewed by sexual minorities as harmful, injurious, discriminatory, and unequal. In addition, and equally

106 In re: Marriage Cases, 49 Cal. Rptr. 3d 675, 721 (Court of Appeal, 2006), rev’d, 183 P.3d 384 (Cal. 2008).
107 Id.
108 In re: Marriage Cases, 183 P.3d 384, 469 (Cal. 2008) (Corrigan, J., concurring and dissenting); see also id. at 469 (stating that “[t]he civil rights cases banning racial discrimination were based on duly enacted amendments to the United States Constitution, proposed by Congress and ratified by the people through the states. To our nation’s great shame, many individuals and governmental entities obdurately refused to follow these constitutional imperatives for nearly a century. By overturning Jim Crow and other segregation laws, the courts properly and courageously held the people accountable to their own constitutional mandates. Here the situation is quite different”).
important, it provides a way for same-sex marriage advocates to avoid the charge that they deploy race analogies in unsuitable ways—or inaptly “dress gay marriage in a suit of civil rights,”\footnote{Shelby Steele, Selma to San Francisco?, WALL ST. J., Mar. 18, 2004, at A16.} in the words of one commentator—when they analogize marriage discrimination against sexual minorities to past forms of discrimination against racial minorities, a view espoused by some of those who have taken issue with the deployment of race/sexual orientation analogies both in the marriage context and outside of it.\footnote{Indeed, race/sexual orientation analogies have invited critique for any number of reasons, either because they treat the categories that they analogize—racial minorities, sexual minorities—in monolithic ways that fail to capture intra-group convergences (e.g., some racial minorities are gay) or because they group together historical moments that, at least under one view, share little in common (e.g., the fight for same-sex marriage and the historical civil rights movement for racial minorities). \textit{See, e.g.}, Angela Onwuachi-Willig, \textit{Undercover Other}, 94 CAL. L. REV. 873, 879 (2006) (noting that the comparison between same-sex marriage prohibitions and anti-miscegenation laws “has generated a number of legal and non-legal responses in the black community that challenge” that analogy and providing some examples of such responses); Marc Spindelman, \textit{Reorienting Bowers v. Hardwick}, 79 N.C. L. REV. 359, 430-36 (2001) (discussing the race/sexual orientation analogy and its criticisms); Devon W. Carbado, \textit{Black Rights, Gay Rights, Civil Rights}, 47 U.C.L.A. L. REV. 1467 (2000) (arguing that race/sexual orientation analogies often render invisible, or “erace,” black sexual minorities); Steele, \textit{supra}, at A16 (arguing that the deployment of the race/sexual orientation analogy in the marriage context is misplaced because civil rights for African Americans and the battle for marriage for same-sex partners do not share common ground).} Indeed, it offers a way for marriage equality advocates to move beyond race/sexual orientation analogies when framing legal arguments, or at least to supplement, and thereby enhance, one of those analogies with a history that is unique to sexual minorities and that has so far been overlooked in marriage (or nominal) equality jurisprudence. While this Article disagrees with those who have criticized the deployment of race analogies in general, and the separate-but-equal analogy in particular, in the marriage equality context, it does view their criticisms as an opportunity to look beyond race/race discrimination alone when considering why certain governmental action vis-à-vis sexual minorities is unconstitutional and why separate names will never be equal, as the next two Parts will now do.
IV. HOMOSEXUALITY’S RHETORICAL PAST

Although most societies have sexual taboos . . . few, if any, other major cultures have made homosexuality—either as a general classification of acts according to gender or as an “orientation”—the primary and singular moral taboo it has long been in Western society: “the sin that cannot be named,” “the unmentionable vice,” “the love that dare not speak its name” . . . . Murder, matricide, child molesting, incest, cannibalism, genocide, even deicide are mentionable.

John Boswell, Same-Sex Unions in Premodern Europe

Parts IV and V will view the recent name issue through the lens of homosexuality’s rhetorical history in order to illuminate why names matter to gays and lesbians, and, more important, in order to show why separate nomenclature for officially-recognized gay relationships will never cure or remedy the constitutional violation of excluding same-sex couples from the institution of marriage. Part IV, which is divided into three Sections, surveys the economy of silence that marked homosexuality’s rhetorical past, a past in which the practice of either, or both, (1) not talking about same-sex intimacy at all, or (2) simply referring to it as something so abhorrent and distasteful that it could not, or should not, be named, flourished. Moreover, this Part considers the principal reason for, or motivation behind, that rhetorical tradition as well as the harmful effects that it produced.

The objective of this Part is not so much to posit that such a rhetorical tradition in fact existed; indeed, some legal scholars have already observed the reticence that historically surrounded sodomy and homosexuality in the law. Rather, its objective is to set forth that tradition in such a way that it can be used to develop a strategic legal argument with respect to why nominal difference is unconstitutional. Whereas legal scholars have in the past alluded to homosexuality’s rhetorical tradition, none has used that tradition in deeper ways to challenge contemporary forms

112 Boswell, Same-Sex Unions, supra note ______, at xxii.
113 See, e.g., Kenji Yoshino, Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays, 98 Colum. L. Rev. 1753, 1789 (1996) (detailing the ways in which “homosexuality . . . is framed through preterition: that is, the mention of a term only to dismiss it”); Katherine Franke, Cunning Stunts: From Hegemony to Desire: A Review of Madonna’s Sex, 20 N.Y.U. L. Rev. & Soc. Change 549, 564 (1994) (stating that “[t]he unspeakability of the crime of homosexuality, that is, the crime of deviance from compulsory heterosexual norms, is evident in such bastions of legal tradition as Blackstone and the United States Supreme Court”).
of sexual orientation discrimination, as this Article will. Moreover, this Part’s goal is to show just how far back that rhetorical tradition can be traced, something which scholars have overlooked by locating it almost exclusively in the English common law, as well as to clarify what drove that tradition and to set forth what its harmful effects were. In so doing, this Part lays the necessary groundwork for making the argument that sits at the heart of this Article and with which it will conclude in Part V.B.

A.   

Homosexuality’s Rhetorical Past: A Survey

This Section provides a general overview of homosexuality’s rhetorical tradition, from the early-Christian period in Europe (300 – 500 A.D.) through twentieth-century American law. For purposes of convenience, this Section is divided into two subsections. Subsection 1 broadly surveys sodomy/homosexuality’s representation in the Christian theological tradition. Subsection 2 then broadly surveys sodomy/homosexuality’s representation in the English/American legal tradition.

1.   

Christian Theological Tradition

In 1170, Alan of Lille, a twelfth-century French theologian and poet whose “philosophical support for popular hostility [against homosexuality] provided effective ammunition against gay people for later theologians,” wrote that when a man has sex with another man, he not only “blackens the honor of his sex” and is “made woman,” but also “pushes the laws of grammar too far.” In the Latin poem where he most vehemently attacks homosexuality, Alan maintains that sex between “members of the same-sex” constitutes an “inexcusable and monstrous solecism,” the latter of which

114 Following Boswell, this Article identifies the early-Christian period as including the years from 300 – 500 A.D. In addition, and also following Boswell, it identifies the early Middle Ages as extending from 500 – 1050 A.D., the high Middle Ages as extending from 1050 – 1150 A.D., and the later Middle Ages as extending from 1150 – 1350 A.D. See BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY, supra note _____, at 119, 169, 243, 269.
115 BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY, supra note _____, at 310.
117 Id.
(solecism) was defined then, as it is now, as a grammatical blunder or error. In other words, for Alan, sex between men violated the laws of nature and gender as well as the law of language. Non-procreative and therefore unnatural, same-sex sodomy was, above all, a grammatical mistake that “produced meaningless discourse, the lack or absence of verbal meaning.” It was, in short, a linguistic failure.

Long before there was such a thing as a “homosexual” identity, a medical term invented by a Swiss doctor in 1869, writers referred to the conduct by which those with a homosexual orientation in time came to be known in linguistic terms—in terms, that is, that made clear that sodomy was thought of as something that both resisted representation in language and was itself a linguistic violation of sorts. While Alan’s peculiar conflation of natural, moral, and grammatical categories has been described by at least one reader of his work as “puzzling,” it nonetheless reflected a much larger theological and literary tradition that conceptualized deviant sexuality as that which should not, and even could not, be named. Starting with St. Paul and continuing well beyond him, sodomy earned its “status” in society as the “unspeakable or unnameable vice.” In the provocative formulation of one

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118 See Boswell, Christianity, Social Tolerance, and Homosexuality, supra note _____, at 148 (stating that “any use of human sexuality, potential or actual, which did not produce legitimate offspring violated ‘nature;’ all moral issues were subordinate to the primary duty of males to procreate”).

119 Susan Schibanoff, Sodomy’s Mark: Alan of Lille, Jean de Meun, and the Medieval Theory of Authorship, in Queering the Middle Ages 30 (Glen Burger & Steven F. Kruger, eds. 2001).

120 Jennifer Terry, An American Obsession: Science, Medicine, and Homosexuality in Modern Society 36 (1999); see also Michel Foucault, 1 The History of Sexuality: An Introduction 43 (Robert Hurley Trans., Vintage Books 1990) (1976) (stating that “[t]he nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology”); but see Mark D. Jordan, The Invention of Sodomy in Christian Theology 163 (1997) (arguing that the idea that those who engage in same-sex sodomy might be perceived as having a separate ‘identity’ as such might be traced back to Peter Damian, an eleventh-century Church reformer who not only coined the term sodomia but also built an incipient identity around those who engaged in that conduct, persons known at that time as “Sodomites”).

