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Creating the Perfect Case: The Constitutionality of Retroactive Application of the Domestic Partner Rights and Responsibilities Act of 2003

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Creating the Perfect Case: The Constitutionality of Retroactive Application of the Domestic Partner Rights and Responsibilities Act of 2003

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I. INTRODUCTION

A California same-sex couple has been in a committed relationship for well over a decade.¹ One of the partners is a young movie producer. While

1. The official Census data recorded in 2000 shows that there were 811,000 households containing two or more unmarried adults. S. JUDICIARY COMM., ANALYSIS OF ASSEMBLY BILL 205,

he is somewhat new to the industry, reviews of his films have been positive. His income is modest but has been substantial enough to allow the other partner to abstain from formal employment. For the past decade, the unemployed partner has been able to pursue his hobbies and interests without worrying about financial issues. This is not to say he has not contributed to the relationship. He maintains the home in which the couple resides, provides emotional and familial support for his partner, and renders other valuable household services.² Needless to say, the unemployed partner contributes to the relationship in a substantial, non-economic manner.

Having been in the relationship for some time, the couple decides to further solidify their commitment and attain state recognition in early 2000 by registering their partnership with the California Secretary of State.³ They both realize that the registration is little more than a token evidencing same-sex couples' societal progress. Yet they appreciate the limited rights that registration actually does convey and are happy to be making a principled statement through their registration.

Shortly after their registration, the movie producer experiences a substantial boost in his career. He produces a film which immediately garnered critical acclaim and eventually puts him in contention for an Academy Award. In addition to the public recognition, production company bonuses begin to flood in. His phone is constantly ringing with new offers.

The financial boost for the couple was unexpected. Having more money than they ever had previously, the couple purchases substantial real estate in California. With the rising prices of homes in California, each home is valued at well over 2 million dollars. The couple also acquires various items of personal property, including two expensive sports cars and a boat.

2003-2004 Reg. Sess., at 4 (Cal. 2003), available at http://info.sen.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_cfa_20030702_125401_sen_comm.html. Of those households, 100,000 were headed by same-sex partners. *Id.* Another source shows the exact number as being 92,138. Gaydemographics.org, http://www.gaydemographics.org/USA/states/california/2000Census_state_ca.htm (last visited Jan. 30, 2007). The same website also shows that California ranks as the number one state in total number of same-sex couples. *Id.* While the United States Census Bureau results are the most reliable, they are only collected every ten years. Thus, the above numbers were seven years old when this article was written.

2. See *Marvin v. Marvin*, 557 P.2d 106, 121 (Cal. 1976) ("There is no more reason to presume that [domestic] services are contributed as a gift than to presume that funds are contributed as a gift . . ."); *Quezada v. County of Bernalillo*, 944 F.2d 710, 722 (10th Cir. 1991) (awarding plaintiff over 1 million dollars for "lost earning[s]; the loss of household services; and the value for loss of life"); *Cochrane v. Schneider Nat'l Carriers*, 980 F. Supp. 374, 380 (D. Kan. 1997) (establishing different methods for determining the value of household services); *Reid v. Moyd*, 198 S.E. 703, 705 (Ga. 1938) (valuing household services provided by a two-year-old child with "unusual physical powers"); see also Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1172 n.40 (1992).

3. The California domestic partners registry was created under A.B. 26, 1999 Reg. Sess. (Cal. 1999) (codified as amended at CAL. FAM. CODE §§ 297-299.6 (West 2004)).

Professional acknowledgement and increased salary creates a busy schedule for the producer partner; he quickly becomes entrenched in his career. The unemployed partner starts to realize that he is spending more and more time alone. The relationship eventually falls apart in December of 2005. The couple realizes that the domestic partnership needs to be terminated. As far as they are aware, a simple filing with the State office should be sufficient. Little do they realize, however, that the Domestic Partner Rights and Responsibilities Act of 2003 passed, substantially affecting their rights in the partnership.⁴ Both were aware of letters they received from the Secretary of State concerning their domestic partnership. But with all the recent changes in their lives, neither paid the letters any real attention.⁵

The Domestic Partner Rights and Responsibilities Act of 2003 (“the Act”) was arguably the single biggest advancement of rights for same-sex couples in our nation’s history.⁶ Not only did the legislation provide a litany of new rights to couples registered in California as domestic partners, it also validated domestic partnership as a union deserving legal acknowledgment.⁷

4. A.B. 205, 2003-2004 Reg. Sess. (Cal. 2003). Section 2 of the bill dubs the act the Domestic Partner Rights and Responsibilities Act of 2003. *Id.*

5. This hypothetical situation is entirely the creation of the author. While many stories of same-sex relationships and consequent problems were read prior to the creation of this hypothetical, none of the facts in the story are the result of any of that research. For more anecdotal information regarding same-sex couples and difficulties under current laws, see S. JUDICIARY COMM., ANALYSIS OF ASSEMBLY BILL 205, 2003-2004 Reg. Sess., at 4 (Cal. 2003), available at http://info.sen.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_cfa_20030702_125401_sen_comm.html. See also Will Harper, *See Ya in Court: Registered Same-Sex Partners Can't Marry, But Now Face Divorce Court if They Break Up: You Say it Wasn't That Way When You Registered? Tough Luck, Baby: The New Law is Retroactive*, East Bay Express, Oct. 11, 2006, available at <http://news.eastbayexpress.com/2006-10-11/news/see-ya-in-court/>; Meghan M. Gavin, *The Domestic Partners Rights and Responsibilities Act of 2003: California Extends Significant Protections to Registered Domestic Partners and Their Families*, 35 MCGEORGE L. REV. 482, 482 n.1 (2004). See also Kaiponanea T. Matsumura, *Reaching Backward While Looking Forward: The Retroactive Effect of California's Domestic Partner Rights and Responsibilities Act*, 54 UCLA L. REV. 185, 198 (2006) (creating a hypothetical couple, Poor and Rich, whom she later uses to illustrate her ideas on retroactive application of the Act).

6. The creation of the domestic partner registry was also a huge step toward equalizing the rights of same-sex and heterosexual couples. Yet the creation of the registry did little more than that. See *infra* notes 54-57 and accompanying text. The Domestic Partner Rights and Responsibilities Act was an amendment to the bill that created the registry and added significant rights. See *infra* notes 73-85 and accompanying text.

7. The Domestic Partner Rights and Responsibilities Act, A.B. 205, 2003-2004 Reg. Sess. (Cal. 2003) (stating that the Act was “intended to help California move closer to fulfilling the promises of inalienable rights, liberty, and equality . . . by providing *all caring and committed couples*, regardless of their gender or sexual orientation, the opportunity to obtain essential rights, protections, and benefits and to assume corresponding responsibilities, obligations, and duties . . .”) (emphasis added).

Admittedly, the Act falls short in some areas of rights to which only married couples are entitled. Nevertheless, its implications for the development of a burgeoning body of law cannot be overstated.

The Act's expansive proviso—"Registered domestic partners shall have the same rights . . . and . . . responsibilities . . . as . . . spouses"—has repercussions which have yet to be tested by the courts.⁸ One such gray area is the imposition of California's community property system onto registered domestic partners.⁹ The Act provides for court-supervised termination proceedings in which couples will have the same rights and obligations imposed on divorcing married couples.¹⁰ Standing alone, court-supervised property distributions for same-sex couples are not problematic.¹¹ But, applying the community property system and judicial regulation retroactively to domestic partnerships entered into *before* the enactment of the statute, does create issues.¹² Historically, many cases in California community property law have faced similar retroactive statutes.¹³ Almost invariably, these same statutes have been challenged on constitutional grounds as impairments of vested property rights without due process of law.¹⁴

This article will examine the Act and its retroactive application. It will also make predictions about the success of constitutional arguments against applying the Act retroactively. Part II examines the history of domestic partnerships in California and provides a selected history of California cases

8. CAL. FAM. CODE § 297.5(a) (West 2006).

9. See Matsumura, *supra* note 5, at 197 (noting that "it seems inevitable that the retroactive provisions [of the Act] will be challenged in California courts").

10. CAL. FAM. CODE § 299(d) (West 2006). The code section states:

The superior courts shall have jurisdiction over all proceedings relating to the dissolution of domestic partnerships, nullity of domestic partnerships, and legal separation of partners in a domestic partnership. The dissolution of a domestic partnership, nullity of a domestic partnership, and legal separation of partners in a domestic partnership shall follow the same procedures, and the partners shall possess the same rights, protections, and benefits, and be subject to the same responsibilities, obligations, and duties, as apply to the dissolution of marriage, nullity of marriage, and legal separation of spouses in a marriage, respectively, except as provided in subdivision (a), and except that, in accordance with the consent acknowledged by domestic partners in the Declaration of Domestic Partnership form, proceedings for dissolution, nullity, or legal separation of a domestic partnership registered in this state may be filed in the superior courts of this state even if neither domestic partner is a resident of, or maintains a domicile in, the state at the time the proceedings are filed.

Id.

11. The statute is only innocuous in a vacuum. Assuming there was no new property distribution scheme applied, all property acquired during a domestic partnership would remain the separate property of the partner who acquired it (absent any contractual agreements to the contrary).

12. See *infra* notes 313-70 and accompanying text.

13. See *infra* notes 106-236 and accompanying text.

14. See *infra* notes 106-236 and accompanying text.

wherein courts decided issues of retroactivity.¹⁵ Part III covers more recent litigation surrounding the Act and its amendments.¹⁶ Part IV then analyzes the possible impacts of the recent decisions and legislation.¹⁷ Part V concludes.¹⁸

II. BACKGROUND

A. History of Registered Domestic Partnerships in California

1. Prior to the Domestic Partner Registry—*Marvin* Relationships

California is one of many states that does not recognize common law marriage.¹⁹ Before the California domestic partner registry was created in 1999, no form of cohabitation or other committed relationship was legally recognized in California.²⁰ Despite the absence of legal recognition for non-married couples, *Marvin v. Marvin*²¹ acknowledged the large number of non-traditional couples in California nearly thirty years ago.²² In so doing, the California Supreme Court created an alternative for people who wished to gain some of the rights of matrimony without the formalities of traditional marriage.²³

Marvin involved a woman and man who lived together for seven years without marrying.²⁴ When the relationship ended, the woman claimed the couple had an oral agreement providing for equal division of any property

15. *Infra* notes 19-237 and accompanying text.

16. *Infra* notes 238-306 and accompanying text.

17. *Infra* notes 307-70 and accompanying text.

18. *Infra* notes 371-74 and accompanying text.

19. See Dorian Solot & Marshall Miller, *Common Law Marriage Fact Sheet*, Alternatives to Marriage Project, <http://www.unmarried.org/commonlaw.pdf> (last visited January 21, 2008). In fact, only fifteen states do recognize common law marriage. Those states are: Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, New Hampshire, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, and Washington, D.C. California does recognize a common law marriage legally established in one of these states. CAL. FAM. CODE § 308 (West 2006).

20. *Domestic Partners: Hearing on Assembly Bill 25*, Assembly Committee on Judiciary (2001) (“[U]ntil the enactment of AB 26 in 1999, same sex couples and their families received no recognition under California law.”) (quotations omitted), available at [http://www.assembly.ca.gov/acs/committee/c15/publications/SelectedBillAnalyses/AB%2025%20\(Migden\)%20Domestic%20partners.htm](http://www.assembly.ca.gov/acs/committee/c15/publications/SelectedBillAnalyses/AB%2025%20(Migden)%20Domestic%20partners.htm).

21. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

22. See *supra* note 11.

23. *Marvin*, 557 P.2d at 122.

24. *Id.* at 110.

acquired by either individual during the relationship.²⁵ She also claimed that the couple held themselves out as husband and wife.²⁶ The female plaintiff brought suit for declaratory relief to determine her property and contractual rights.²⁷ The court held that, although the couple was not legally married, the alleged oral understanding was valid and enforceable.²⁸ The opinion was clear that they did not create a new form of putative relationship.²⁹ Rather, the holding was limited to validation of agreements between unmarried persons unless they relied solely upon illicit meretricious consideration.³⁰

Enforcement of express agreements between unmarried couples was nothing new.³¹ However, *Marvin*'s validation of such agreements opened

25. *Id.*

26. *Id.*

27. *Id.* at 110-11.

28. *Id.* at 122. The court prefaced its holding with a clear statement acknowledging the growing number of nonmarital cohabitations. *Id.* While one would likely expect the court to condemn such practice, this court praised the growing number of young couples living together before marriage as a type of socially beneficial, pre-marriage test drive.