121 Jordan, supra, at 79 (stating that “the most obvious and puzzling feature of Alan’s work” is “his choice of grammatical metaphors for describing deviations of human copulation”).

scholar, sodomy in time became the “obscene counterpart to the Tetragrammaton, or the unspeakable name of God.”

Early-Christian theological writings established the conditions that allowed the later-medieval period’s more virulent anti-homosexual rhetoric to thrive. Admittedly, unlike their late-medieval counterparts, the early-Christian and early-medieval church fathers did not explicitly target same-sex sodomy. Rather, for early European Christians, sodomy largely referred either to excessive sexual appetite generally or to any non-procreative conduct, regardless of the way in which, and between whom, it occurred. Nevertheless, early-Christian theologians periodically deployed a rhetoric of unnameability and unspeakability with respect to sodomy that would in time become synonymous with same-sex sodomy—and, in due course, with homosexuality.

For instance, St. Jerome, the fourth-century church father who is best known for translating the Bible from Greek and Hebrew into the Latin Vulgate, maintained that the place-name “Sodom” from Genesis 18-19, which recounts the fall of Sodom, means “mute” or “silent beast.” The sin that in time would become an unnameable crime, then, eponymously derived from a place which Jerome, that “master of the scriptural text and its renowned translator,” understood to denote silence and speechlessness. This Article will return to St. Jerome’s peculiar etymology of Sodom as “mute” or “silent” below, and will there suggest an intriguing connection between that etymology and the expressive harm that some gays and lesbians are said to feel upon being denied the universally-recognizable, and inherently communicative, language of marriage.

In associating Sodom with muteness or silence, St. Jerome laid the foundations for subsequent theologians and political actors from the early-Christian period and the early Middle Ages to place a speech taboo around sodomy, that is, to underscore the importance of remaining silent—or of

123 Id.
124 See supra note ______ for a description of this and other temporal terms.
125 See, e.g., Boswell, Christianity, Social Tolerance, and Homosexuality, supra note ______, at 202 (stating that during the early Middle Ages “[s]odomy’ came to refer to any emission of semen not directed exclusively toward the procreation of a legitimate child within matrimony, and the term included much—if not most—heterosexual activity”).
126 See id.
128 Jordan, supra note ______, at 33.
129 See infra notes ______ and accompanying text.
actually remaining silent—about that which could, under St. Jerome’s interpretation, render one silent. For instance, quoting St. Paul, St. Augustine referred to the kind of sex that we would today understand to mean sodomy, “unnatural” or non-procreative sex, in terms of the unspeakable, or “those things about which, as the Apostle says, ‘It is shameful even to speak.’” John Chrysostom echoed these sentiments in his *Homilies on Titus*, where he referred to the pagans’ “passion for boys” as a subject on which he would rather not speak, as it was, after all, something “not fit to be named.”

Similarly, Emperor Justinian’s *Institutes*, Roman civil law that went into effect throughout the Eastern Roman empire in 533, defined sodomy as “nefandam libidinem,” or “vile acts of lust,” that took place between men. While the Latin adjective, “nefandam,” is colloquially translated as “vile” or “abominable,” it actually denotes a condition of unspeakability, as the words “ne” and “fari” mean “not” and “to speak,” respectively. In other words, Justinian used an adjective that quite literally means “that which should not be spoken about” to qualify the sexual crime that rendered one eligible for death starting in the sixth century. Soon thereafter, Pope Gregory the Great wrote in his *Moralia* that because “the air is corrupted by the very mention” of sodomy, that vice should remain unspoken.

The early-Christian and early-medieval eras’ periodic tendency to conceptualize non-procreative sex as an unspeakable sexual sin and crime became, during the later Middle Ages, something significantly more explicit and more persistent. What was a tendency, in short, became a tradition—and not just a tradition, but one that applied to sex between men almost exclusively. As already mentioned, for Alan of Lille, the twelfth-century

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130 Augustine, *De bono conjugali* 40:373-96.
132 Thomas Cooper & George Harris, *The Institutes of Justinian* 387 (“De adulteriis”) (J.S. Voorhies 1852).
134 See Boswell, *Christianity, Social Tolerance, and Homosexuality*, supra note ______, at 171 (stating that “[n]ot until 533 did any part of the Empire see legislation flatly outlawing homosexual behavior . . . In that year . . . the emperor Justinian placed all homosexual relations under the same category as adultery and subjected them for the first time to civil sanctions (adultery was at that time punishable by death)).”
136 Boswell, *Christianity, Social Tolerance, and Homosexuality*, supra note ______, at 277 (stating that during the later Medieval period “[a] few social critics . . . did
theologian and poet largely responsible for providing “effective ammunition
against gay people for later theologians,” sodomy was not only an act that
took place between two men, but also one that quite literally violated
language. To be sure, if same-sex sex violated the norms of grammar, as
Alan contended that it did, then how could one put that act into words
without also doing the same?

Similarly, in the thirteenth century, St. Thomas Aquinas wrote that he
would not speak about the “vice against nature” in his theological
expositions because that vice itself was “unnameable.” In so doing,
Thomas was merely appropriating what by that time had become a well-
established rhetorical tradition of “pushing [the vice of sex between men]
outside the boundaries of the discourse of ethics” and of placing it
“beyond the realm of rational inquiry,” a tradition that reflected
theologians’ collective “desire to exclude [sodomy] from speech
altogether.” For Albert the Great, the thirteenth-century theologian and
bishop, this meant that same-sex sex was something about which one should
remain utterly “silent,” even to the point of “confusion about which acts the
word [sodomy] names.” For priests, this meant that the sin against nature

single gay people out for special attack” and started “[u]sing the word ‘sodomy’ to refer
solely to homosexual acts (. . . against theological precedent); see also id. at 293 (stating
that “[b]etween 1250 and 1300, homosexual activity passed from being completely legal in
most of Europe to incurring the death penalty in all but a few contemporary legal
compilations”); id. at 295 (stating that “[d]uring the 200 years from 1150 to 1350, homemosexual behavior appears to have changed, in the eyes of the public, from the personal
preference of a prosperous minority, satirized and celebrated in popular verse, to a
dangerous, antisocial, and severely sinful aberration”).

137 BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY, supra note
______, at 310.
138 JORDAN, supra note _____, at 150 (commenting on Thomas’ appropriation of “the
tradition according to which vice against nature is a vice that cannot be named”); see also id.
at 151 (arguing that the “vagueness of [Thomas’] Summa and its emphasis on the rare
conditions under which the vice [against nature] is generated would seem to indicate
something of the traditional reserve”).
139 Id. at 150.
140 Id.
141 Id. at 133.
142 Id. Jordan writes:

There is in Albert the Great’s texts on Sodomy a series of dissociations by
which he refuses to engage the analyses of same-sex copulation in his own
scientific or medical authorities, and this despite his regular appropriation
of their teaching on other topics. At the same time, Albert fails to correct
was “to be spoken of with great caution, both in preaching and in hearing confessions, so that nothing be revealed to men that might give them occasion to sin.”

In fact, confessors’ manuals during this time routinely invoked Jerome’s traditional etymology of the sin of Sodom as “mute” or “silent beast” when warning priests that “[t]hose guilty of the sin that cannot be named . . . are rendered mute as animals before God.” Speech and speechlessness thus existed in a feedback loop: To name homosexual sex would have been “to tell the penitent that the act occur[ed] frequently enough to have been named,” and therefore, quite possibly, to encourage the penitent to commit it. In turn, committing that act could ultimately render the penitent without speech, or “mute before God at the last judgment.” It was therefore critical that priests talk about that sin sparingly, if at all—critical, that is, that they become mute with respect to the sin that could render one mute.

the medical or scientific analyses of same-sex copulation—even though he is eager to correct errors elsewhere. His refusal to discuss even to the point of refusing to correct shows quite plainly a new familiar feature of the theological artifact that is the conception of “Sodomy”: the desire to exclude it from speech altogether. Albert here enacts that desire with regard to medicine and natural philosophy. Where he will not engage, he keeps silence. Id. (emphasis added).

143 Id. at 111.
144 Id. at 106.
145 Id. at 93.
146 Id. at 111.
147 On this subtle connection, Jordan writes:

Confessors are not to mention any of the forms of Sodomy for fear of encouraging them in those who might not know about them . . . The fear of Sodomy ends up by undoing the pretense of spiritual care for Sodomites. Their sin cannot be spoken plainly. It cannot be preached against. It cannot be broached even within the confession except with utmost indirection. The fanciful etymology recalled by Robert of Sorbonne and William Peraldus claims that “Sodom” means mute. In fact, it is Robert and William who have been made mute on the subject of Sodomy. Incoherent fear of sin has taken away the voice of confessors and preachers. Their silence is an ironic, an unintended testimony to the power of Sodom over the clergy. Id. at 113 (emphasis added).
2. **English and American Legal Tradition**

The late-medieval theological tradition of either not talking about same-sex sex at all, or of naming it only as the unnameable act, directly influenced the English common law—and, through it, American law. The theme of sodomy’s unnameability in the English common law is most often associated with Sir Edward Coke and Sir William Blackstone, the two English jurists whose writings on sodomy were enormously influential in shaping the discursive terrain that surrounded that conduct and its criminal prohibition in the United States well into the twentieth century. For Coke, writing in the early seventeenth century, and for Blackstone, writing in the eighteenth, sodomy was, respectively, “a crime not fit to be named” and “a detestable, and abominable sin, amongst Christians not to be named.”

In the *Commentaries*, Blackstone in particular observed that Roman law approached sodomy with a significant degree of “taciturnity” or reticence. He assures his readers that he will do the same, promising not to “dwell” too long “upon a subject, the very mention of which is a disgrace to human nature.”

Starting in the late nineteenth century, and continuing well into the twentieth, American courts routinely adverted to Coke and Blackstone’s formulation of sodomy as an unnameable crime when considering constitutional challenges to criminal sodomy statutes, statutes that failed to name with any particularity the precise conduct that was subject to criminal prohibition. In 1897, a state appeals court upheld a sodomy conviction in the face of a vagueness challenge by the defendant, a male who was charged with committing “the infamous crime against nature upon and with” another man. In response to the defendant’s claim that the indictment’s language was “uncertain and insufficient,” and therefore failed to inform him “of the nature of the offense charged,” the *Honselman v. People* court wrote that

> [t]he statute gives no definition of the crime, which the law, with due regard to the sentiments of decent

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148 See *Jordan*, supra note _____, at 150 (commenting on Thomas’ appropriation of “the tradition according to which vice against nature is a vice that cannot be named”).
151 BLACKSTONE, supra note ________, at 215.
humanity, has always treated as one not fit to be named. It was never the practice to describe the particular manner or the details of the commission of the act, but the offense was treated in the indictment as the abominable crime not fit to be named among Christians. The existence of such an offense is a disgrace to human nature . . . the records of the courts need not be defiled with the details of different acts which may go to constitute it.\textsuperscript{152}

In naming sodomy only by unnaming it, the \textit{Honselman} court was merely following a well-established theological and common law tradition of speaking about the act that in time came to be intimately, and almost exclusively, associated with homosexuality in American law,\textsuperscript{153} in tropes relating to speech or to the lack thereof. Because “everyone knows what a crime against nature is” when they see it, one court later remarked, the crime itself need not be “spell[ed] out”\textsuperscript{154}—need not, quite literally, be put into words (\textit{e.g.}, “spelled out”). In any event, even if that were not the case, criminal sodomy statutes that used vague terms like “the abominable and detestable crime against nature” were perfectly legitimate in most cases because, as a Texas court averred in 1909, “the charge was too horrible to contemplate and too revolting to discuss.”\textsuperscript{155} Indeed, “by reason of the vile and degrading nature of [sodomy], it has always been an exception to the strict rules requiring great particularity and nice certainty in criminal pleading,” another court declared not long thereafter.\textsuperscript{156}

\textsuperscript{152} Honselman v. People, 168 Ill. 172, 174-75 (1897) (emphasis added).
\textsuperscript{153} On sodomy as a “metonym” for homosexuality, see infra note \_\_\_. Prior to \textit{Lawrence v. Texas}, courts routinely conflated conduct (sodomy) and status (homosexuality). \textit{See, e.g.}, Shahar v. Bowers, 114 F.3d 1097 (11\textsuperscript{th} Cir. 1997) (en banc) (upholding an openly gay attorney’s termination from the state attorney general’s office on the ground that her participation in a same-sex commitment ceremony indicated that she was homosexual and therefore presumptively violating Georgia’s criminal sodomy statute). Even after \textit{Lawrence}, the law continues to conflate homosexuality and sodomy. For instance, the military’s exclusionary policy, popularly known as “don’t ask, don’t tell,” subjects members of the armed forces to discharge if they engage in “homosexual acts,” and provides that admission of one’s homosexual status raises the inference that he/she engages in that prohibited conduct. 10 U.S.C. § 654.
\textsuperscript{155} Harvey v. State, 115 S.W. 1193 (Tex. Crim. 1909).
\textsuperscript{156} Glover v. State, 101 N.E. 629, 630 (Ind. 1913) (upholding male defendant’s conviction for committing sodomy with another male); see also \textit{id.} at 630 (stating that “[i]t has never
By the later twentieth century, it was altogether common practice for courts to uphold convictions for sodomy by relying on what Professor Janet Halley has referred to as the “unknowability trope,” the rhetorical strategy of talking about (or naming) homosexual conduct by not talking about (or not naming) it.\textsuperscript{157} In 1966, for instance, a state supreme court remarked that it was unnecessary to recount what the state’s evidence in a same-sex sodomy prosecution was for the sole reason that “[i]t would serve no useful purpose to soil the pages of our Reports with [sodomy’s] sordid details.”\textsuperscript{158} Here, the court transposed the dirtiness (or ‘sordidness’) that it imaginatively associated with the criminalized sexual act at issue in that case onto the scriptural act of recounting it, the latter of which would “soil the pages” of the judicial reports. Under this view, deviant sexual acts perverted language in much the same way that same-sex sex, for Alan of Lille in twelfth-century France, perverted grammar.

Similarly, in 1972, an appeals court asserted that it did not need to “describe in detail” what fell under one state’s prohibition of “oral/genital contact” and “any other unnatural or perverted practice.”\textsuperscript{159} Because such things were matters “of common knowledge,” the court opined, they need not be given definitional clarity—indeed, need not be given any definition at all.\textsuperscript{160} Another court one year later went so far as to say that “[i]t [would] be unnecessary for us to set out the sordid testimony about the [homosexual] act, which appeared so revolting to one of the two deputies sheriff . . . that he vomited thrice during the evening.”\textsuperscript{161} Finally, in 1986, then Chief Justice Burger “placed his imprimatur on such definitions”\textsuperscript{162} when, in his \textit{Bowers v. Hardwick},\textsuperscript{163} concurrence, he approvingly cited Blackstone for the proposition that sodomy, which emerges from that case as a metonym for

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\textsuperscript{157} Halley, supra note ______, at 954; see also Lawrence Goldyn, \textit{Gratuitous Language in Appellate Cases Involving Gay People: “Queer Baiting” From the Bench}, 3 \textit{POLITICAL BEHAVIOR} 31, 36 (1981).

\textsuperscript{158} State v. Stubbs, 145 S.E.2d 899 (N.C. 1966); see also State v. White, 217 A.2d 212 (Me. 1966) (describing sodomy as “a dirty business”).


\textsuperscript{160} Id.

\textsuperscript{161} Carter v. State, 500 S.W.2d 368, 370 (Ark. 1973).

\textsuperscript{162} Halley, supra note ______, at 955.

\textsuperscript{163} 478 U.S. 186 (1986) (upholding the constitutionality of Georgia’s criminal sodomy law and finding that no “right to homosexual conduct” existed under the federal Constitution).
homosexuality, could surely be criminalized if it could not even be put into words: a “heinous act ‘the very mention of which is a disgrace to human nature’” and “‘a crime not fit to be named,’” in Burger’s summary of Blackstone’s renowned formulation.

B. **Homosexuality’s Rhetorical Past: Cause or Motivation For**

Whether it was early-Christian Europe or late-twentieth-century America, sodomy or homosexuality’s economy of silence was largely the result of one thing: disgust for same-sex sex and for those who engaged in it. That is, it was repugnance for sodomy that best explains both its categorical elision from speech (i.e., the refusal to talk about it at all in the Christian tradition) and its long-standing association with locutions such as “abominable crime not fit to be named” and conduct “too horrible to contemplate and too revolting to discuss” (i.e., the use of disgust-driven language to discuss why sodomy could not be discussed in the English and American legal tradition). An object of revulsion that was unlike any other, sodomy was “a very pariah of crimes, and . . . [therefore] seldom specifically defined,” in the words of an early nineteenth-century court.

In his examination of same-sex unions in pre-modern Europe, John Boswell notes that homosexuality was uniquely unmentionable in a way that distinguished it from other taboos, child molesting, incest, and murder among them. He attributes that rhetorical tradition, or the failure to “name[] or discuss[]” homosexuality until only just recently, to the fact that homosexuality was perceived as being uniquely disgusting in a way that

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164 For sodomy as a “metonym” for homosexuality, see Janet E. Halley, *Reasoning About Sodomy: Acts and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1737 (1993) (stating that “[s]odomy . . . is such an intrinsic characteristic of homosexuals, and so exclusive to us, that it constitutes a rhetorical proxy for us. It is our metonym”). For the conflation of sodomy and homosexuality in *Bowers*, see Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 288 (1996) (stating that “[f]rom the beginning of the opinion, in which Justice White first described the question on which the Court granted certiorari, the conflation between ‘engaging in sodomy’ and ‘being a homosexual’ is apparent”).

165 *Bowers*, 478 U.S. at 197 (Burger, C.J., concurring) (quoting 4 W. BLACKSTONE, *COMMENTS ON THE LAWS OF ENGLAND* 215 (1769)).

166 Whereas historically those people were called Sodomites, today they are called gays and lesbians. *See, e.g.*, JORDAN, *supra* note _______, at 8.


168 *BOSWELL, SAME-SEX UNIONS, supra* note _______, at xxiii.

169 *Id.* at xxiv.
the other moral and sexual taboos were not. Observing the “extraordinary prejudice” and “remarkable . . . degree of revulsion” that traditionally surrounded homosexuality in Western society, Boswell concludes that “[i]t is actually the affective, taboo aspect of the subject that has rendered it unmentionable until recently.”