[W]e believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case We are aware that many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage. This trial period, preliminary to marriage, serves as some assurance that the marriage will not subsequently end in dissolution to the harm of both parties. We are aware, as we have stated, of the pervasiveness of nonmarital relationships in other situations. The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.

Id.

Although it would be an exaggeration to see this as judicial endorsement of non-marital relationships, the opinion certainly justifies its holding by conforming to the changing social dynamic.

29. *Id.* at 122.

30. *Id.* The court never actually defines "meretricious," the word upon which its holding entirely relies. Webster's Dictionary defines the term as: "of or relating to a prostitute: having the nature of prostitution." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 777 (Merriam-Webster, Inc. 11th Ed. 2003), available at <http://www.m-w.com/dictionary/meretricious>. It is in this context that the court's holding takes on more shape.

The mere fact that parties agree to live together in meretricious relationship does not necessarily make an agreement . . . between them invalid. It is only when the property agreement is made in connection with the other agreement, or the illicit relationship is made a consideration of the property agreement, that the latter becomes illegal.

Marvin, 557 P.2d at 113 (quoting *Croslin v. Scott*, 316 P.2d 755, 758 (Cal. Ct. App. 1957)). Ultimately, the qualification allows for enforcement of agreements between unmarried cohabitants without endorsing illegal conduct.

31. See *Trutalli v. Meraviglia*, 12 P.2d 430 (Cal. 1932) (holding that nonmarital partners may lawfully form contracts to govern the distribution of their property); *Vallera v. Vallera*, 134 P.2d 761 (Cal. 1943) (holding that equity protects individual interests of parties to a relationship controlled by a contractual agreement). See generally Jared Laskin, *California "Palimony" Law: An Overview*, available at <http://www.palimony.com/7.html>.

the door for homosexual and otherwise unmarried couples to exploit some of the rights and obligations imposed on their legally married counterparts. If the couple had some form of cohabitation agreement, an action for breach of express contract would be sustained.³² Despite the expansive reach of the court's holding, there remained only a few cases involving same-sex partners and express cohabitation agreements.³³ The practical difficulties of convincing one's partner to sign an agreement giving away property rights may have often precluded its very existence.³⁴

Despite the import of valid express agreements, *Marvin* was revolutionary because the decision stated that, "[i]n the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract"³⁵ Allowing implied enforceable agreements for unmarried cohabitants was monumental.³⁶ Nonetheless, the court did not stop there: "courts may also employ . . . quantum meruit, or equitable remedies such as constructive or

32. See *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 407 (Ct. App. 1988) ("Adults who voluntarily live together and engage in sexual relations are competent to contract respecting their earnings and property rights. Such contracts will be enforced 'unless expressly and inseparably based upon an illicit consideration of sexual services.'" (quoting *Marvin*, 557 P.2d at 116)).

33. While there were a few cases involving heterosexual couples, those involving homosexual couples were virtually nonexistent. See *Cochran v. Cochran*, 66 Cal. Rptr. 2d 337 (Ct. App. 1997) (holding male respondent breached an express *Marvin* agreement which provided for lifetime support for the female appellant by failing to perform those duties). While *Cochran* involved a heterosexual couple, it reaffirmed the *Marvin* decision.

Though both cases provide rights for heterosexual couples, neither opinion contains language indicating separate treatment for same-sex unmarried cohabitants. In fact, the *Marvin* court intentionally avoided any such distinction with the repeated use of the gender neutral term "nonmarital partners." 3 WILLIAM P. HOGOBOOM & DONALD B. KING, CALIFORNIA PRACTICE GUIDE: FAMILY LAW § 20:147 (The Rutter Group 2005).

One case involving a homosexual couple is *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Ct. App. 1988). The homosexual couple in *Whorton* had a *Marvin* contract with a meretricious element. *Id.* at 408; see also *supra* note 30. The issue was whether the sexual portion of the consideration could be severed from the remainder of the contract so as to save it from being meretricious and, therefore, unenforceable. *Whorton*, 248 Cal. Rptr. at 408. In resolving this issue, the *Whorton* court saw no legal reason to distinguish between heterosexual and homosexual couples for applicability of *Marvin*. *Id.* at 408 n.1.

34. See generally *In re Marriage of Buol*, 705 P.2d 354, 362 (Cal. 1985) (stating that the retroactive application of the statute "impose[d] a new writing requirement with which [plaintiff] cannot possibly comply").

35. *Marvin*, 557 P.2d at 110.

36. See Laskin, *supra* note 31. This article on what the author calls "palimony" discusses *Marvin* as creating new law. *Id.* However, the article also acknowledges that the court did not create any new causes of action for unmarried cohabitants; it simply treated the group the same, "as [it does] any other unmarried persons." *Marvin*, 557 P.2d at 121.

resulting trusts, when warranted”³⁷ These judicial declarations were the most significant part of the *Marvin* holding.³⁸ Implied agreements wholly avoid the practical difficulties of express written contracts.³⁹ While the availability of cohabitation agreements implied-in-fact did not create “marriage” rights for same-sex cohabitants, it did provide recourse upon the termination of their relationship without requiring couples to jump through procedural hoops of written agreements.⁴⁰ This was the first step in the development of the current law.⁴¹

37. *Marvin*, 557 P.2d at 110. The court went even further in a footnote towards the end of the opinion, stating, “[we do] not preclude the evolution of additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate” *Id.* at 123 n.25. See also Laskin, *supra* note 31. *Marvin* also provided a cause of action for breach of partnership and joint venture agreements for unmarried cohabitants. *Marvin*, 557 P.2d at 122 (citing *In re Estate of Thorton*, 499 P.2d 864, 865 (Wash. 1972)).

38. For instance, the conduct of the parties may have indicated a tacit agreement to share in the couples’ earnings and to either mutually or unilaterally provide support. See *Marvin*, 557 P.2d at 117-23; *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 898-99 (Ct. App. 1993). Although the *Friedman* court eventually held there was insufficient evidence to support an implied contract between the litigants, it nonetheless recognized the validity of the cause of action and defined its parameters.

An implied contract “. . . in no less degree than an express contract, must be founded upon an ascertained agreement of the parties to perform it, the substantial difference between the two being the mere mode of proof by which they are to be respectively established.’ It is thus an actual agreement between the parties Although an implied in fact contract may be inferred from the ‘conduct, situation or mutual relation of the parties, the very heart of this kind of agreement is an intent to promise.”

Id. at 899 (quoting *Silva v. Providence Hosp. of Oakland*, 97 P.2d 798, 804 (Cal. 1939); CAL. CIV. PROC. CODE § 1621; *Div. of Labor Law Enforcement v. Transpacific Transp. Co.*, 137 Cal. Rptr. 855, 859 (Ct. App. 1977)). But see *Vallera v. Vallera*, 134 P.2d 761, 762-63 (Cal. 1943) (posing the issue of “whether a woman living with a man as his wife but with no genuine belief that she is legally married to him acquires by reason of cohabitation alone the rights of a co-tenant in his earnings and accumulations during the period of their relationship” and answering it “in the negative”).

39. Difficulties arise not only in convincing one’s partner to sign away property rights, but in the execution of the agreement itself. Because the agreement will be treated like any other contract, ensuring its validity is essential.

40. See Robin Leonard & Stephen Elias, *Unmarried Couples Living Together*, <http://www.lectlaw.com/files/fam14.htm>. *Marvin* also opened the door for equitable contract claims: constructive trusts, resulting trusts, equitable liens, and quantum meruit. *Marvin*, 557 P.2d at 122-23 (“[A] nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward.”); see also *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101, 104-06 (Ct. App. 1998). Although these causes of action were nowhere near the equality homosexual couples had pushed for, they provided some recourse for same-sex cohabitants.

41. See Leonard, *supra* note 40 (stating that “[u]ntil 1976, courts generally did not enforce cohabitation agreements [H]owever, the California Supreme Court ruled in *Marvin v. Marvin* that cohabiting couples in California could contract”).

2. Incremental Legislation and the Development of the Domestic Partner Registry

Marvin relationships and enforceable cohabitation agreements endured as the only legal recourse for unmarried cohabitants in California for nearly twenty-three years.⁴² In that time, however, certain cities in California were ahead of the state legislature. Berkeley made the first move in 1984, when the city council created a policy to provide benefits to the domestic partners of city employees.⁴³ Berkeley was not alone in its push to equalize the rights of married and unmarried couples. One year after Berkeley's landmark policy was enacted, West Hollywood became the first city in California to establish a comprehensive domestic partner registry.⁴⁴

42. *Marvin* relationships were the only recourse until the creation of the statewide domestic partner registry in 1999. See *supra* note 3.

43. City of Berkeley, Domestic Partnership Information, <http://www.ci.berkeley.ca.us/clerk/dom-pol.htm> (last visited Jan. 21, 2008); see also Enrique A. Monagas, *California's Assembly Bill 205, The Domestic Partner Rights and Responsibilities Act of 2003: Is Domestic Partner Legislation Compromising the Campaign for Marriage Equality?*, 17 HASTINGS WOMEN'S L.J. 39, 44 (2006); Matsumura, *supra* note 5, at 188 n.7.

44. See City of West Hollywood, Domestic Partnership Registration, <http://www.weho.org/index.cfm/fuseaction/detail/group/navid/8/cid/7/> (last visited Feb. 2, 2007); Partners Task Force for Gay & Lesbian Couples, *Registration for Domestic Partnership: For the U.S. and Other Countries*, <http://www.buddybuddy.com/d-p-reg.html> [hereinafter *Partners Task Force*] (last visited Feb. 2, 2007); Wikipedia.com, *Domestic Partnership*, http://en.wikipedia.org/wiki/Domestic_partnership (last visited Jan. 21, 2008); see also Monagas, *supra* note 43, at 44; Matsumura, *supra* note 5, at 188 n.7 (citing *West Hollywood City Council Directs its City Attorney to Investigate Legally Recognizing Same-Sex Marriages*, <http://www.weho.org/index.cfm/fuseaction/detail/navid/346/cid/2479>) (last visited Jan. 21, 2008).

All of this progressive language sounds good on paper. However, it is important to note the limited rights granted by the registries. It is one thing to register with one's city; it is entirely another if that registration means something. For example, the frequently asked questions section of the West Hollywood website on domestic partnership outlines some of the restrictions of registration within their city limits:

[Q:] "If I am registered in a domestic partnership with the City of West Hollywood and move to another City, will they recognize my domestic partnership?" [A:] Some of the cities with Domestic Partnership registration offer reciprocity and will recognize registration with the City of West Hollywood when couples move to their City. You should check with your local government City Hall to determine whether they offer domestic partnership registration or recognize registration with other agencies. [Q:] "I want to add my partner to my insurance plan. If I register as a domestic partner will I then be able to add someone to my benefit plan?" [A:] You should always contact your employer and/or insurance carrier regarding eligibility questions. The City of West Hollywood cannot respond to any questions pertaining to your benefit eligibility [Q:] "What is the difference between The City Of West Hollywood's domestic partnership registration and the State of California's Registration?" [A:] The City of West Hollywood's domestic partnership registration is applicable only within our City limits You do not qualify for the benefits provided by the State of California

Berkeley followed suit in 1991 when it expanded its previous policy to form its own domestic partner registry.⁴⁵ Under its new system, all domestic partners registered with the city of Berkeley received the same benefits regardless of their employment status.⁴⁶

California domestic partners were limited to recognition in the very few municipalities that created rights until 1999. In that year, California created the nation's first statewide domestic partnership registry.⁴⁷ The initial legislation was dubbed Assembly Bill 26 and was eventually codified in California Family Code sections 297-299.6.⁴⁸ Effective January 1, 2000, registered participants⁴⁹ were granted a new set of rights per their

unless you register directly with them [Q:] "How soon after I terminate a domestic partnership can I file for a new one?" [A:] You must wait six (6) months before filing for a new domestic partnership.

City of West Hollywood, *Frequently Asked Questions—Domestic Partnerships*, <http://www.weho.org/index.cfm/fuseaction/detail/navid/8/cid/1028/> (last visited Feb. 2, 2007).

Although the rights of unmarried cohabitants have been greatly expanded statewide, the city's current domestic partnership ordinance only discusses hospital and jail visitation rights. West Hollywood, Ca., *Domestic Partnership Ordinance*, available at <http://www.weho.org/download/index.cfm/fuseaction/download/cid/1339/>. Ironically, the city of West Hollywood has neither a jail nor a hospital. Partners Task Force, *supra* note 44.