If it was disgust for sodomy that rendered that conduct uniquely unspeakable or unnameable in the Christian theological tradition as well as in modern American law, then the rhetorical tradition of not talking about sodomy, or of talking about it only as something too heinous to discuss, merely amplified and augmented others’ disgust for it. In other words, disgust and homosexuality’s rhetorical tradition existed in a feedback loop, with the former fueling the latter and vice versa. Part V will return to this interrelationship between disgust and homosexuality’s rhetorical past when arguing that the nominal separation between “marriage” and “civil union” hearkens back to both of them. While a number of commentators have observed the role that disgust has played in shoring up contemporary laws that discriminate against sexual minorities, no one to date has argued, as this Article will, that laws that create a separate nominal status for officially-recognized gay relationships are also linked to disgust, albeit indirectly.

C. Homosexuality’s Rhetorical Past: Harmful Effects Of

Sodomy’s economy of silence had negative consequences for those whose status was long defined by that unnameable criminal act. To be sure, one might argue, as some commentators have, that the silence that surrounded sodomy and homosexuality was a source of power for gays and lesbians, for whom definitional elusiveness and linguistic invisibility might have constituted a protective cover, a form of freedom, and even an

170 Id. at xxiii.
171 Id. at xxiii-xxiv.
173 See, e.g., DOCKS, supra note _____, at 160 (stating that “the unnameable quality of homosexual desire was one of [gay men’s] principal resources” because it “enabled them to develop intimacies which at a later date would have seemed suspicious, if not pathological”).
aesthetically sublime experience.\textsuperscript{175} Moreover, one might also argue, as some have, that the rhetoric of unnameability that was part and parcel of the law’s approach to sodomy and homosexuality, at least until \textit{Lawrence v. Texas}\textsuperscript{176} was decided, did not necessarily mean that either of those things lacked a name and the legal recognition that ordinarily flows from one’s nominal status. Quite the contrary, what that rhetoric of unnameability simply meant was that sodomy and homosexuality would be named, and therefore recognized, in negative terms—something which, of course, is not quite the same thing as saying that sodomy and homosexuality had no name, or no legal identity, whatsoever.\textsuperscript{177}

At the same time, however, this Article contends that homosexuality’s rhetorical past not only linguistically marginalized sexual minorities, but also, in so doing, inflicted certain harms on them, harms that continue to be felt today in same-sex couples’ contemporary struggle to be named in officially-recognized terms. As already mentioned, by “rhetorical past” this Article intends a time when same-sex intimacy was either, or both, (1) pushed outside the boundaries of discourse entirely (\textit{i.e.}, not discussed at all), or (2) referred to simply as that which was so horrible and repugnant that it could not, or should not, be named (\textit{i.e.}, named only by a disgust-driven language of negation). This Article submits that those rhetorical practices together worked four interrelated harms on sexual minorities, a dignitary harm, an expressive harm, an epistemic harm, and an ontic harm, each of which is reproduced and perpetuated by the state’s reluctance to “name” officially-recognized gay relationships in the same way as their opposite-sex counterparts, as the next Part will show.

\textsuperscript{174} DOCKS, \textit{supra} note ______, at 160.
\textsuperscript{175} HALPERN, \textit{supra} note ______, at 22 (stating that for many writers, sodomy was tantamount to the ineffable sublime); ELAINE SHOWALTER, \textit{SEXUAL ANARCHY: GENDER AND CULTURE AT THE FIN DE SIECLE} 176 (1990) (referring to Wilde’s “rationalization of homosexual desire as aesthetic experience”).
\textsuperscript{176} 539 U.S. 558 (2003) (striking down Texas’ criminal sodomy prohibition and overruling \textit{Bowers v. Hardwick}).
\textsuperscript{177} See, \textit{e.g.}, SEDGWICK, \textit{supra} note ______, at 203 (stating that preterition, or the rhetorical practice of naming something by dismissing it, performed the dual function of both negativing/obliterating same-sex intimacy and affirming/reifying it); MORAN, \textit{supra} note ______, at 45 (stating that “the silence of the law does not in the first instance produce an absolute prohibition but gives rise to a certain proliferation of speech . . . by way of a multiplicity of euphemisms”); Lawrence Danson, \textit{Oscar Wilde, W.H., and the Unspoken Name of Love}, 58 ELH 979, 981 (1991) (stating that in Oscar Wilde’s \textit{The Picture of Dorian Gray} “negatives of direct statement [are] subverted into sexual affirmations”).
Homosexuality’s rhetorical past inflicted dignitary harm on gays and lesbians because it conceptualized the conduct that would become synonymous with homosexuality in demeaning, offensive, and disgust-driven ways. Indeed, and as suggested above, while it was disgust for same-sex sex that motivated or underlay the persistent refusal to discuss or name it, the persistent refusal to discuss or name it merely increased others’ disgust for it. In addition, homosexuality’s rhetorical past inflicted expressive harm on gays and lesbians because it both established and maintained a wall of silence around the conduct that came to define their very identity. How could sexual minorities express their intimacy, or have that intimacy expressed, in words when it was not only criminalized, but negated in language as well? One thinks here of St. Jerome’s curious etymology of the place-name “Sodom” from Genesis as “mute” or “silent beast,” and wonders whether it was the speech taboo that surrounded sodomy, rather than anything intrinsic to sodomy (as Jerome’s etymology appears to suggest), that rendered one mute.

The latter two harms, epistemic and ontic, warrant some explanation. Elsewhere, Professor Kenji Yoshino has explained that an epistemic harm “relate[s] . . . to how one is known,” and that an ontic harm “relate[s] to one’s being, or to how one is constituted.” Thus, whereas an epistemic harm results from action that renders one less known or less recognized, an ontic harm results from action that renders one less real. In this context, one might say that it was the economy of silence that traditionally surrounded homosexuality that contributed to sexual minorities’ epistemic harm, and that it was their epistemic harm that led naturally to their ontic harm.

More specifically, not talking about sodomy and homosexuality inflicted epistemic harm on gays and lesbians because silence made it difficult to ‘know’ what either sodomy or homosexuality was all about—or, indeed, whether either even existed at all. For instance, Sir John Wolfenden, the primary author of the 1957 report that recommended that homosexuality be decriminalized in Great Britain, once remarked that it was because

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178 On sodomy as a metonym for homosexuality, see supra note ______.
180 The Wolfenden Report, short for The Report of the Departmental Committee on Homosexual Offences and Prostitution, was published in Britain in 1957. It is named after the chairman of that committee, Sir John Wolfenden. The Report recommended to
homosexuality was “never mentioned in polite society [in Britain] . . . [that mA]jost ordinary people had never heard of it.” In other words, it was in large part because an economy of silence long surrounded homosexuality that “most ordinary people” did not really know all that much, if anything, about it. To be sure, if, as John Boswell wrote in 1994, homosexuality “could not, until the last few decades, be named or discussed,” then one can hardly be surprised that same-sex intimacy for a very long time existed as something “vague” and “necessarily unexamined,” in his words. Or, as nicely put by the plaintiffs in In re: Marriage Cases, “until very recently, [sexual minorities’] relationships [were] completely unrecognized.”

To offer another example of this phenomenon, take, for instance, certain statements of “rap cultural icon Professor Griff of Public Enemy.” Professor Griff, as recently observed by Professor Devon Carbado, has remarked that “[i]n knowing and understanding black history, African history, there’s not a word in any African language which describes homosexual . . . You would like to make them part of the community, but that’s something brand-new to black people.” Professor Carbado observes that “[t]he notion that homosexuality is ‘brand new’ to black people is intended to convey the idea that precolonial black people were exclusively heterosexual.” This Article would in addition argue that in the above statement Professor Griff makes the mistake of assuming that homosexuality is “brand-new” to the black community because it did not historically exist in language, specifically, in “any African language.” Quite the contrary, this Article contends, it was the erasure of homosexuality from “African language” that made it appear as if something that has existed for centuries did not exist until only just recently. In other words, once again, it was the elision of homosexuality from speech that helped set the conditions for


Boswell, Same-Sex Unions, supra note ______, at xxiv.

Respondents’ Opening Brief on the Merits in In re: Marriage Cases, Case No. S147999, at 23 (emphasis added).

Carbado, supra note ______, at 1476.

Id. (citing Marlon T. Riggs, Black Macho Revisited: Reflections of a SNAP! Queen, in Black Men on Race, Gender, and Sexuality: A Critical Reader 310 (quoting Professor Griff of Public Enemy)) (emphasis added).

Id.

At least, of course, according to Griff.
rendering it less known and less recognized—an epistemological problem—as either a set of acts or an orientation.

In turn, the lack of recognition of homosexuality inflicted ontic harm on gays and lesbians because it helped create a situation where their intimacy did not seem to exist. That is, Professor Yoshino has argued that because we ‘are’ to some extent the sum of our expressions, it follows that when our expression is burdened (an expressive harm), we are not only less recognized (an epistemic harm) but also less real (an ontic harm).\(^\text{188}\) Applying that idea here, if what we name our intimacy in some sense creates it,\(^\text{189}\) then when that name is a language of negation, or no name at all, that intimacy is not only less recognizable to the world but also, and for that very reason, less real. Put differently, if same-sex intimacy was linguistically closeted in such a way that rendered it “completely unrecognized,” and if “[m]ost ordinary people had never heard of homosexuality” because it was a topic that was “not mentioned in polite society,” then on what level could that intimacy really be said to ‘exist’ or to ‘be’?