45. See City of Berkeley, *supra* note 43.

46. *Id.*

47. See *supra* note 3; see also 1999 Legislative Summary, COURT NEWS (Judicial Council of California, San Francisco, CA), Nov. 1999, at 3, available at <http://www.courtinfo.ca.gov/courtnews/1999se.pdf> (briefly summarizing AB 26, explaining that the Bill "[d]efines domestic partners and provides procedures for the registration and termination of domestic partnerships . . ." and "[s]pecifies domestic partner hospital visitation rights [and] [p]rovides an option for state and local public employers to extend health benefits to domestic partners . . ."); Gavin, *supra* note 5, at 484; The National Center for Lesbian Rights, *The Evolution of California's Domestic Partnership Law—A Timeline*, <http://www.nclrights.org/publications/timeline-ab205.htm> (last visited Feb. 2, 2007) (tracing the evolution of California's Domestic Partnership Law from 1999 to 2006).

48. See *supra* note 3.

49. The new code established that a domestic partnership is formed when:

(1) Both persons have a common residence[;] (2) [b]oth persons agree to be jointly responsible for each other's basic living expenses incurred during the domestic partnership[;] (3) [n]either person is married or a member of another domestic partnership[;] (4) [t]he two persons are not related by blood in a way that would prevent them from being married . . . [;] (5) [b]oth persons are at least 18 years of age[;] (6) [e]ither of the following: (A) [b]oth persons are members of the same sex [or] (B) [o]ne or [b]oth of the persons meet the eligibility criteria . . . of the Social Security Act . . . [stating that] persons of opposite sexes may not constitute a domestic partnership unless one or both persons are over the age of 62[;] (7) [b]oth persons are capable of consenting to the domestic partnership[;] (8) [n]either person has previously filed a Declaration of Domestic Partnership with the Secretary of State . . . that has not been terminated . . . [;] (9) [b]oth file a Declaration of Domestic Partnership with the Secretary of State pursuant to this division.

CAL. FAM. CODE § 297(b) (West 2006).

As the above listed requirements imply, couples were required to file specific registration documents ("Declaration of Domestic Partnership") to commence a domestic partnership and termination papers ("Notice of Termination of Domestic Partnership") in order to dissolve the partnership. *Id.* § 298. The forms had to be notarized in order to be valid. *Id.* Although by no

registration.⁵⁰ While the registry did not put same-sex couples on par with married couples, it was among the most generous set of rights to be established for homosexual couples nationwide.⁵¹

Although the registry was a step in the right direction for same-sex couples, the substantive rights it conferred were sparse. Hospitals were required to provide visitation privileges to domestic partners.⁵² State-employed domestic partners were allowed to include their partner in their employer-provided health plans.⁵³ However, aside from those new privileges, AB 26 did not change the way the law viewed same-sex couples.⁵⁴ The act specifically excluded any change in the status of property held by either partner before registration.⁵⁵ It also refused to create any rights in property incident to registration.⁵⁶ Domestic partners also received

means equal to marriage, the added formality brought California domestic partnerships closer to legally recognized marital unions.

It is important to note that the domestic partner registry also applied equally upon creation to opposite sex couples. § 297(5)(B). This subsection provided a means for opposite sex couples “over the age of 62,” who may have been widowed or divorced, to enter into a relationship without having to remarry. *Id.* Application to opposite sex couples in this way continues throughout this article—all the amendments and new statutes affecting the registry discussed herein affect this set of domestic partners equally. However, this article focuses on the registry in the context of same-sex relationships and thus approaches the analysis solely from that vantage point.

50. § 297.

51. See Human Rights Campaign, *Relationship Recognition in the U.S.* (Washington, D.C., updated Jul. 24, 2007), available at http://dev.hrc.org/documents/Relationship_recognition_map.pdf. This map shows that only one state, Massachusetts, provides marriage licenses to same-sex couples. *Id.* Only four states—California, Connecticut, New Jersey, and Vermont—currently have “statewide law [that provides] the equivalent of state-level spousal rights to same-sex couples within the state.” *Id.* Within that group, California stands as the only state to offer domestic partnerships (although Oregon will soon offer the same, effective January 2008), and three of those states—Vermont, Connecticut and New Jersey—provide for civil unions (although New Hampshire will soon offer the same, effective January 2008). *Id.* Four more states—Hawaii, Maine, Washington State, and the District of Columbia—have “statewide law [that provides] some statewide spousal rights to same-sex couples . . .” *Id.*

52. CAL. HEALTH & SAFETY CODE § 1261 (West 2006). The required visitation privileges were subject to some limitations, none of which had to do with sexual orientation and all of which were likely imposed on all visitors regardless of their marital/registration status. *Id.*

53. CAL. GOV'T CODE §§ 22867-77 (West 2003), repealed by Act of June 23, 2004, ch. 69, A.B. 3063, 2004 Reg. Sess. (Cal. 2004); see also Matsumura, *supra* note 5, at 189 n.11 and accompanying text.

54. See Matsumura, *supra* note 5, at 189.

55. CAL. FAM. CODE § 299.5(c) (West 2006), repealed by A.B. 205, 2003-2004 Reg. Sess. (Cal. 2003).

56. *Id.* § 299.5(d). This was not to say that registered domestic partners were not legally able to order their financial affairs. This portion of the statute expressly allows for domestic partners to acquire property together during the domestic partnership, but the character of joint ownership must have been “expressly agreed [to] in writing by both parties.” *Id.* § 299.5(e). In effect, requiring a writing for this sort of “cohabitation agreement” imposed a heavier burden on registered couples

the same tax treatment as they had as single individuals.⁵⁷ While AB 26 provided recognition for same-sex couples vis-à-vis the registry, it did little to expand the rights they received.

Over time, amendments were made and provisions were added to the California domestic partnership registry. In 2001, Assembly Bill 25 was passed.⁵⁸ It was written by Carole Midgen, the same assembly member who wrote AB 26.⁵⁹ The Bill greatly expanded the rights provided under the domestic partner registry.⁶⁰ AB 25 provided domestic partners with “a cause of action for . . . negligent infliction of emotional distress and . . . wrongful death.”⁶¹ It allowed domestic partners to adopt each other’s children using the same procedures as married stepparent adoptions.⁶² The Bill extended state-provided benefits to a surviving domestic partner after the death of a state-employed partner.⁶³ Domestic partners were authorized to make personal medical decisions and to file for state disability benefits on behalf of a disabled partner.⁶⁴ The legislation forced group health care plans to treat registered domestic partners and married spouses uniformly.⁶⁵ It required employers who allowed employees to use sick leave to care for a sick spouse to allow the same privilege for domestic partners and their children.⁶⁶ The Bill also provided a host of rights which eased the administration of a deceased partner’s estate.⁶⁷

The privileges provided under AB 25 were legal rights that had always been enjoyed by heterosexual married couples.⁶⁸ Nevertheless, the legislature declined to create laws affecting domestic partners’ property.⁶⁹

than on unmarried cohabitants before AB 206 passed. See *Marvin v. Marvin*, 557 P.2d 106, 115 n.9 (Cal. 1976) (refusing to apply statute of fraud requirements to agreements between nonmarital partners).

57. CAL. FAM. CODE § 299.5(f) (West 2006), *repealed by* A.B. 205, 2003-2004 Reg. Sess. (Cal. 2003).

58. A.B. 0025, 2001 Reg. Sess. (Cal. 2001).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Governor Gray Davis recognized that the bill was not the creation of new rights, but rather equalizing the rights of various family dynamics. *Id.* In an act of political hedging, the Governor signed the bill and remarked, “This legislation does nothing to contradict or undermine the definition of a legal marriage, nor is it about special rights. It is about civil rights, respect, responsibility, and, most of all, it is about family.” *Id.* He reaffirmed his adherence to the traditional marital unions even while signing the bill which granted extensive rights to homosexual couples. *Id.* Davis further stated, “In California, a legal marriage is between a man and a woman. I believe the only things that can undermine the bonds of a strong marriage are ignorance and fear.” *Id.*

69. See *Matsumura*, *supra* note 5, at 191.

Following the enactment of AB 25, various other bills passed in California adding new rights for domestic partners and modifying those already created.⁷⁰ Domestic partners were given everything from inclusion in intestate succession⁷¹ to the right to draft wills for one another.⁷²

Following the piecemeal addition of rights to the domestic partner registry that occurred between 1999 and 2002, the Legislature penned the single most significant addition to California's domestic partnership registry—the Domestic Partner Rights and Responsibilities Act of 2003.⁷³ The Bill, which was codified in California Family Code section 297.5, provides:

Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.⁷⁴

The law, which was slated to take effect January 1, 2005,⁷⁵ did two very important things for California registered domestic partners. First, the new law provided judicially supervised distribution of domestic partnership property upon dissolution.⁷⁶ A dissolution proceeding, similar to a divorce for married couples, was the default provided by the Act.⁷⁷ Domestic partners could avoid this formality by filing a Notice of Termination with

70. See Evolution of California's Domestic Partnership Law, *supra* note 47.

71. A.B. 2216, 2002 Reg. Sess. (Cal. 2002).

72. A.B. 1575, 2002 Reg. Sess. (Cal. 2002). Even though domestic partners were allowed to receive property from one another upon death and able to take part in designating where their partner's property was to go on death, they were still not included in California's property or spousal protection schemes. *Id.*

73. See *supra* note 4.

74. CAL. FAM. CODE § 297.5(a) (West 2006). Former domestic partners, surviving domestic partners, domestic partners with children, and domestic partners as prospective parents were also granted rights equal to their legally married counterparts. *Id.* § 297.5(b)-(e).

75. *Id.* § 297.5.

76. *Id.* § 299.3. This section required notice to be sent to all registered domestic partners. The notice disclosed, "[D]omestic partners will have a great many new rights and responsibilities, including laws governing community property, those governing property transfer, those regarding duties of mutual financial support and mutual responsibilities for certain debts to third parties, and many others." *Id.*; see also Equality California, AB 205 Fact Sheet, available at http://www.eqca.org/atf/cf/%7B687DF34F-6480-4BCD-9C2B-1F33FD8E1294%7D/factsheet_ab205.pdf (last updated Aug. 18, 2003); Monagas, *supra* note 43, at 49.

77. CAL. FAM. CODE § 299(a) (West 2006).

the Secretary of State if they met a series of stringent requirements prescribed by the Act.⁷⁸

Application of judicial oversight to domestic partnership terminations not only meant that the intricacies of the community property system applied,⁷⁹ but that *all* property rights *and obligations* had by married couples affected registered domestic partners as well.⁸⁰ Undoubtedly, this was the most significant effect of the Act. The law effectively abrogated the unpredictable system of *Marvin* agreements upon which domestic partners wanting to control their property rights were previously forced to rely.⁸¹

The Act's second significant impact was that it applied retroactively.⁸² Many rationales for retroactivity have been advanced, including the California Legislature's desire to reduce administration costs and provide dependent domestic partners a larger share of the newly community funds.⁸³

78. *Id.* § 299(a)(1)-(10) (West Supp. 2007). The requirements are:

(1) The Notice of Termination . . . [must be] signed by both registered domestic partners[;] (2) There are no children of the relationship of the parties born [or adopted] before or after registration of the domestic partnership . . . [;] (3) The . . . partnership is not more than five years in duration[;] (4) Neither party has any interest in real property . . . [;] (5) There are no unpaid obligations in excess of [\$4,000] . . . excluding [an automobile loan;] (6) The total fair market value of community [and separate] property assets . . . is less than . . . [\$25,000 each;] (7) The parties have executed an agreement setting forth the division of assets . . . [;] (8) The parties waive any rights to support by the other domestic partner[;] (9) The parties have read and understand a brochure prepared by the Secretary of State describing the . . . effect of terminating a domestic partnership[;] and (10) Both parties desire that the domestic partnership be terminated.

Id.; see also Secretary of State of Cal., Terminating a California Registered Domestic Partnership (last revised Jan. 1, 2006), available at http://www.ss.ca.gov/dpregistry/forms/sfdp_term_brochure.pdf.

79. See CAL. FAM. CODE § 760 (West 2006) (“[A]ll property, real or personal, wherever situated, acquired by a married person [or registered domestic partner] during the marriage [or registered domestic partnership] while domiciled in this state is community property.”).

80. The added rights and responsibilities included liability of each partner to the other's creditors, child support obligations to children of former partners, marital support rights after dissolution of the partnership, and a court supervised dissolution proceeding. See Harper, *supra* note 5; Virginia Palmer, The New Domestic Partnership Law, <http://www.ceb.com/info/ab205.htm>.