In fact, one might even argue that it was the speech taboo that long surrounded same-sex intimacy that led, at least in part, the New Jersey Supreme Court to declare in *Lewis v. Harris* that same-sex relationships were “new” and therefore needed a “new language” to describe them—to declare, that is, that relationships that have been around for centuries did not really exist until only just recently.\(^\text{190}\) Part V will return to that language and reasoning from the *Lewis* opinion and examine it at some length. Suffice it to say here, though, that had same-sex relationships not been subject to a linguistic taboo for such a long time, then perhaps the *Lewis* court would not have been able to characterize their existence as “new” with quite so much ease, and, in the process, continue to inflict ontic harm on gays and lesbians by making it appear as if their unions did not ‘exist’ until only just recently.\(^\text{191}\)

\(^{188}\) Yoshino, *supra* note ______, at 530 (stating that “if one suspends the assumption that essences exist” and assumes instead that “expression is not just an effect of an underlying identity but potentially a cause of it as well,” then “when that expression is burdened, the burden is not only an epistemic harm but also an ontic one”).

\(^{189}\) For instance, Judith Butler has argued that “the name wields a linguistic power of constitution” and that “to utter is to create the effect uttered.” JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 31 (emphasis added), 32 (1997).

\(^{190}\) See *supra* notes ______ and accompanying text and *infra* notes ______ and accompanying text.

\(^{191}\) The same, of course, goes for Professor Griff’s statement that black homosexuality is a “brand new” phenomenon. See Carbado, *supra* note ______, at 1476. When the *Lewis*
This Section has identified four interrelated harms that flowed from homosexuality’s rhetorical past, specifically, a dignitary harm, an expressive harm, an epistemic harm, and an ontic harm. It has done so in order to establish a connection between the harm of unnaming, and of not talking about, same-sex intimacy (sexual minorities’ old nominal struggle) and the harm of not giving same-sex couples the specific name, “marriage” (sexual minorities’ new nominal struggle). Part V will now make that connection.

V. SEPARATE NOMENCLATURE: A “REMNANT AND A REAFFIRMATION” OF HOMOSEXUALITY’S RHETORICAL PAST, AND THEREFORE UNEQUAL

Separate nomenclature for officially-recognized gay and straight relationships will never be equal because it points back in a variety of ways to a time when homosexuality was subject to a speech, or a name, taboo, and because it reproduces and perpetuates the harms that followed from that taboo. Section A will first consider several ways that we might read or interpret the new name issue in light of that past. In particular, this Part will discuss the myriad ways in which nominal separation reflects, recalls, evokes, bears the traces of, leads us back to, and even derives from a time when same-sex intimacy was either, or both, (1) excised from speech entirely, or (2) viewed as something so repugnant that it could not, or should not, be named.

Section B will then use Section A’s observations to make the argument that is the principal focus of this Article. Specifically, this Section will argue that separate nomenclature for gay and straight relationships will never be equal because it reflects, or is somehow connected to, homosexuality’s disgust-driven rhetorical past and its harmful effects, a past that should no longer play even a residual role in our legal order for reasons set forth below. Separate nomenclature is, quite simply, both “a remnant and

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court, and Professor Griff, characterize same-sex relationships/homosexuality as a “new” phenomenon, they exercise what Sedgwick has referred to as the “epistemological privilege of unknowing.” Eve K. Sedgwick, Privilege of Unknowing: Diderot’s Nun, reprinted in TENDENCIES 23, 23 (1993) (citations omitted). Professor Yoshino has recently argued that the “privilege of unknowing” is still powerfully deployed by straights” in American law and culture. Kenji Yoshino, Covering, 111 YALE L.J. 769, 824 (2002). See also Yoshino, supra note ____, at 1790 (commenting on the Bowers majority’s exercise of the “privilege of unknowing”).
a reaffirmation” not just of homosexuality’s criminal past, but of its nameless, unspeakable, and unspoken past, and for that reason is unequal.

A. Nominal Separation Points Back To Homosexuality’s Rhetorical Past

Nominal separation points back to homosexuality’s rhetorical past in any number of ways. It is the objective of this Section to consider three of them. It should be noted that it is not the aim of this Section to make conventional legal arguments or to establish strict one-to-one correspondences between the current name issue and homosexuality’s rhetorical tradition. Rather, its goal is to identify in more general ways the residues of the past in the present, and to locate the connective tissue and thematic continuities that exist between giving a different name to same-sex relationships and either, or both, (1) not discussing same-sex intimacy at all, or (2) naming it only through a disgust-motivated language of negation.

1. Nominal Separation Evokes or Is Reminiscent of Homosexuality’s Rhetorical Past

Nominal separation points back to homosexuality’s rhetorical past because it deals not just with names, but also with the law’s reluctance to name same-sex intimacy in a certain way. As such, it evokes a time when the law withheld names and language from same-sex relationships entirely— withheld names and language, moreover, out of a belief that same-sex intimacy was disgust-provoking in a way that no other moral or sexual taboo was. Put differently, when the state tells gays and lesbians that they may have the substance of marriage but only under a different name, it takes them back to a time when the law was reluctant to name their intimacy at all or when it could only name it in a lexicon that exhibited a “remarkable . . . degree of revulsion.” Nominal separation, in other words, reminds the class most negatively affected by it that it has always been relegated to a non-nominative or quasi-nominative status in the law (and well beyond it); that the law has always used language, or the lack thereof, to marginalize it; and that it has suffered, and continues to suffer, the harmful effects of a

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192 Respondents’ Opening Brief on the Merits in In re: Marriage Cases, Case No. S147999, at 23.
193 BOSWELL, SAME-SEX UNIONS, supra note ________, at xxiii.
rhetorical tradition that was both the product of, and itself produced, repugnance for same-sex conduct.

Admittedly, some differences exist between present and past, that is, between the current name issue and its nominal antecedent. Today, same-sex intimacy is denied a name, albeit the name that apparently will validate it most, as subsection 3 will demonstrate. Historically, and as Part IV has shown, same-sex intimacy was denied any name whatsoever, or was named only as that which could not be named. In other words, today officially-recognized same-sex intimacy at least has a name (“civil union,” “domestic partnership”), whereas historically it did not.

The relevant (and larger) point here, however, is that it is still just all about names and sexual minorities’ exclusion from them, and that the recent legal issue over names merely reminds gays and lesbians of their perennial struggles with names and with the resultant harms of nominal exclusion. That is, telling same-sex couples that they may be denied the officially-recognized lexicon of marriage simply reminds them that homosexuality has always been a site of nominal struggle in law and culture, even if the tenor of that struggle has changed over time. One of the plaintiffs’ briefs in In re: Marriage Cases puts it best: Giving a different name to officially-recognized same-sex relationships places gays and lesbians “outside of the common . . . vocabulary of . . . civic life”—to be sure, places them in a quasi-nominal space that they know only too well. Indeed, the very way in which some courts have framed the issue of nominal difference, whether same-sex couples must be given “the ‘m’ word,” itself evokes the language of taboo that was once applied to sodomy, as “the ‘m’ word” locution curiously suggests that it is taboo to use the word “marriage” for same-sex couples, just as it was once taboo to name same-sex intimacy at all.

2. Nominal Separation is a Result, By-Product, or Consequence of Homosexuality’s Rhetorical Past

Nominal separation points back to homosexuality’s rhetorical past in the sense that it is, in many ways, a result, by-product, or consequence of it. To better understand how this is so, it is helpful to consider some of the reasons that have been offered by courts and by states in support of a separate nominal status for gay relationships. In particular, it is helpful to return to Lewis v. Harris, where the New Jersey Supreme Court offered two

194 Respondents’ Supplemental Brief in In re: Marriage Cases, Case No. S147999, at 25.
195 See supra notes ______ and accompanying text.
reasons in support of its finding that nominal difference was not an issue of constitutional magnitude. Each of those reasons, this subsection maintains, not only points back to the economy of silence that marked homosexuality’s rhetorical past, but does so in such a way that suggests that nominal separation is, or might be viewed as, a result, by-product, or consequence of it.

First, the *Lewis* court declared that separate names for gay and straight relationships were constitutional because the name, marriage, referred to the traditional definition of marriage, and the traditional definition of marriage was an opposite-sex one. Specifically, it stated that the definition of marriage as the legally-recognized union of a man and a woman was one “that has reigned for centuries” and that has been “accepted in forty-nine states and in the vast majority of countries in the world.”\(^{196}\) Moreover, the court continued, it was not “prepared immediately to overthrow the long established definition of marriage” and to alter “a social institution of ancient origin,” one whose meaning had been “passed down through the common law [and] into our statutory law”\(^{197}\)—which is precisely what it thought it would be doing were it to mandate, “by judicial fiat,”\(^ {198}\) that same-sex couples be given the name, marriage, as the official designation of their relationship.

The *Lewis* majority is not alone in adverting to the traditional definition of marriage in support of separate names for officially-recognized gay and straight relationships. The state of California, for instance, made a similar argument to the California Supreme Court in *In re: Marriage Cases*. There, in arguing why reserving a different name for officially-recognized same-sex relationships was constitutionally permissible, the state adverted to the “traditional definition of marriage” as a “union between a man and a woman,” one that has operated “in the overwhelming majority of jurisdictions in the United States and around the world.”\(^{199}\) Given “the historic and well-established nature” of this definition, the state continued, it was entirely reasonable for the state of California “to reserve the designation of marriage” for “opposite-sex couples” only.\(^{200}\) In other words, in the state’s view, a different *designation* or name for same-sex relationships


\(^{197}\) *Id.* at 222.

\(^{198}\) *Id.* at 223.

\(^{199}\) *In re: Marriage Cases*, 183 P.3d 384, 450 (Cal. 2008) (summarizing these arguments).