81. See *supra* notes 19-41 and accompanying text. The Act was the closest same-sex couples had gotten in California to having their relationships legitimized. By making domestic partnerships subject to the community property system, the Legislature forced spousal support on same-sex couples. In so doing, they recognized that a financially dependent partner in a same-sex relationship contributes equally to the partnership as a financially dependent spouse does to a marriage. Providing forced spousal protection schemes for domestic partnerships solidified same-sex committed relationships as legitimate.

82. The initial legislation said nothing as to when the new rights and responsibilities were to apply and, therefore, prospective application was presumed. Monagas, *supra* note 43, at 56; see also *infra* notes 96-104 and accompanying text. The legislature quickly addressed the oversight in 2004 with AB 2580. A.B. 2580, 2003-2004 Reg. Sess. (Cal. 2004). The Bill was an amendment to the Act which declared, “This bill would provide that any reference to the date of a marriage also be deemed to refer to the date of registration of a domestic partnership with the state with regard to, among other things, community property or the dissolution of a partnership.” *Id.*

83. See Harper, *supra* note 5 (quoting Frederick Hertz, author of *Living Together: A Legal Guide*

Whatever the reason, the provision effectively created a five-year period of possible retroactivity.⁸⁴ Although five years may not seem important, for partners with large income disparities who registered at the inception of the registry, it has the potential to be a significant hindrance.⁸⁵

Recognizing potential for ill effects, the Legislature included a provision for pre-registration agreements in the Act.⁸⁶ This portion of the legislation was essentially a reassurance to domestic partners that their *Marvin* agreements would be legally enforced even if the Act applied to their relationship.⁸⁷ Enforcing pre-registration agreements created an “opt-out” provision within the Act because it would be enforced against couples absent such an agreement.⁸⁸ Making application the default provision placed the onus on registered couples to keep abreast of their rights if they desired ultimate control over their affairs.

In order to take advantage of the available opt-out provision, registered domestic partners had to be aware of the pending changes.⁸⁹ To that end, the Act further required the California Secretary of State to send out three notice letters to the addresses under which domestic partners had

for Unmarried Couples). Another rationale is that the Legislature made the Act retroactive so that those who had registered under the previous law would not have to reregister. Matsumura, *supra* note 5, at 193-95.

84. Matsumura, *supra* note 5, at 196-97 (“[W]ith AB 2580 . . . the Assembly extended the responsibilities concerning . . . the ownership of property, to the date that the partnership first registered under . . . AB 26[,] . . . effectively transform[ing] separate property acquired during a window of up to five years into community property.”).

85. See *infra* notes 319-70 and accompanying text.

86. CAL. FAM. CODE § 297.5(k)(2) (West Supp. 2007) (“[F]or domestic partnerships registered with the state before January 1, 2005, an agreement between the domestic partners that the partners intend to be governed by the [Uniform Premarital Act] . . . shall be enforceable . . . if that agreement was fully executed and in force as of June 30, 2005.”).

87. *Id.*

88. *Id.* This provision put domestic partners on par with married couples in yet another area. California community property attaches automatically to all marriages absent a written agreement to the contrary. See CAL. FAM. CODE §§ 1600-20 (West 2006).

89. Notice is also one of the paramount requirements of due process. See *City of W. Covina v. Perkins*, 525 U.S. 234, 240 (1999) (stating that, “when law enforcement agents seize property . . . due process requires them . . . to give notice that the property has been taken”); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (holding that the State has a constitutional obligation to provide actual notice to a mortgagee of real property subject to a tax sale if they are particularly inexperienced in the area”); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969) (holding that due process requires notice and a hearing before wages may be garnished). Thus, requiring that the Secretary of State provide notice to registered domestic partners about the significant amendments to their rights was likely an act of Legislative foresight anticipating the possibility of due process litigation. For a discussion on the success of the preemptive solution to the constitutional problems with the Act’s retroactive application, see *infra* notes 359-70 and accompanying text.

registered.⁹⁰ Additionally, the Secretary of State was required to post similar information on his official website⁹¹ and provide notice of the changes with each new domestic partner registration form.⁹²

The Act and its various provisions brought domestic partnership to its most progressive point regarding the rights it granted to same-sex couples. However, simply declaring that domestic partnerships were to be governed by community property laws was not enough to make it so. Retroactivity only added to the difficulties inherent in applying a property scheme to a new group of individuals. California courts have long been challenged by

90. CAL. FAM. CODE § 299.3(a) (West Supp. 2007). The statute required that the notice letters be sent on or before June 30, 2004, December 1, 2004, and January 31, 2005. *Id.* Each letter read:

Dear Registered Domestic Partner:

This letter is being sent to all persons who have registered with the Secretary of State as a domestic partner.

Effective January 1, 2005, California's law related to the rights and responsibilities of registered domestic partners will change (or, if you are receiving this letter after that date, the law has changed, as of January 1, 2005). With this new legislation, for purposes of California law, domestic partners will have a great many new rights and responsibilities, including laws governing community property, those governing property transfer, those regarding duties of mutual financial support and mutual responsibilities for certain debts to third parties, and many others. The way domestic partnerships are terminated is also changing. After January 1, 2005, under certain circumstances, it will be necessary to participate in a dissolution proceeding in court to end a domestic partnership.

Domestic partners who do not wish to be subject to these new rights and responsibilities MUST terminate their domestic partnership before January 1, 2005. Under the law in effect until January 1, 2005, your domestic partnership is automatically terminated if you or your partner marry or die while you are registered as domestic partners. It is also terminated if you send to your partner or your partner sends to you, by certified mail, a notice terminating the domestic partnership, or if you and your partner no longer share a common residence. In all cases, you are required to file a Notice of Termination of Domestic Partnership.

If you do not terminate your domestic partnership before January 1, 2005, as provided above, you will be subject to these new rights and responsibilities and, under certain circumstances, you will only be able to terminate your domestic partnership, other than as a result of your domestic partner's death, by the filing of a court action.

Further, if you registered your domestic partnership with the state prior to January 1, 2005, you have until June 30, 2005, to enter into a written agreement with your domestic partner that will be enforceable in the same manner as a premarital agreement under California law, if you intend to be so governed.

If you have any questions about any of these changes, please consult an attorney. If you cannot find an attorney in your locale, please contact your county bar association for a referral.

Sincerely,

The Secretary of State

Id.

91. CAL. FAM. CODE § 299.3(b) (West 2006). While abbreviated, the online notice provided substantially similar information. Notably, it directed partners that their rights had been significantly changed, that termination of partnerships had new requirements, and it advised couples to consult a qualified attorney to discuss the ramifications. *Id.*

92. *Id.*

retroactive legislation, especially so in community property.⁹³ From those challenges has arisen a body of law dictating when and how community property statutes can retroactively apply.⁹⁴ What follows is a brief summary of that precedent.

B. Retroactivity and the California Community Property System

Analysis of community property statutes and their retroactive application comes by way of case law. However, since the domestic partner registry is still in its infancy and community property for registered partners is just under two years old, there is scant precedent on point.⁹⁵ Therefore, a general overview of retroactivity and a summary of judicial decisions on retrospective community property statutes are helpful in predicting how the courts will handle retroactive application of the Act.

1. The Presumption Against Retroactivity

Generally, laws are created to apply prospectively.⁹⁶ The predilection for prospective legislation has roots in both Greek and Roman law.⁹⁷ It is based on the theory that the ability of citizens to order their affairs and to predict the outcomes of their behaviors based upon set and certain rules is essential to the organization of any society.⁹⁸ This principle survived through the development of the common law and into our modern justice system.⁹⁹ It remains today as a general presumption in favor of prospective application of legislation.¹⁰⁰

93. See *infra* notes 106-236 and accompanying text.

94. *Id.*

95. In fact, there has yet to be a case *directly* on point—that is, a case involving a same-sex couple who challenge the retroactive application of the Act to the termination of their relationship created prior to the Act’s enactment.

96. See, e.g., Gene A. Maguire, *Retroactive Application of Statutes: Protection of Reliance Interests*, 40 ME. L. REV. 183, 183-84 (1988) (stating that although legislatures “may enact a statute to have retroactive effect . . . courts traditionally interpret statutes to apply prospectively absent clear indication of legislative intent to the contrary”).

97. *Id.* at 183 n.4; see also Andrew C. Weiler, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 DUKE L.J. 1069, 1069 (1993) (“Fundamental to a civilized and just society is a recognition that citizens should be able to understand the obligations and sanctions that the legal system imposes on them. Retroactive application of the law has historically been seen as inimical to this norm . . .”).

98. Maguire, *supra* note 96, at 183 n.4.

99. *Id.* at 183; Weiler, *supra* note 97, at 1069-70.

100. See, e.g., Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2764-65 (2006) (“If a statutory provision ‘would operate retroactively’ as applied to cases pending at the time the provision was enacted, then

The presumption's deep roots and ability to persevere do not, however, conclusively prohibit retroactive legislation. To the contrary, backward-reaching laws are passed quite frequently.¹⁰¹ Just as often as laws assert retroactive application, they are challenged.¹⁰² Invariably, the challenges are based upon violations of constitutional rights.¹⁰³ Courts dealing with such challenges have consistently determined that retroactive legislation only applies when the legislature expressly so indicated.¹⁰⁴ However, determination of legislative intent is only one factor in the constitutional question.¹⁰⁵ What follows is an abridged summary of California community property cases that tested retroactive statutes and shaped the analysis for determining when such application was constitutional.

2. Retroactive Application of California Community Property Law

The evolution of the California community property system is long and complex.¹⁰⁶ Within the system there have been various statutes and amendments which professed to apply retrospectively.¹⁰⁷ Introduction of each of these pieces of legislation spurred subsequent litigation over the constitutionality of the respective statutory provision.¹⁰⁸ Similarly, the Act

[the court's] 'traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.'"); *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2428 (2006) ("[W]e ask whether applying the statute . . . would have a retroactive consequence If the answer is yes, we then apply the presumption against retroactivity . . . [in the] 'absen[ce of] a clear indication from Congress that it intended such a result.'" (citations omitted)); *see also* Maguire, *supra* note 96, at 203. *But see* Weiler, *supra* note 97, at 1078 (asserting that the current presumption is in favor of validating retroactive economic laws).

101. *Smith v. Doe*, 538 U.S. 84 (2003) (holding that the Alaska Sex Offender Registration Act was non-punitive and therefore could be applied retroactively without violating the ex post facto clause of the United States Constitution); *see also infra* notes 106-236 and accompanying text.

102. *E. Enters. v. Apfel*, 524 U.S. 498 (1998) (challenging the retroactive application of a statute requiring company to pay additional medical benefits to employees after the company left the industry as an unconstitutional taking in violation of the Fifth Amendment to the United States Constitution); *Lindh v. Murphy*, 521 U.S. 320 (1997) (challenging retroactive application of an addition to a statutory section dealing with habeas corpus petitions); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) (challenging retroactive application of an amendment to the False Claims Act).

103. *See infra* notes 106-236 and accompanying text.

104. *Id.*

105. *Id.*

106. *See generally* William A. Reppy, Jr., *Major Events in the Evolution of American Community Property Law and Their Import to Equitable Distribution States*, 23 *FAM. L.Q.* 163 (1989).

107. *CAL. FAM. CODE* § 125 (West 2006) (applying the quasi-community property scheme retroactively); *CAL. FAM. CODE* § 771 (West 2006) (applying the separate property presumption retroactively); *CAL. FAM. CODE* §§ 2580-81 (West 2006) (attempting to apply the community property presumption for all jointly held property retroactively); *see also infra* notes 117-236 and accompanying text; Stephen M. Tennis, *Retroactive Application of California's Community Property Statutes*, 18 *STAN. L. REV.* 514 (1966).

108. *Addison v. Addison*, 399 P.2d 897 (Cal. 1965) (challenging the retroactive application of California's quasi-community property law as an unconstitutional impairment of a vested right); *In*

has entered into the realm of California family law with promises of retroactivity.¹⁰⁹ Based upon prior incidents, it follows that a constitutional challenge will eventually surface.

When the constitutionality of the Act is finally challenged, it will likely come in the form of a challenge to retroactive application of the community property system to registered couples.¹¹⁰ Since there is no case law directly on point,¹¹¹ a history of how the court has handled retroactive application of community property laws is the closest alternative to precedent. In addition to working under identical systems, the Act claims to put domestic partners on equal ground with married couples.¹¹² Because it grants *all* the rights and imposes *all* the responsibilities of marriage,¹¹³ there should be no difference in application of the law between the two distinct groups.¹¹⁴ For the foregoing reasons, an overview of the progression of retroactive California community property legislation provides a reasonably accurate forecast of the future application of the Act.