\(^{200}\) *Id.*
followed naturally from the traditional, and nearly universal, opposite-sex definition of marriage.

Second, the Lewis court declared that reserving a separate name, or different language, for officially-recognized same-sex relationships was well within constitutional limits because those relationships were, in its estimation, new. In the court’s words:

New language is developing to describe new social and familial relationships, and in time will find its place in our common vocabulary. Through a better understanding of those new relationships and acceptance forged in the democratic process, rather than by judicial fiat, the proper labels will take hold. However the Legislature may act, same-sex couples will be free to call their relationships by the name they choose . . . .

This second reason offered by the Lewis court in support of the constitutionality of a separate nominal status for gay relationships works together with the first reason that it offered, the definitional one, in the following way: Because same-sex relationships were “new,” according to Lewis, they could not possibly satisfy the “ancient” definition of marriage. Consequently, using a new name, or a new language, to describe them was entirely justified.

The reasons offered by the Lewis court and by the state of California to justify why a separate nominal status for officially-recognized gay relationships is not unconstitutional lead back in many ways to homosexuality’s rhetorical past as a nameless crime; indeed, they lead back to that past in such a way that suggests that the former (a separate nominal status) is in some sense a result or by-product of the latter (not being named at all). Looking first at the definitional rationale for nominal separation, if, as Lewis and the state of California assert, different names for officially-recognized gay and straight relationships are somehow a consequence of marriage’s opposite-sex definition, then they are no less a consequence of homosexuality’s rhetorical past as a nameless crime for that very reason. To better understand this causal connection—the connection, that is, between a

201 Lewis, 908 A.2d at 223 (emphasis added).
separate nominal status for gay relationships and not naming same-sex intimacy at all—consider the following.

In Part IV, this Article surveyed the centuries-old theological and legal tradition of not naming, and of not talking about, same-sex intimacy. In light of that tradition, one might argue that it is not at all surprising that the definition of marriage is an opposite-sex one. To be sure, if same-sex intimacy could not be named at all, then how could it possibly make its way into language, and, specifically, into a dictionary definition of “marriage”? The California Supreme Court recognized as much in *In re: Marriage Cases*. There, the court responded to the state’s contention that a separate name for same-sex relationships reasonably followed from the opposite-sex definition of marriage by observing that we can “hardly be surprised” if the definition of marriage has always been an opposite-sex one, given that homosexuality has long been subject to “disparagement . . . in many cultures.” This Article would merely add to that court’s observation the following: We can “hardly be surprised” if the definition of marriage has always been an opposite-sex one, given that homosexuality has been not only disparaged, but also negated in language for centuries.

If homosexuality’s exclusion from speech, in addition to its criminalization, ensured that the definition of marriage would remain an opposite-sex one, and if marriage’s opposite-sex definition is the reason why gay and straight relationships should have separate names, then it would not be incorrect to say that separate names for those relationships are in some sense a result, by-product, or consequence of homosexuality’s nameless rhetorical past. In other words, to justify separate names for gay and straight relationships on the basis of marriage’s opposite-sex definition, which both *Lewis* and the state of California did, is, in effect, to establish a causal connection between separate nomenclature for gays and straights and a history of not naming same-sex intimacy at all.

Turning now to *Lewis’s* second rationale for nominal separation, if, as that court asserts, nominal separation is somehow a consequence of the novelty or ‘newness’ of same-sex relationships, then it is no less a consequence of homosexuality’s rhetorical past for that very reason. The logic behind this causal chain is similar to that of the first: Because same-sex intimacy was negated in language for such a long time, same-sex relationships appear to be new. In turn, their apparent newness or novelty justifies why same-sex couples cannot have the name, marriage. When

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viewed in this light, separate names for gay and straight relationships are a result or consequence of not naming, and of not talking about, homosexuality at all. That is, if same-sex relationships are “new,” according to the Lewis court, then that is only because, or largely because, an economy of silence surrounded them for centuries. To then justify nominal separation on the so-called newness of same-sex relationships, as Lewis does, is in effect once again to establish a causal connection between separate names for gay and straight relationships and a history of not naming, and of not talking about, same-sex intimacy at all.

That separate names for officially-recognized gay and straight relationships might in some sense be viewed as a result or by-product of homosexuality’s rhetorical past was completely lost on the Lewis court. As mentioned above, in finding that a difference in name was not an issue of constitutional magnitude, that court placed significant emphasis on the fact that the opposite-sex definition of marriage was an “ancient” one, a definition “that has reigned for centuries” and that has been “accepted in forty-nine states and in the vast majority of countries in the world.” What that court overlooked, however, was the equally “ancient” tradition of negating same-sex intimacy in language, a tradition that has also “reigned for centuries,” as Part IV has shown; a tradition that helps to explain why marriage has long been defined in opposite-sex terms and why same-sex relationships might seem so “new”; and, most important for this Article’s purposes, a tradition that has in many ways resulted in the state’s refusal to name officially-recognized gay relationships as “marriage.” Indeed, what Lewis overlooks is the fact that a difference in name does matter, or at least should matter, if that difference is somehow the result, by-product, or consequence of a time when same-sex intimacy was subject to a name taboo.

3. Nominal Separation Reproduces and Perpetuates the Harmful Effects of Homosexuality’s Rhetorical Past

Nominal separation points back to homosexuality’s rhetorical past because it reproduces, and therefore perpetuates, the four varieties of harm that followed from it, that is, from either, or both, (1) not discussing same-sex intimacy at all, or (2) referring to it as something so disgusting that it could not, or should not, be named. Those harms, as noted above, are dignitary harm, expressive harm, epistemic harm, and ontic harm. Where Part IV.C already discussed the way in which homosexuality’s economy of silence either caused or contributed to each of those harms, this subsection
will now consider how not extending the lexicon of marriage to same-sex couples curiously reproduces and perpetuates all of them.

a. **Dignitary Harm**

First, the creation of a separate nominal status for officially-recognized gay relationships inflicts dignitary harm on sexual minorities because it conceptualizes officially-recognized same-sex relationships in ways that gays and lesbians find to be insulting, demeaning, and humiliating. The plaintiffs in *Lewis*, for instance, argued to the state trial court in that case that “having to use a different language to describe our commitment and our family. . . chips away at our self-esteem and makes us feel like second-class citizens.” 203 This “different language,” they continued, not only “discounts and cheapens” 204 their families, but also constitutes an “assault on [their] dignity” 205 because their partnership is not taken as seriously as it would be if it were called a “marriage.”

Similarly, the plaintiffs in *Kerrigan v. Connecticut Department of Public Health* argued to the state trial court in that case “that the term civil union” was unconstitutional because it was “offensive and demeaning to them.” 206 The trial court disagreed. In particular, it reasoned that “[n]eutral and of relatively recent origin, [civil union] has no history as an insult or slur, and is properly descriptive of the type of legal institution to which it applies.” 207

The *Kerrigan* court neglected to realize the following: Whereas the name, “civil union,” might be a new one, the idea that sexual minorities can experience dignitary harm by being excluded from names—whether from any name or from a particular name, like marriage—has a very long history indeed. As argued in Part IV, homosexuality’s rhetorical tradition inflicted dignitary harm on gays and lesbians because it conceptualized the conduct that would become synonymous with sexual minority status in demeaning, offensive, and disgust-driven ways. Same-sex conduct was something so abhorrent, according to many courts, that it could not even be named, let

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204 *Id.* ¶ 13.
205 *Id.* ¶ 15.
207 *Id.* at 98.
alone discussed at any length. Today, the law’s use of a separate nominal status inflicts dignitary harm on gays and lesbians because that status is itself perceived as “demeaning” and “offensive.” Now as then, language and naming—or the exclusion of same-sex intimacy from both—gives offense and demeans. Indeed, viewing the recent name issue through the lens of homosexuality’s rhetorical history throws into stark relief precisely why nominal separation is perceived as injurious and even “putrid” by many sexual minorities, \(^{208}\) namely, because it mimics homosexuality’s old name taboo and reproduces the same sort of dignity harm that followed from it.

b. Expressive Harm

Second, the creation of a separate nominal status for officially-recognized gay relationships reproduces the expressive harm that resulted from, or was in one way or another associated with, homosexuality’s rhetorical past. More specifically, according to the testimony of several same-sex couple plaintiffs in litigation over the name, a separate nominal status for officially-recognized same-sex relationships can inhibit any expression whatsoever about that status. For instance, one plaintiff testified that her mother “almost never talked about [her daughter’s same-sex relationship] with [her] friends because [she] did not know how to describe it” and because she “didn’t have the right words to explain” what it meant—that is, because she could not officially refer to her daughter as “married” and to her daughter’s partner as a “spouse.”\(^{209}\) Another plaintiff testified that her son neglected to talk with others about her relationship with her same-sex partner “in part because he had no words to describe” that partner’s status, and specifically because he was unable to say that his mother and her partner were officially “married.”\(^{210}\) To be sure, without the “common vocabulary” of “marriage,” advocates have argued, same-sex couples are sometimes at a loss for words when describing to others just what kind of relationship they are in, as “[t]here are no civil union analogues to the verb ‘to marry’ or the adjective ‘married.’”\(^{211}\) As one plaintiff put it, “[h]ow can

\(^{208}\) Supra note ______ and accompanying text.

\(^{209}\) In re: Marriage Cases, 143 Cal. App. 4th 873, 960 n.22 (Court of Appeal 2006) (Kline, J., concurring and dissenting) (summarizing these statements) (emphasis added), rev’d, 183 P.3d 384 (Cal. 2008).

\(^{210}\) Respondents’ Opening Brief on the Merits in In re: Marriage Cases, Case No. S147999, at 15 (emphasis added).

you explain domestic partnership or civil union to a child or even to an older person?\textsuperscript{212}

These plaintiffs’ statements call to mind the ancient correlation between “sodomy” and “muteness” or “silence.” Now, however, it is no longer an issue of whether one will become “silent” upon committing that conduct, but rather whether one is rendered “silent”—quite literally, at a total loss for words—when trying to express the relationship of two people of the same sex that does not bear the label “marriage.” Indeed, now as then, gays and lesbians struggle with, or are confronted by, a language that silences them, or that is linked to silence, in some way. Historically, it was a word that was interpreted to mean mute or silent (Sodom), a language replete with disgust-driven metaphors of silence (unspeakable, unnameable), and/or a language that was itself silent about same-sex intimacy. Today, it is a language that quite literally renders sexual minorities silent and leaves them at a loss for words (civil union/domestic partnership).

c. \textit{Epistemic Harm}

Third, the creation of a separate nominal status for officially-recognized gay relationships reproduces the same sort of epistemic harm that followed from homosexuality’s economy of silence. More specifically, one of the most consistent themes that runs throughout plaintiffs’ and advocates’ arguments in favor of the name, “marriage,” is that of acknowledgement and recognition, and, in particular, of the extent to which the language of marriage, unlike any other language, provides both of those things. For instance, plaintiffs in California testified that their respective families refused “to acknowledge” their relationship as legally-registered “domestic partners” precisely because that relationship was not called, “marriage,” and that they desired the name, marriage, “so that others [would] recognize” their relationship.\textsuperscript{213}

Similarly, the New Jersey Civil Union Review Commission, which was established in 2007 to evaluate the effectiveness of that state’s civil union status for same-sex couples, issued a report earlier this year that stated that “civil unions” were a “second-class status,” in its view, because they

\textsuperscript{212} Respondents’ Supplemental Brief in In re: Marriage Cases, Case No. S147999, at 25.
\textsuperscript{213} Respondents’ Opening Brief on the Merits in In re: Marriage Cases, Case No. S147999, at 15 (emphasis added).
lack the “universal recognition” that the word, “marriage,” provides.\(^\text{214}\) The report highlighted the statements of one woman, who testified before the Commission that “[w]hen you tell your employer or union you are married, there’s something about that word that makes them recognize your relationship in a way they don’t recognize it when you tell them you are [sic] civil union.”\(^\text{215}\) Employers and unions, she continued, have “respect for the word marriage” because it is “something they understand.”\(^\text{216}\)

Now as then, the exclusion of same-sex intimacy from speech, or from a certain kind of speech, can cause epistemic harm. In the past, not naming, and not talking about, homosexuality inflicted epistemic harm on gays and lesbians because it rendered same-sex intimacy less recognized and less understood (recall Wolfenden’s statement that “[m]ost ordinary people had never heard of homosexuality” because it was so rarely “mentioned,”\(^\text{217}\) as well as Boswell’s remarks that homosexuality was “vague” and “unexamined” because it “could not, until the last few decades, be named or discussed”\(^\text{218}\)). Today, not naming same-sex relationships in a particular way does much the same. That is, when the state refuses to extend the lexicon of marriage to same-sex couples, it inflicts epistemic harm on gays and lesbians because it fails to give their relationships the one name that, in their view, others will recognize, acknowledge, and understand.\(^\text{219}\)

d. **Ontic Harm**

Fourth and last, the creation of a separate nominal status for officially-recognized same-sex relationships reproduces and perpetuates the ontic harm associated with homosexuality’s rhetorical past because that status makes same-sex relationships seem less real, both to same-sex couples and to their families, than they would otherwise be with the name,

\(^{214}\) New Jersey Civil Union Review Commission, First Interim Report (Feb. 19, 2008), at 10. An online version of the Report may be found at www.NJCivilRights.org/curc.

\(^{215}\) Id. at 8 (emphasis added).

\(^{216}\) Id.

\(^{217}\) WOLFENDEN, supra note ______, at 132.

\(^{218}\) BOSWELL, SAME-SEX UNIONS, supra note _______, at xxiv.

\(^{219}\) Judith Butler has described this epistemic problem as one of “intelligibility.” In particular, she has noted that “marriage” is “the current episteme of intelligibility” among all other family forms. Judith Butler, *Is Kinship Always Already Heterosexual?*, in JUDITH BUTLER, UNDOING GENDER 102, 114 (2004).
marriage. For instance, several plaintiffs in litigation over the name have testified that, in their view, their same-sex relationships “are not real” in both “the eyes of the law and of much of society” without the name, marriage. The official language of marriage, they argue, transforms a “pretend” marriage into a real marriage. Their families, it seems, feel much the same way. The son of one plaintiff, for example, testified that his mother’s domestic partnership would not be “the real thing until” it became a marriage. The mother of another plaintiff testified that she would not feel that her daughter’s same-sex partner was “truly” her daughter-in-law until she and her daughter were “married.”

In the wake of receiving the right “to marry” (and not just the substance of marriage) four years ago in Massachusetts, many gays and lesbians from that state have echoed these sentiments. A participant in one study on the effects of same-sex marriage on the understanding of same-sex relationships, for instance, stated that “I’ve considered myself to be in a committed relationship for a long time. But, there is something to the word marriage that makes it feel more real . . . even to me. That word, marriage, makes it mean something different because it makes it a more concrete thing to be in this relationship. Getting ‘married’ . . . makes our love seem more real, even to us.” Another participant remarked that “marriage” turned what was “parody” or “pretend” into something “real.” Based on these remarks and others like it, the author of the above-mentioned study

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220 On the power of “marriage” to make relationships more ‘real,’ see Butler, supra, at 114 (stating that excluding same-sex couples from legitimate familial forms like marriage can cultivate a “sense of delegitimation [that] can make it harder to sustain a bond, a bond that is not real anyway, a bond that does not ‘exist,’ that never had a chance to exist, that was never meant to exist. If you’re not real, it can be hard to sustain yourselves over time”) (emphasis added). Butler, however, also questions whether “there [are] not other ways of feeling possible, intelligible, even real, apart from the sphere of state recognition?” Id. (emphasis added).

221 In re: Marriage Cases, 143 Cal. App. 4th 873, 960 n.22 (Court of Appeal 2006) (Kline, J., concurring and dissenting) (summarizing these statements), rev’d, 183 P.3d 384 (Cal. 2008).


223 In re: Marriage Cases, 143 Cal. App. 4th 873, 960 n.22 (Court of Appeal 2006) (Kline, J., concurring and dissenting) (summarizing these statements), rev’d, 183 P.3d 384 (Cal. 2008).

224 Id.


226 Id. at 143.
concluded that one of the principal benefits of “marriage” for same-sex couples, as opposed to differently-named relational forms, is its ability “to make same-sex relationships seem more real” both to the world and to those in them.\footnote{Id. at 140; see also Pamela J. Lannutti, \textit{For Better or Worse: Exploring the Meanings of Same-Sex Marriage Within the Lesbian, Gay, Bisexual and Transgendered Community}, 22 \textit{J. OF SOC. \& PERSONAL RELATIONSHIPS} 5, 10 (2005) (summarizing a study that found that same-sex marriage was viewed by the gay community “as a means for same-sex partnerships to become more serious” but “more fanciful” as well).}

If it is the word, marriage, rather than the benefits that flow from that relationship, that makes same-sex relationships feel “more real” both to those in them and to the world at large, then it follows that gays and lesbians suffer ontic harm when their relationships are denied that language. Now as then, same-sex intimacy’s exclusion from speech, or from a certain kind of speech, throws into doubt not only the legitimacy of that intimacy, but also its very existence. If same-sex intimacy was rendered unreal by the economy of silence and by the tradition of unnaming that long surrounded it, then it only continues to remain so today by the state’s refusal to extend the language of “marriage” to it.

\textbf{B. Nominal Separation Is Unequal}

As mentioned in Part III, some advocates in litigation over the constitutionality of nominal difference have argued that a separate nominal status for officially-recognized gay relationships will never be equal, even if that status is equal in all substantive respects to marriage, because it will always be “both a remnant and a reaffirmation of the unequal outsider status that lesbians and gay people have experienced as a historically disfavored minority.”\footnote{Supra note ______ and accompanying text.} More specifically, these advocates have contended that a separate nominal status will always be a “badge of inferiority” for gays and lesbians because it will not only reflect, but also reaffirm the legal discrimination to which that class has been subjected for decades under United States law, in areas as varied as immigration, the military, and employment.

What these advocates have so far overlooked, however, is what this Article maintains is the best reason why a separate nomenclature for officially-recognized same-sex relationships will never be equal, namely, because it will always reflect (1) the speech or name taboo that has
surrounded homosexuality for centuries, both in the law and far beyond it, (2) the disgust or repugnance that gave rise to that taboo, and (3) the harmful effects that followed from it. Or, to echo advocates’ framing of the argument, separate nomenclature is “both a remnant and a reaffirmation” of the non-nominative, or quasi-nominative, “status that lesbians and gay people have experienced” since at least the later Christian period, a time when “lesbians and gay people” were not known as “lesbians and gay people” at all but rather merely by reference to a set of acts—acts that were uniquely un-mentionable because they were perceived as being uniquely repulsive.