Many of the retroactive laws were expansions of the rights of women in the community property system.¹¹⁵ The remainder of the history comes from statutes dealing with joint tenancy.¹¹⁶ The following section is broken down chronologically as each piece of legislation was introduced and according to the type of law it concerns.

re Marriage of Bouquet, 546 P.2d 1371 (Cal. 1976) (challenging the retroactive application of community property law altering community property status of husband's post-separation income). For constitutional challenges to the California Family Code section 2581 dealing with concurrent estates, see *In re* Marriage of Buol, 705 P.2d 354 (Cal. 1985) (constitutionally challenging § 2581 as an impairment of vested rights); *In re* Marriage of Hilke, 841 P.2d 891 (Cal. 1992); *In re* Marriage of Heikes, 899 P.2d 1349 (Cal. 1995). See *infra* notes 186-236 and accompanying text; see also Viiu Spangler, *Happily Settled Ever After: In re* Marriage of Heikes and Retroactivity, 18 WHITTIER L. REV. 339 (1997).

109. See *supra* note 82 and accompanying text.

110. See generally *supra* note 76.

111. This is to say that at the time this article was written, there was no case law dealing with domestic partners and retroactive application of the community property system.

112. See *supra* notes 73-92 and accompanying text.

113. CAL. FAM. CODE § 297.5 (West 2006).

114. See *supra* note 33 (discussing the *Marvin* court's treatment of the same-sex issue as entirely avoiding any distinction on the basis of sexual orientation).

115. See *infra* notes 117-78 and accompanying text. It seems strangely appropriate to use the legislative history involved in expanding the rights of one previously oppressed group to discuss how the court will deal with expanding the property rights of another historically repressed group.

116. CAL. FAM. CODE §§ 2580-81 (West 2006). See *infra* notes 179-236 and accompanying text.

i. Application of California's Quasi-Community Property Scheme

From its inception, retroactive application of the quasi-community property statute was problematic for courts.¹¹⁷ The struggle was played out in the 1965 case of *Addison v. Addison*.¹¹⁸ Morton and Leona Addison were married in Illinois in 1939 and moved to California ten years later.¹¹⁹ The couple brought property which had accumulated as a result of Morton's Illinois business ventures during the marriage.¹²⁰ After twelve years of California residency, Leona sought a divorce from Morton and requested an equitable division of the marital assets.¹²¹ Leona's petition claimed that the newly adopted California quasi-community property statute should apply to the couple's divorce.¹²² She averred that the property held in her husband's name alone was acquired using property brought by the couple from Illinois to California.¹²³ She further testified that the property in question would have been community property had it been acquired in California.¹²⁴

The defendant, Morton, opposed the application of the quasi-community property statute to property he held before the statute's enactment on two constitutional grounds.¹²⁵ First, he alleged that the law deprived him of a vested property interest without due process of law.¹²⁶ To resolve

117. The California Family Code reads:

'Quasi-community property' means all real or personal property, wherever situated, acquired before or after the operative date of this code in any of the following ways:

(a) By either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated, which would have been community property if the spouse who acquired the property so exchanged had been domiciled in this state at the time of its acquisition.

CAL. FAM. CODE § 125 (West 2006) (emphasis added). For a somewhat historical table of California community property statutes with retroactivity problems, see Tennis, *supra* note 107, at 524.

118. 399 P.2d 897 (Cal. 1965).

119. *Id.* at 898.

120. *Id.*

121. *Id.*

122. *Id.* at 898-99. At the time of the case, the quasi-community property statute was CAL. CIV. CODE § 140.5, enacted in 1961. Leona's petition for divorce was filed February 20, 1961. *Id.* at 898. The opinion is dated March 15, 1965. *Id.* at 897.

123. *Id.*

124. *Id.* at 899. These elements were sufficient to state a claim under the quasi-community property statute.

125. Defendant relied on *Estate of Thorton*, 33 P.2d 1 (Cal. 1934), as his primary controlling precedent. *Id.* at 901. Both contentions of unconstitutionality arise from *Thorton's* logic.

126. *Id.* at 902. The Fourteenth Amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

defendant's due process challenge, the court recognized the general rule that vested rights may not be impaired without due process of law.¹²⁷ However, the court quickly inserted an exception to the general rule, stating, "[v]ested rights . . . may be impaired . . . whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people."¹²⁸ The court's discussion turned to the state interest in regulating matrimonial property.¹²⁹ It stated that the quasi-community property statute at issue was a means of protecting those property interests and was "of large social importance."¹³⁰

Applying the above law to the facts of the case, the court zeroed in on the protection of morals allowed under the exception.¹³¹ The court held that the deprivation of property rights occasioned on the defendant was not unconstitutional because the state was appropriately using its police power to uphold societal morals.¹³² It was exceedingly clear that the court's rationale was heavily influenced by the defendant's adultery.¹³³ In fact, this consideration alone justified the court's holding.¹³⁴

The defendant's second constitutional challenge to the retroactive application of the quasi-community property statute was premised on the Privileges and Immunities Clause of the Fourteenth Amendment.¹³⁵ The

U.S. CONST. amend. XIV, § 1 (emphasis added).

127. *Addison*, 399 P.2d at 901 ("[C]hanges in the community property system which affected 'vested interests' could not constitutionally be applied retroactively but must be limited to prospective application." (citing *Spreckels v. Spreckels*, 48 P. 228 (Cal. 1897)).

128. *Id.* at 902 (quoting Barbara N. Armstrong, "Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity?, 33 CAL. L. REV. 476, 495 (1945)). Under the exception, the California Supreme Court reframed the issue. *Id.* The court saw it as a question of whether there was a sufficient public justification for applying the new law, rather than whether a vested property right had been impaired. *Id.* Another commentator framed the issue as whether the enactment of the statute was a "valid exercise of the [state's] police power." Tennis, *supra* note 107, at 518. Tennis claims that the court then balances, "the interest to be promoted against the right to be impaired." *Id.* at 519. So long as the state's interest is greater than the individual right they are impairing, the exercise of police power is valid. *Id.*

129. *Addison*, 399 P.2d at 902.

130. *Id.* (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)).

131. *Id.* at 903.

132. *Id.* In essence, it was the couple's choice to divorce which caused the deprivation of property rights, not the relocation across state lines. *Id.*

133. *Id.* The court makes no attempt to disguise the fact that it rules for the plaintiff because of its contempt for the defendant's infidelity. It conditions its rule on the infidelity of the property-holding spouse: "[W]here the innocent [i.e. faithful] party would otherwise be left unprotected the state has a very substantial interest and one sufficient to provide for a fair and equitable distribution of the marital property without running afoul of the due process clause of the Fourteenth Amendment." *Id.*

134. *Id.*

135. *Id.* The Fourteenth Amendment states: "No State shall make or enforce any law which shall

court quickly dismissed the argument, stating that the legislation did not cause any loss of rights due to the couple's relocation because the law was only applicable in divorce or separate maintenance proceedings.¹³⁶ Therefore, the Privileges and Immunities Clause did not apply.¹³⁷

The opinion also addressed defendant's contention that the statute was inapplicable because it was enacted after the dissolution proceeding was commenced.¹³⁸ As quickly as it dismissed the defendant's two constitutional challenges, the court labeled this argument "untenable."¹³⁹ According to the court, the statute was not being applied retroactively.¹⁴⁰ Since the genesis of the case was the divorce filing, any argument that the legislation improperly affected property rights was precluded.¹⁴¹ The holding reaffirmed this position, noting that even though the law was enacted after the lawsuit was filed, its application was not retroactive because the judgment of divorce was also entered *after* the enactment of the statute.¹⁴²

abridge the privileges or immunities of citizens of the United States" U.S. CONST. amend. XIV, § 1.

136. *Addison*, 399 P.2d at 903. The Privileges and Immunities Clause guarantees citizens that they will be allowed to travel and indeed create a domicile in any state of the United States without losing valuable rights. *Id.* While this situation seems ripe for such a challenge, the court distinguished the rights granted under the Privileges and Immunities Clause from those being affected in this case. *Id.* Since the institution of divorce proceedings, not the change of domicile, was what caused the loss of property rights, the Privileges and Immunities Clause was not violated. *Id.* Had the couple remained married, their property rights would have remained the same as they were before their move. *Id.*

As the United States Supreme Court has observed, . . . the privileges and immunities clause . . . does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it [T]he inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures. In the case at bar, Leona . . . is a member of a class of people who lost the protection afforded [her in her prior domiciliary] had [she] sought a divorce there before leaving that state. She has lost that protection, and is thus in need of protection from California. Hence, the discrimination, if there be such, is reasonable and not of the type [the Privileges and Immunities Clause] seeks to enjoin.

Id. at 903-04 (quotations and citations omitted).

137. *Id.*

138. *Id.* at 904.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* Following its analysis, the court proclaimed, "Nor is the statute being applied retroactively. That is so because the legislation here involved neither creates nor alters rights except upon divorce or separate maintenance. The judgment of divorce was granted after the effective date of the legislation. Hence the statute is being applied prospectively." It seems strange that after an entire opinion dismantling constitutional challenges to the retroactive application of the statute in question, a court would insert a sentence such as this one. In this respect, the statement has been heavily criticized and analyzed since the opinion was published. According to the court in *Bouquet*, the *Addison* court clearly applied the statute retroactively and thus, "[t]he quoted passage was probably intended to convey the modest message that the court was not applying the 1961 legislation

Addison was a starting point in the evolution of retroactive legislation in the California community property system.¹⁴³ Its holding cemented the proposition that vested property rights may be constitutionally impaired when justified by a sufficient state interest.¹⁴⁴

ii. Post-Separation Earnings

After the *Addison* decision, the court again struggled with applying a community property statute retroactively in *In re Marriage of Bouquet*.¹⁴⁵ The Bouquets were married in California in 1941.¹⁴⁶ Two years after their separation in 1969, the wife filed for divorce and determination of their property rights.¹⁴⁷ After the divorce petition was filed, *but before the court granted the divorce*, an amended civil code section took effect.¹⁴⁸ The new section read: “the earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse.”¹⁴⁹ The previous section of the civil code provided that only the wife’s earnings and accumulations during separation were separate property.¹⁵⁰

The amended section had positive effects on the husband’s property interests.¹⁵¹ He therefore argued for retroactive application of the new law

in a way that would disturb judgments handed down prior to its effective date on the basis of the then-prevailing law.” *In re Marriage of Bouquet*, 546 P.2d 1371, 1377 n.10 (Cal. 1976) (citing William A. Reppy, Jr., *Retroactivity of the 1975 California Community Property Reforms*, 48 S. CAL. L. REV. 977, 1083 (1975); Donald C. Knutson, *California Community Property Laws: A Plea for Legislative Study and Reform*, 39 S. CAL. L. REV. 240, 270 (1966); Barbara Brudno Gardner, *Marital Property and the Conflict of Laws: The Constitutionality of the “Quasi-Community Property” Legislation*, 54 CAL. L. REV. 252, 266-267 (1966); Stephen M. Tennis, *Retroactive Application of California’s Community Property Statutes*, 18 STAN. L. REV. 514, 520-21 (1966)).

143. See generally Tennis, *supra* note 107.

144. *Addison*, 399 P.2d at 903.

145. 546 P.2d 1371 (Cal. 1976).

146. *Id.* at 1372.

147. *Id.*

148. *Id.* The section was CAL. CIV. CODE § 5118, *repealed by* 1992 Cal. Legis. Serv. 162. The 1992 amendment was codified in CAL. FAM. CODE § 771 (West 2006) and remains today substantially the same as the Civil Code version.

149. 546 P.2d at 1372 n.1.

150. *Id.* at 1372 n.2.