As Section A has shown, separate nomenclature points back in any number of ways to the speech or name taboo that has long been an integral feature of sodomy and homosexuality’s theological and legal representation. Separate nomenclature is, in the most general sense, reminiscent of homosexuality’s rhetorical past because it deals with names and with sexual minorities’ exclusion from them, and therefore evokes a time when sodomy, the conduct by which gays and lesbians have traditionally been identified, was viewed as so repugnant and unnatural that it (1) could not be talked about at all, (2) was cast in tropes of silence and negation, and/or (3) was even regarded as a grammatical defect or “solecism.” Moreover, separate nomenclature is, in a more specific sense, the result or consequence of homosexuality’s rhetorical past because it was the disgust-driven exclusion of same-sex intimacy/homosexuality from language that has arguably led, at least in part, to a separate nominal status for same-sex relationships. That is, if same-sex intimacy had not been negated for such a long time in language, and viewed at most as an “abominable sin . . . not to be named,” then perhaps same-sex relationships would not seem so “new” and so undeserving of the “ancient” lexicon of “marriage.” Finally, separate nomenclature reproduces and therefore perpetuates the harms that followed from homosexuality’s rhetorical past because it injures gays and lesbians on a dignitary, expressive, epistemic, and ontic level, all of which recall (1) the harms that flowed from homosexuality’s rhetorical tradition, and (2) the disgust that gave rise to that tradition in the first place.

In all of these ways, and for all of these reasons, separate nomenclature is “both a remnant and a reaffirmation” of homosexuality’s outsider status vis-à-vis language and naming. As such, it will never be equal, and will therefore never cure or remedy the constitutional violation of

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229 COKE, supra note _______, at 58.
excluding same-sex couples from the institution of marriage, as some states have argued. Indeed, when a state, like New Jersey, maintains separate names for same-sex relationships that seek the imprimatur of the state, it places that same imprimatur on a centuries-old speech taboo that most people would agree should play no role whatsoever, not even a residual one, in American law.

If this last point warrants clarification, or if some people would argue that it is perfectly appropriate to exclude sexual minorities from a name given that they have been subjected to a name taboo for such a long time, consider the following. In a narrow sense, Lawrence v. Texas,230 which overruled Bowers v. Hardwick,231 stands for the proposition that the state may no longer criminalize same-sex relations that take place between two people in private. In a more general sense, however, that case also stands for the proposition that the state may no longer use the law to treat gays and lesbians in demeaning ways because of the conduct in which they actually or presumptively engage. Under this more general reading of that landmark case, the Supreme Court threw out the proverbial bath water along with the proverbial baby. Here, that baby is criminal sodomy laws, and that bath water is the demeaning and disgust-driven rhetoric that was at one time deployed in support of them—deployed even as late as 1986, when then Chief Justice Burger used it in a not-just-rhetorical-sense in his Bowers concurrence to argue that criminal sodomy laws were by no means unconstitutional if sodomy had always been a “crime not fit to be named.”232

If, as this Article maintains, Lawrence did throw out the bathwater along with the baby, then the demeaning rhetoric that once supported criminal sodomy statutes should play no more a role in the law than do those statutes themselves. And if, as this Article has argued, laws that maintain a separate nominal status for officially-recognized same-sex relationships point back in any number of ways to that demeaning rhetoric and to a time

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232 While one might argue that when Lawrence overruled Bowers, it also ‘overruled’ the tradition of reticence and unnameability reflected in the case, some commentators have to the contrary suggested that Lawrence is itself marked by reticence. See, e.g., Laurence Tribe, Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name, 117 Harv. L. Rev. 1893 (2004); Cass R. Sunstein, What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage, 2003 Sup. Ct. Rev. (calling Lawrence a “remarkably opaque” decision); Mary Anne Case, Of “This” and “That” in Lawrence v. Texas, 55 Sup. Ct. Rev. 75 (2003).
when gay intimacy was perceived to be so repugnant that it could not even be named, let alone talked about, then such laws fail to cure the constitutional violation of excluding same-sex couples from marriage. Not only are they the remnant of a harmful and disgust-driven way of talking about homosexuality, but the reproduction and reaffirmation of it.

VI. CONCLUSION

In their brief to the California Supreme Court, the In re: Marriage Cases plaintiffs argued that “domestic partnership” status “does not cure the constitutional violations caused by barring same-sex couples from marriage” in part because the name, “domestic partnership,” is a separate nominal status that is inherently unequal.233  “It is no more acceptable for the State of California to assign a separate family status to lesbian and gay people,” they contended, “than it would be for the State to do so for any other minority group.”234  To exemplify the problems with the state’s desired approach, the plaintiffs went on to argue that “if the State were to determine that Catholics, or those of Chinese descent, or left-handed people were eligible only for domestic partnership, while everyone else remained eligible to marry, the constitutional defect would be unmistakable.  It is no less obvious here.”235

This Article agrees with the plaintiffs’ separate-but-equal argument.  Nevertheless, it also believes that the plaintiffs overlooked an invaluable opportunity to argue why names and nominal difference were issues of especial importance to gays and lesbians specifically when they adverted to “other minority groups”—Catholics, the Chinese, left-handed people—in order to throw into relief the “unmistakeable” problems with nominal difference.  As this Article has shown, plaintiffs and their advocates need not look beyond the class that is most immediately affected by nominal separation, sexual minorities, to argue why that separation is problematic, constitutionally as well as morally.

Sexual minorities have long struggled with issues pertaining to names and to naming; this Article has brought into focus just one of those struggles, albeit a significant one, in order to show more precisely why separate nomenclature will never be equal. Indeed, there are any number of named-related issues that gays and lesbians have had to face throughout

233 Respondents’ Opening Brief on the Merits in In re: Marriage Cases, Case No. S147999, at 22.
234 Id.
235 Id.
history, some more recent and others less so. One need only think here of the naming of homosexuality in the nineteenth century, and of the disease or pathology that that name connoted until just recently.\textsuperscript{236} Or, of sexual minorities’ struggles with other derogatory names or of the question of what to name the class at issue itself.\textsuperscript{237} It goes without saying that issues of names, language, words, and vocabulary—in short, issues of representation—have always confronted gays and lesbians, and that the new name issue is but the most recent example of this phenomenon.\textsuperscript{238} When Alan of Lille compared same-sex sex to a grammatical mistake or defect in the twelfth century, he was merely putting a unique spin on a tradition that far preceded him—and, if the recent name issue is any indication, one that would long outlive him as well.

Among those many name-related issues, this Article has chosen to focus on the speech or name taboo that long surrounded same-sex conduct in legal and non-legal discourse alike because it believes that sodomy’s—and, through it, homosexuality’s—historic name taboo best explains (1) how or why the new name issue even arose in the first place, and (2) how or why nominal separation harms or injures gays and lesbians, something which has eluded those jurists and commentators who have found it difficult to understand how giving gays and lesbians substantive equality in the form of “civil union” or “domestic partnership” status constitutes a form of harm or discrimination. To be sure, and as mentioned throughout this Article, the old name taboo that surrounded sodomy is replaying itself or resurfacing in any number of fascinating ways today, in the form of what is effectively becoming a new name taboo surrounding same-sex marriage—or “the ‘m’ word,” according to some jurists’ rather telling locution. Where historically it was sodomy/same-sex intimacy that eluded naming, today it is same-sex “marriage.” While the character of that taboo has changed over time, the

\textsuperscript{236} See, e.g., Jami Weinstein & Tobyn DeMarco, \textit{Challenging Dissent: The Ontology and Logic of Lawrence v. Texas}, 10 Cardozo Women’s L.J. 423, 433 (2004) (stating that “the very word homosexual became linked to the pathologization of it insofar as the term was invented and the species was born under the guise of essentializing a class of people thought to be deviant”). It was not until 1973 that the American Psychiatric Association removed “homosexuality” as a listed medical condition from the Diagnostic and Statistical Manual-II. See Yoshino, \textit{supra} note \________, at 805.

\textsuperscript{237} The issue, that is, of whether the class should be ‘named’ LGBT, GLBT, LGB, etc.

\textsuperscript{238} See, e.g., Deborah Cameron & Don Kulick, \textit{Language and Sexuality} 12 (2003) (stating that “[l]anguage, arguably the most powerful definitional/representational medium available to humans, shapes our understanding of what we are doing (and of what we \textit{should} be doing) when we do sex or sexuality”).
salient point here is that being excluded from names and from speech, and being harmed by that exclusion, has been an integral part of gays’ and lesbians’ lived experience both in the law and outside of it for quite some time. Which is why, then, it is odd that advocates for nominal equality have neglected to place the new name issue in the historical context that seems most naturally suited to it, focused as they are instead on viewing it exclusively through a racial lens.

To closely examine the connection between these two name taboos and their harmful effects, as this Article has, is to lay the groundwork for developing a more persuasive argument for why separate nomenclature will never be equal, an argument that takes an analogy grounded in race and race discrimination and supplements it with a history that is unique to homosexuality—and, therefore, to the class for whom nominal difference is most injurious. Beyond its strategic usefulness, however, this Article has provided an occasion to witness the power that the past has on the present, the former of which continues to influence the latter in both direct and indirect ways despite our belief that we have moved well past it. As C.S. Lewis once said, “Humanity does not pass through phases as a train passes through stations; being alive it has the privilege of always moving yet never leaving anything behind.”239 Here, that thing that has been ‘left behind’ is a very old way of talking about homosexuality (or not, as it were), one that the legal community has so far overlooked because of its deceptively new dress.

239 C.S. LEWIS, ALLEGORY OF LOVE 1 (1936).