151. The couple separated March 2, 1969. *Id.* at 1372. The effective date of the amendment was March 4, 1972. *Id.* The husband wanted the statute applied to his earnings acquired since the separation (3/2/69), as opposed to since the statute’s enactment date (3/4/72). *Id.* Such a holding provided the husband with return of the one-half interest in his earnings which the wife acquired under the old law.

to all his earnings during the entire period of separation.¹⁵² In her own self-interest, the wife contested that argument.¹⁵³ She claimed, among other things, that retroactive application of the statute to the husband's earnings during separation would unconstitutionally deprive her of vested property rights in her husband's post-separation income.¹⁵⁴

The court unhesitatingly agreed with the husband's interpretation of the statute.¹⁵⁵ The holding not only resolved the immediate issue, but it provided the constitutional framework for analyzing questions of retrospective statutory application in California.¹⁵⁶ That analysis is two-fold. The first step is to determine whether the legislature intended the statute to apply retroactively.¹⁵⁷ According to the court, the starting point for this determination is the general presumption against retroactivity,¹⁵⁸ rebuttable by express statutory language evincing contrary legislative intent.¹⁵⁹ In this case, "[t]he language of the amendment [did] little to reveal the Legislature's intent regarding the amendment's prospective or retroactive application," thereby forcing the court's analysis to another step.¹⁶⁰

152. *Id.* The husband was given leave to amend his original complaint after the enactment of the statute. *Id.* It was in this amended complaint that the husband asserted that the statute should apply retroactively to his earnings since separation. *Id.*

153. *Id.*

154. *Id.* at 1376; *see also* Matsumura, *supra* note 5, at 208.

155. *Bouquet*, 546 P.2d at 1372.

156. Matsumura cites what she calls, the *Bouquet* court's "fairness concerns." Matsumura, *supra* note 5, at 209. The three factors are: "(1) the extent of reliance by the aggrieved party on the former version of the law; (2) the legitimacy of that reliance; and (3) the degree to which retroactive application of the new law would disrupt settled expectations." *Id.* The *Bouquet* court articulated the factors a little differently. *See Bouquet*, 546 P.2d at 1376. The court stated that to determine whether retroactive application of a statute breached due process rights, consideration must be given to:

[T]he significance of the state interest served by the law, the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.

Id. While this section of the court's analysis is crucial to its rationale, it is not the most important factor to pull from the case. Rather, these factors are part of the larger analysis, and they aid in determining but one of the three steps of the court's test. *See infra* notes 168-78 and accompanying text.

157. *Bouquet*, 546 P.2d at 1372.

158. *Id.* at 1372-73 (citing *Interinsurance Exch. v. Ohio Cas. Ins. Co.*, 373 P.2d 640 (Cal. 1962); *DiGenova v. State Bd. of Educ.*, 367 P.2d 865 (Cal. 1962)).

159. Of the rebuttal, the court states, "We have explicitly subordinated the presumption against the retroactive application of statutes to the transcendent canon of statutory construction that the design of the Legislature be given effect." *Id.* at 1373 (citing *Mannheim v. Superior Court*, 478 P.2d 17 (Cal. 1970)).

160. *Id.*

In cases with questions of retroactivity, legislative silence is not rare and does not end the first portion of the inquiry. The court relied on *In re Estrada* for the proposition that, “[w]here the Legislature has not set forth in so many words what it intended, the [presumption] should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent.”¹⁶¹ Additionally, the presumption against retroactive legislation should only be applied after, “considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent.”¹⁶² The “pertinent factors” which elucidated legislative intent were: “[the] context, the object[ive] . . . , the evils to be remedied, the history of . . . legislation upon the same [topic], public policy, and contemporaneous construction.”¹⁶³

Analysis of the factors laid out above provided the *Bouquet* court little help. The only tangible evidence of intent was a letter written on a Senate resolution indicating one assembly member’s view that the statute was to operate retroactively.¹⁶⁴ The letter and the complete lack of evidence showing a contrary intent supported a legislative intent in favor of retroactivity.¹⁶⁵ Had the court reached the contrary conclusion, the inquiry would have ended there.¹⁶⁶ However, because it determined the amendment was intended to have a retroactive effect, it continued on to the second prong of the test.¹⁶⁷

161. *Id.* (quoting *In re Estrada*, 408 P.2d 948, 952 (Cal. 1965)).

162. *Id.* (emphasis added).

163. *Id.* (quoting *Alford v. Pierno*, 104 Cal. Rptr. 110, 114 (Ct. App. 1972); citing *Estate of Jacobs*, 142 P.2d 454 (Cal. 1943)).

164. *Id.* at 1374-76. The court discussed the letter extensively but prefaced the discussion with a disclaimer as to its relevance: “[a]lthough the letter is irrelevant to the extent that it merely reflects the personal views of Assemblyman Hayes, it is quite relevant to the extent that it evidences the understanding of the Legislature as a whole.” *Id.* at 1374.

165. *Id.* at 1375 (“Apart from the . . . letter, the legislative history is silent on the issue of retroactivity. In short, the only indicators of legislative intent ascertainable in this case call for the retroactive application of the amendment.”).

166. *See id.*

167. *Id.* at 1375-76. The court concluded the first step of the analysis by declaring that the challenger to retroactivity,

must do more than merely point to the presumption against retroactive application as a counterweight [T]he presumption should operate only when, looking at all the pertinent factors, we fail to detect the legislative intent. Given the . . . letter and the absence of conflicting indicia, we cannot hold that “it is impossible to ascertain the legislative intent.” We conclude, therefore, that the Legislature intended [the statute] to apply retroactively.

Id. (citations omitted).

A simple summary of the rule was presented in a footnote following this discussion. It stated, “the presumption against retroactivity is dispositive until such time as other evidence permits us to deduce the Legislature’s intent, and is completely irrelevant thereafter.” *Id.* at 1376 n.6. The intent

Once a court determines that the statute under examination is intended to apply retroactively, it then must determine whether retroactive application of the statute is constitutional.¹⁶⁸ There must be a vested property right for the constitutional question to be relevant.¹⁶⁹ Consequently, the *Bouquet* court briefly examined the character of the wife's property interests.¹⁷⁰ It held that, because property is characterized at the time of its acquisition, the wife's interest in her husband's income vested when the husband earned the money.¹⁷¹ Therefore, retroactive application of the statute deprived the wife of a vested right in a portion of her husband's income by classifying it as his separate property.¹⁷²

Once property rights are characterized as vested, they cannot be constitutionally impaired by state action unless such action is within the state's police power to protect a sufficiently significant state interest.¹⁷³ The *Bouquet* court utilized the same state interest as did the *Addison* court to

determination lead the court to its next issue. *Id.* at 1376.

168. *Id.* The constitutional analysis turns on whether there has been a deprivation of a property right. *Id.* The court adopted the constitutional issue posed by *Addison* that, "[t]he constitutional question . . . [is] not whether a vested right is impaired by a marital property law change, but whether such a change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment." *Id.* (quoting *Addison v. Addison*, 399 P.2d 897, 902 (Cal. 1965)); see also *supra* note 126.

169. The legislature can impair non-vested rights without running afoul of the constitution. *In re Marriage of Hilke*, 841 P.2d 891, 896 (Cal. 1992) ("[Plaintiff's] interest was not vested but was, rather, contingent on his surviving his former wife. We need not engage in extensive analysis of the *Bouquet* . . . factors as they might apply in this situation, because *in the absence of a vested interest, retroactive legislation does not violate due process.*") (emphasis added).

170. *Bouquet*, 546 P.2d at 1376.

171. *Id.* This court defines the term "vested" as the condition of property rights "that are not subject to a condition precedent." *Id.* at 1376 n.7. This definition of the term is fairly uniform. See *In re Marriage of Hilke*, 841 P.2d at 897. Webster's Dictionary defines "vest" as "to grant or endow with a particular authority, right, or property." Merriam-Webster Online Dictionary, "vested," <http://www.m-w.com/dictionary/vested> (last visited Jan. 15, 2007). But see *Loop v. State*, 49 Cal. Rptr. 909, 913 (Ct. App. 1966); *Knutson*, *supra* note 142, at 267; Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 696 (1960); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 245-48 (1927). The term "vested" has uniformly been used to describe rights which the court was not permitted to impair with retroactive legislation.

172. *Bouquet*, 546 P.2d at 1376. In other words, the wife had a vested community property interest in the husband's income the moment he earned it under the prior statute. *Id.* Applying the new statute retrospectively effectively changed that characterization *at the time it was earned* to separate property. *Id.* The reclassification thereby took vested property rights from the wife. *Id.* Had the question been answered in the negative (i.e. that the wife had no vested interest), the constitutional discussion would be over. *Id.* If there is no vested property right, the statute may be applied retroactively without worry. *Hilke*, 841 P.2d at 897.

173. *Bouquet*, 546 P.2d at 1376. Significantly sufficient state interests include "the health, safety, morals and general well being of the people." *Id.*; see also *Addison*, 399 P.2d at 897; *In re Marriage of Fabian*, 715 P.2d 253, 259 (Cal. 1986) ("In the interest of finality, uniformity and predictability, retroactivity of marital property statutes should be reserved for those rare instances when such disruption is necessary to promote a significantly important state interest.").

justify the impairment of the vested property right at issue.¹⁷⁴ It also provided a list of factors to help in determining whether a retroactive statute impairs due process.¹⁷⁵ Accordingly, the court stated, “[t]he state’s interest in the equitable dissolution of the marital relationship supports [the] use of the [state’s] police power to abrogate rights in marital property that derived from the patently unfair former law.”¹⁷⁶ Because the state interest was considerably high and the unconstitutionality of the former law clear,¹⁷⁷ the *Bouquet* court decided that the legislation could be applied retroactively despite the impairment of the wife’s vested property rights.¹⁷⁸

iii. Application of Joint Tenancy Statutes

Vested property rights also come into issue with property held in joint tenancy. Concurrent estates, including joint tenancy, have caused California courts constant aggravation.¹⁷⁹ Upon dissolution of marriage or death of one of the partners, courts often could not discern whether couples intended to hold titled property in joint tenancy—the default form of title for many banks and real estate companies.¹⁸⁰ The common law approach viewed the

174. *Bouquet*, 546 P.2d at 1377. As summarized by the *Bouquet* court, “The state’s paramount interest in the equitable distribution of marital property upon dissolution of the marriage, we concluded, justified the impairment of the husband’s vested property rights.” *Id.* (emphasis added).

175. See *supra* note 156. This is the area in the *Bouquet* analysis where Matsumura’s “fairness concerns” fit. *Id.*

176. *Bouquet*, 546 P.2d at 1378.

177. *Id.* at 1373.

Although the constitutionality of [the] former [law] is not directly before us in this case, we can nonetheless observe that it would be subject to strong constitutional challenge. Prior to the amendment, [the law] blatantly discriminated against the husband during periods of separation: the earnings of the wife were her separate property while those of the husband belonged to the community. It seems doubtful that the state could conjure a rational relation between this unequal treatment and any legitimate state interest. It is even less likely that the state could sustain the greater showing required by our recognition that sex based classifications are inherently suspect.

Id. (citation omitted).

178. *Id.* at 1378; see also Spangler, *supra* note 108, at 353 (“The [*Bouquet*] court held that the retroactive application of [the law] was necessary to correct the ‘rank injustice’ of the preceding law . . .”).

179. See *infra* note 180.

180. For an idea of the history of confusion caused by concurrent estates and their application, see CAL. FAM. CODE § 2580(b) (West 2006). This portion of the statute declares:

The methods provided by case and statutory law have not resulted in consistency in the treatment of spouses’ interests in property they hold in joint title, but rather, have created confusion as to which law applies to property at a particular point in time, depending on the form of title, and, as a result, spouses cannot have reliable expectations as to the characterization of their property and the allocation of the interests therein, and attorneys

written title as an effective rebuttal of the general community property presumption; thus, property acquired during marriage was presumed to be community property absent title indicating a different form.¹⁸¹

Recognizing the nightmare courts experienced in applying the law to cases where most parties did not understand the implications of the form of title,¹⁸² the legislature passed California Civil Code section 4800.1.¹⁸³ This section classified any jointly held property as community property for purposes of distribution at divorce, regardless of the form of ownership indicated on the title.¹⁸⁴ Moreover, the law created explicit retroactivity.¹⁸⁵

cannot reliably advise their clients regarding applicable law.

Id.; see also *In re Marriage of Buol*, 705 P.2d 354, 360-61 (Cal. 1985) (citing the Senate Journal which reprinted the California Law Revision Commission's Report Concerning AB 26). The report cited in *Buol* shed light on the reasoning for giving retroactive effect to the Bill. *Id.* at 361. As the court explained:

The Senate was concerned that because marital partners often use community property funds to acquire assets taken in joint tenancy without knowledge of the legal distinctions between the two, and the courts are without jurisdiction to divide joint tenancy property upon dissolution, absent section [2581]'s community property presumptions, the courts may be precluded from making 'the most sensible disposition of all the assets of the parties.' . . . [T]he Senate wanted to extend the presumption to all marital property taken in joint tenancy because, 'spouses frequently hold substantial amounts of their wealth in joint tenancy form, including bank accounts, stocks, and other real property.'

Id.

The court further illuminated the historical problem with concurrent estates when it explained: "The Legislature and the courts have long been aware that 'husbands and wives take property in joint tenancy without legal counsel but primarily because deeds prepared by real estate brokers, escrow companies and by title companies are usually presented to the parties in joint tenancy form . . .'" *Id.* (citing *In re Marriage of Lucas*, 614 P.2d 285, 288 (Cal. 1980)).

181. See CAL. FAM. CODE § 760 (West 2006) ("Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.").

182. See *supra* note 180.

183. CAL. CIV. CODE § 4800.1 (1992) (current version at CAL. FAM. CODE §§ 2580-81 (1994)). Since there is no substantive change between the old civil code section 4800.1 and the current version in the family code, any further reference to the old section will be amended to refer to CAL. FAM. CODE § 2581. See *In re Marriage of Heikes*, 899 P.2d 1349, 1350 n.1 (Cal. 1995) ("Section[] 4800.1 . . . [is] continued in Family Code sections 2580 [and] 2581 . . . without substantive change.").

184. Couples could still hold property in joint tenancy. California Family Code section 2581 states:

For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form . . . is presumed to be community property. This presumption . . . may be rebutted by either of the following:

- (a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.
- (b) Proof that the parties have made a written agreement that the property is separate property.

CAL. FAM. CODE § 2581 (West 2006).

185. See *Buol*, 705 P.2d at 356 (quoting Section 4 of California AB 26: "[t]his act applies to the following proceedings: [] (a) Proceedings commenced on or after January 1, 1984[;] [] (b)

The law's effect was to retroactively change property ownership—thus creating the ideal environment for constitutional challenges.

The California courts faced their first constitutional challenge to the law in 1985 with *In re Marriage of Buol*.¹⁸⁶ The Buols married in 1943 and remained together until 1977.¹⁸⁷ The husband worked during the course of the marriage until 1970 when he was fired.¹⁸⁸ Following termination, the husband entered into a prolonged period of unemployment wherein he collected social security benefits.¹⁸⁹ The wife began working in 1954 doing miscellaneous housekeeping and caring for the elderly.¹⁹⁰ She was employed full-time as a nursing attendant in 1959 and remained so up through the divorce proceedings.¹⁹¹ All earnings from her employment were kept separate from any other source of income in the household.¹⁹² She did so with her husband's consent and in 1963 used the money to purchase a home.¹⁹³ She made all of the mortgage, tax, and maintenance payments on the property out of her separate account; the husband contributed nothing.¹⁹⁴

Upon divorce, the husband claimed a one-half interest in the value of the home as community property.¹⁹⁵ The wife countered, alleging the couple had an oral agreement that both her earnings and the home were her separate

Proceedings commenced before January 1, 1984, to the extent [those] proceedings . . . are not yet final on January 1, 1984.”). A similar provision applies to the section as added to the Family Code. CAL. FAM. CODE § 2580 (West 2006). This antecedent to section 2581 acts as an introduction to the law and provides some context for its purpose and weight. After discussing the confusion caused by prior laws and the significant state interest in “provid[ing] uniformly and consistently for the standard of proof in establishing the character of property acquired by spouses during marriage in joint title form,” the section speaks to its intended application. § 2580(a). It reads:

[A] compelling state interest exists to provide for uniform treatment of property. Thus, former Sections 4800.1 and 4800.2 of the Civil Code . . . and as continued in Sections 2581 and 2640 of this code, apply to all property held in joint title *regardless of the date of acquisition* of the property or the date of any agreement affecting the character of the property, and those sections apply in all proceedings commenced on or after January 1, 1984.

§ 2580(c) (emphasis added).

186. 705 P.2d 354 (Cal. 1985).

187. *Id.* at 355.

188. *Id.*

189. *Id.* The court's recantation of the facts provides indications of the husband's character. *Id.* It refers to him as an alcoholic and compulsive gambler. *Id.* at 355-56.

190. *Id.* at 355.

191. *Id.*

192. *Id.*

193. *Id.* Facts provided in the case indicate that the property increased in value from a purchase price of \$17,500 in 1963 to \$167,500 in 1985 when the case was decided. *Id.* at 356.

194. *Id.*

195. *Id.*

property.¹⁹⁶ She corroborated her contentions through personal testimony and that of other family members.¹⁹⁷ They testified that the husband publicly acknowledged his wife was the sole owner of the home, claiming that he did not want any responsibility.¹⁹⁸

The trial court ruled that the parties had an enforceable oral agreement and distributed the property accordingly.¹⁹⁹ The husband appealed, during which Civil Code section 4800.1 was enacted.²⁰⁰ The law was created to apply retroactively,²⁰¹ which created an issue: whether “legislation requiring a writing to prove . . . that property taken in joint tenancy form is the separate property of one spouse [may] constitutionally be applied to cases pending before its effective date[.]”²⁰²

The *Buol* court began its analysis the same way the *Bouquet* court had—by determining the legislative intent on retroactivity.²⁰³ However, the *Buol* court had a much easier time because the statutory language was explicit.²⁰⁴ Despite its determination that the Legislature intended the law to apply retroactively, the court noted, “[l]egislative intent . . . is only one prerequisite to retroactive application of a statute [I]t remains for us to determine whether retroactivity is barred by constitutional constraints.”²⁰⁵

From this point on, the court relied on *Bouquet* and *Addison* to decide whether the enactment of the statute deprived the wife of a vested property interest without due process.²⁰⁶ First, the court recognized that the wife had a vested separate property interest in the home at the time of trial.²⁰⁷ The

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *See supra* note 185 and accompanying text.

202. *Buol*, 705 P.2d at 355. The court later noted that, because the other property in the marriage was distributed prior to the appeal, “[t]he sole issue at trial was the status of the home as separate or community property.” *Id.* at 356.

203. *Id.*

204. *Id.* at 357.

205. *Id.* This court posited three ways in which a retroactively applied statute could be unconstitutional: (1) it could be an ex post facto law; (2) it could deprive a person of a vested right without due process of law; or (3) it could impair the obligations of a contract. *Id.* (citing *Rosefield Packing Co. v. Superior Court*, 47 P.2d 716, 717 (Cal. 1935); *San Bernardino County v. Indus. Acc. Com.*, 20 P.2d 673, 677 (Cal. 1933)).

206. *Buol*, 705 P.2d at 360-62.

207. *Id.* The court used the definition of “vested” handed down by the *Bouquet* court, “to describe property rights that are not subject to a condition precedent.” *Id.* at 357 n.6 (citing *In re Marriage of Bouquet*, 546 P.2d 1371, 1376 (Cal. 1976)). With this idea in hand, it also relied on the precedential holding that “[t]he status of property as community or separate is normally determined at the time of its acquisition.” *Id.* at 357 (quoting *Bouquet*, 546 P.2d at 1376). Absent any other indications, the home purchased by the wife would be community property. *See supra* note 79.

However, the *Buol* court also utilized the “long recognized” principal of marital transmutations. *Buol*, 705 P.2d at 357. The principal is that “‘separate property . . . [might] be

statute impaired this right by requiring a written instrument to prove the couple's intent to make the home the wife's separate property.²⁰⁸ Despite the clear infringement of a vested property interest, the court recognized that the law could be constitutional if "reasonably necessary to protect the health, safety, morals and general welfare of the people."²⁰⁹

Regardless of the *Buol* court's heavy reliance on *Bouquet* and *Addison*, it was unable to reach a result consistent with those cases.²¹⁰ The court identified the state interest supporting the impairment of vested rights in the two precedent cases as the "equitable dissolution of the marital relationship."²¹¹ *Addison* and *Bouquet* justified the retroactive application of the law in question as necessary to cure the "rank injustice" that resulted from the previous law.²¹² In this case, however, the court was unable to find a similar wrong which would substantiate retroactive application of the statute.²¹³ The holding stated that retroactive application of the writing requirement, "vitiates [the couple's] oral agreement, which the trial court found to be valid and enforceable under existing law, and imposes a new writing requirement with which [the wife] cannot possibly comply."²¹⁴ Consequently, retroactive application of the statute was held unconstitutional.²¹⁵

converted into community property or *vice versa* at any time by oral agreement between the spouses." *Id.* (quoting *Woods v. Sec.-First Nat'l Bank*, 299 P.2d 657, 659 (Cal. 1956)); *see also* CAL. FAM. CODE § 852 (requiring a writing to effect a valid transmutation; but "not apply[ing] to or affect[ing] a transmutation of property made before January 1, 1985"). Thus, the separate character of the home hinged entirely on the validity of the agreement between the spouses. In a note, the court discussed the husband's contention that no such agreement existed. *Buol*, 705 P.2d at 357 n.7. Yet the court was confined by precedent as to its ability to review the trial court's factual findings. *Id.* Additionally, the court provided a litany of witness testimony that directly controverted the husband's claim. *Id.* Since the trial court's conclusion concerning the existence of an agreement was supported by substantial evidence, that determination could not be disturbed. *Id.*

208. *Id.* at 359.

209. *Id.* at 360. The court relies on the *Bouquet* factors for determining whether retroactive laws violate due process. *Id.* They also affirm the position that, "[w]here 'retroactive application is necessary to subserve a sufficiently important state interest,' the inquiry need proceed no further." *Id.* (quoting *Bouquet*, 456 P.2d at 1376).

210. *See infra* note 213 and accompanying text.

211. *Buol*, 705 P.2d at 360 (quoting *Bouquet*, 456 P.2d at 1377-78).

212. *Id.*

213. *Id.* ("No such compelling reason exists for applying section [2581] retroactively. Section [2581] cures no 'rank injustice' in the law and, in the retroactivity context, only minimally serves the state interest in equitable division of marital property, at tremendous cost to the separate property owner.").

214. *Id.* at 362.

215. *Id.*

Confusion in joint tenancy presumptions was not settled with the conclusion of *Buol*. *In re Marriage of Hilke* came before the California Supreme Court seven years after *Buol* and carved out a specific factual situation wherein retrospective application of section 2581²¹⁶ was constitutional.²¹⁷ The facts leading up to the divorce in *Hilke* are substantially similar to the facts in *Buol*. In 1955, Robert and Joyce Hilke married.²¹⁸ They purchased a home together in joint tenancy in 1969 and filed for divorce twenty years later in 1989.²¹⁹ At this point the similarities end. The *Hilke* court bifurcated the proceedings in order to grant the couple's divorce, but it retained jurisdiction to decide the property issues at a later date.²²⁰ Following the divorce decree but *before any of the property issues were decided*, Mrs. Hilke died.²²¹

Mrs. Hilke's death was problematic because the joint tenancy statute was created to apply to divorce proceedings only.²²² Despite the

216. California Family Code section 2581 is the antecedent to section 4800.1. See *supra* note 183.

217. *In re Marriage of Hilke*, 841 P.2d 891 (Cal. 1992).

218. *Id.* at 893.

219. *Id.* While the chronology of events in the two cases is almost identical, one major distinction is that in *Hilke*, "[n]either party contended there had been any contributions of separate property toward purchase of the residence, and there was no claim of an agreement that the property would be the separate property of either spouse." *Id.* Towards the end of the opinion, the court notes another difference: "An additional difference between this case . . . and *Buol* . . . is that section [2581] was enacted well before Mrs. Hilke filed the petition for dissolution." *Id.* at 897 n.4.

220. *Id.* at 893. Effectively, the court split the single proceeding into two distinct legal actions—one dealing with the dissolution of the marriage and the other handling the division of property. *Id.* All of this does not matter except for the fact that Mrs. Hilke died immediately after the granting of the divorce but before the property judgment. *Id.* It was because of this fact that Mr. Hilke's attempted reliance on *Estate of Blair*, a seemingly similar case, failed. *Id.* at 895.

In *Blair*, the wife died before the entry of judgment on the dissolution of the couple's marriage. *Estate of Blair*, 244 Cal. Rptr. 627, 629 (Ct. App. 1988). Her death effectively discontinued the divorce proceeding. *Id.* at 630. The court noted, "[w]here one party dies during the pendency of a dissolution proceeding, the court retains power to enter judgment in conformity with matters adjudicated *before the death*, but cannot adjudicate unresolved issues." *Id.* (citing *In re Marriage of Williams*, 161 Cal. Rptr. 808, 809-10 (Ct. App. 1980) (emphasis added)).

Thus, the *Hilke* court stated that the difference in result between the two cases was merely a temporal matter with respect to the death of the parties. *Hilke*, 841 P.2d at 895. "Th[e] result [in *Blair*] was correct . . . [but it] does not . . . dictate the identical result in the present case, since here the trial court had dissolved the spouses' marriage before the wife's death, and had reserved its jurisdiction to determine property issues in subsequent proceedings." *Id.*

221. *Id.* at 893. Footnote two in the opinion notes that Mrs. Hilke devised her share of the couple's community property to her children. *Id.* at 893 n.2. This devise is the factor that created problems for the couple. If the home were determined to be community property, the children would receive the wife's half under her will and the husband would retain his one-half community property interest. If, on the other hand, the community property presumption did not apply, "then the presumption arising from the form of title is that the spouses were joint tenants and Mr. Hilke consequently succeeds to the property by right of survivorship, absent a transmutation." *Id.* at 894. For a brief discussion of the development of the statute in question and the problems with joint tenancy and the older presumptions, see *id.* at 893-94.

222. *Id.* at 894. Some history of the legislation proves useful at this point. The section was originally enacted as an amendment to former section 5110, protecting the single family residence,

limitation,²²³ the court resolved the issue in favor of applying the statute.²²⁴ The application effectively extinguished half of Mr. Hilke's potential interest in the property and solidified Mrs. Hilke's community property interest.²²⁵ Consequently, Mr. Hilke raised the now familiar constitutional argument—retroactive application of the statute deprived him of a vested property right without due process of law.²²⁶

The court acknowledged the decisions in *Bouquet* and *Buol* on similar topics, but easily distinguished the facts before it from those cases.²²⁷ The problem with Mr. Hilke's contention hinged on the idea of vested property rights. As the courts in both *Buol* and *Bouquet* discussed, a vested property right is one that is not subject to a condition precedent.²²⁸ Here, Mr. Hilke had a survivorship interest in joint tenancy.²²⁹ Survivorships are necessarily predicated on surviving the other individual in interest—here, Mrs. Hilke.²³⁰ Since Mr. Hilke's interest was subject to this condition precedent, it was not vested.²³¹ Thus, the court held that there was no "need [to] engage in extensive analysis of the *Bouquet-Buol* factors as they might apply in this

in 1983. *Id.* The amendment was codified in the California Family Code as section 4800.1. *Id.* Section 4800.1 expanded "the presumption regarding marital property held in joint tenancy form . . . to cover all property acquired during marriage in joint tenancy form." *Id.* The legislature found the interest protected by the statute to be sufficiently important to create retroactivity in a 1986 amendment. *Id.* Hence the issue in this case, which the court framed as, "whether the prerequisite for [the statute's] application is met" was "whether the instant proceeding involves a division of property upon dissolution of marriage." *Id.* Since the statute only applied to dissolution and separate maintenance proceedings, Mrs. Hilke's death made application of the statute problematic.

223. Section 2581 states that it applies "[f]or the purpose of division of property on dissolution of marriage or legal separation of the parties [only]." CAL. FAM. CODE § 2581 (West 2006). This language expressly limits the application of the section to divorce and separation, thereby excluding application to division of property at death.

224. *Id.* Had the court held against applying the statute, Mr. Hilke's one-half interest in the property would have remained intact. *See supra* note 221. However, on the specific issue of Mrs. Hilke's death, the court held that "[t]he death of one of the spouses abates a cause of action for dissolution, but does not deprive the court of its retained jurisdiction to determine collateral property rights if the court has previously rendered judgment dissolving the marriage." *Hilke*, 841 P.2d at 894.

225. *See supra* note 224.

226. *Hilke*, 841 P.2d at 895.

227. *Id.* at 895-97.

228. *Id.* at 896; *see also supra* note 171.

229. *Hilke*, 841 P.2d at 896.

230. *Id.* at 891. The general rule for ownership of property in joint tenancy is the automatic application of a right of survivorship, meaning that when one tenant dies, the entire estate survives to the remaining tenants to the exclusion of the deceased tenant's heirs. *Tenhet v. Boswell*, 554 P.2d 330, 334 (Cal. 1976); *Estate of Mitchell*, 91 Cal. Rptr. 2d 192, 196 (Ct. App. 1999); *Cole v. Cole*, 294 P.2d 494, 496 (Cal. Ct. App. 1956).

231. *See supra* note 171.

situation, because in the absence of a vested interest, retroactive legislation does not violate due process.”²³²

Lacking the vested interest, the court easily applied section 2581 to the property in *Hilke*.²³³ Under that statute, the couple’s home was presumed to be community property even though the title was in joint tenancy.²³⁴ As a result, Mrs. Hilke’s one-half interest was not extinguished on her death, but remained with her estate.²³⁵ Thus, her will was effectuated and her one-half interest in the home went to her children.²³⁶

Although the *Hilke* decision further qualified the statutory rule in divorce proceedings, it left the law substantially the same as it was following *Bouquet* and *Buol*. Specifically, *Hilke* stands for the proposition that parties cannot successfully challenge the impairment of *vested* rights if their property interests are merely *contingent*.²³⁷ The holding concluded the body of jurisprudence on community property law and concurrent estates.

III. CURRENT STATE OF THE LAW

Community property law as applied to heterosexual married couples has undergone extensive evolution. Within that development, a body of law pertaining to retroactive application of statutes has emerged.²³⁸ The passage of the Act abruptly thrust that very same property distribution scheme on an entirely new class of legally recognized couples.²³⁹ Expanding the system’s scope will inevitably lead to confusion and litigation as couples and courts determine exactly how the letter of the law will be interpreted.²⁴⁰ While the above overview of retrospective community property law will likely guide courts in their decisions, scenarios unique to domestic partnerships will surely arise.²⁴¹

232. *Hilke*, 841 P.2d at 897.

233. *Id.*

234. *Id.* The court applied the older version of the statute, section 4800.1. *Id.*; see also *supra* note 183. The court noted that the statute provided two methods of rebutting the presumption, but that neither applied to this case. *Hilke*, 841 P.2d at 896.

235. *Id.* at 897. The practical effect of community property application was that the court ordered the home sold and the proceeds divided between Mr. Hilke and Mrs. Hilke’s beneficiaries.

236. See *supra* note 221.

237. *Hilke*, 841 P.2d at 891.

238. See *supra* notes 106-236 and accompanying text.

239. See *supra* note 74.

240. See generally Matsumura, *supra* note 5; Monagas, *supra* note 43; Gavin, *supra* note 5.

241. Some already have. See *infra* notes 257-307 and accompanying text.

A. Initial Challenges—California's Defense of Marriage Act

In California, one such issue has already been decided under the heading, Proposition 22.²⁴² The initiative was voted into law in 2000 by a majority of California voters.²⁴³ Immediate challenges arose after the passage of the Domestic Partner Rights and Responsibilities Act from those who believed Proposition 22 preempted such an expansion of rights to non-married couples.²⁴⁴ According to those in opposition of the Act, the new law altered the definition of marriage that was voted on by a majority of California citizens and subsequently placed into law.²⁴⁵ The Act's proponents claimed that the law did not affect marriage in any way.²⁴⁶ In support of their position, they referred to the substantial differences between legal marriages and legally recognized domestic partnerships that remained even after the passage of California Family Code section 297.5.²⁴⁷

The California Court of Appeal eventually came down in support of the Act in *Knight v. Superior Court*.²⁴⁸ The case arose out of a petition for declaratory and injunctive relief by groups of California citizens opposing

242. California Proposition 22, commonly known as the California Defense of Marriage Act, created California Family Code section 308.5 which provides: "Only marriage between a man and a woman is valid or recognized in California." CAL. FAM. CODE § 308.5 (West 2006).

243. For a comprehensive look at the outcomes of the 2000 California election, including the results for Proposition 22, see California Secretary of State, State Ballot Measures, available at <http://primary2000.ss.ca.gov/returns/prop/00.htm> (showing that 61.4 percent of California voters approved Proposition 22).

244. See Gavin, *supra* note 5, at 492-93.

245. *Id.* Proposition 22 did not effectively change who could and could not legally marry in California. See CAL. FAM. CODE § 300 (1992) (formerly CAL. CIV. CODE § 4100) (providing that the marriage contracts may only be entered into by a man and a woman; see also Assembly Committee on Judiciary, Committee Analysis of AB 205, at 11 [hereinafter Committee Analysis] (April 1, 2003) available at http://info.sen.ca.gov/pub/03-04/bill/asm/ab_02010250/ab_205_cfa_20030328_132344_asm_comm.html. The Proposition was more of a preemptive strike to prevent California from recognizing same-sex marriages that occurred in other jurisdictions. *Id.*

246. See Committee Analysis, *supra* note 245, at 12.

247. *Id.* The proponents of the Act cited a list of ways in which domestic partnership is different from marriage:

It will continue to be entered into and, for many people, exited in a different way than marriage; It may not be recognized outside of California; The federal government will not recognize domestic partners for the 1,049 federal rights and benefits associated with marriage, such as social security, Medicaid, and federal taxes; [and] it will not grant same-sex couples the full social and symbolic equality of marriage.

Id. (quoting Goldberg).

248. 26 Cal. Rptr. 3d 687 (Ct. App. 2005).

the Act.²⁴⁹ Petitioners claimed that California Family Code section 297.5 effectively amended Proposition 22 and was, therefore, constitutionally void without voter approval.²⁵⁰ The court did not agree.

First, it defined what constituted an amendment: “any change of the scope or effect of an existing statute, whether by addition, omission, or substitution of provisions, which does not wholly terminate its existence”²⁵¹ Then the court noted that Proposition 22 was intended to prevent the recognition of same-sex marriages from other jurisdictions, *not* to limit or define the rights of domestic partners.²⁵² Since the Proposition contained no reference to domestic partners, the court held that section 297.5 was not an amendment.²⁵³ The court further adopted respondent’s position when it used the list of differences between legal marriages and domestic partnerships surviving the Act as a justification for its holding.²⁵⁴ The list

249. *Id.* at 689.

250. *Id.* Petitioners cited the California Constitution, averring that “[t]he Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective *only when approved by the electors* unless the initiative statute permits amendment or repeal without their approval.” CAL. CONST. art. II, § 10(c) (emphasis added).

251. *Knight*, 26 Cal. Rptr. 3d at 692-93 (citations omitted). The court also noted that, “[a] statute which adds to or takes away from an existing statute is considered an amendment.” *Id.* at 693.

252. *Id.* at 696.

253. *Id.*

254. *Id.* at 699. This was the very same list that the Act’s supporters had used to justify its existence before this litigation commenced. Those differences include:

[Domestic partners] may not file joint tax returns and their earned income is not treated as community property for state income tax purposes, and they are not entitled to numerous benefits provided to married couples by the federal government, such as marital benefits relating to Social Security, Medicare, federal housing, food stamps, veterans’ benefits, military benefits, and federal employment benefit laws.

And prerequisites for the formation of domestic partnerships differ from marriage. Persons under the age of 18 who wish to marry may do so with parental consent; however, there is no similar provision for minors to register as domestic partners. In addition, homosexuals must share a common residence before they can register as domestic partners, but there is no similar limitation for persons who wish to marry

In addition, the mechanisms for forming and terminating the relationships are different. Domestic partners simply file with the Secretary of State a Declaration of Domestic Partnership to form their legal union; but couples who want to marry must obtain a license and participate in some form of ceremony solemnizing their marriage. Another difference is the method for terminating a domestic partnership. [Under certain circumstances] . . . they may terminate the relationship simply by filing with the Secretary of State a Notice of Termination of Domestic Partnership. The dissolution of a marriage under similar circumstances requires judicial intervention

Furthermore, unlike a marriage, a domestic partnership will not automatically be recognized by other states.

Id. (citations omitted).

The court concluded that, “These factors indicate marriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership.” *Id.* By listing the differences between the two groups of rights, the court clearly sides with the Act’s proponents. *See supra* note 247.

bolstered the court's rationale and holding that "the Legislature has not created a 'same-sex marriage' under the guise of another name."²⁵⁵ Accordingly, the court held that California Family Code section 297.5 did not require separate voter approval because it was not an amendment to Proposition 22.²⁵⁶

B. Current Domestic Partner Litigation

Under *Knight*, the Domestic Partner Rights and Responsibilities Act withstood its first challenge.²⁵⁷ However, there have been further challenges to the Act's validity since *Knight*.²⁵⁸ The decisions are not directly on point to the retroactivity problem but they do elucidate the court's reaction to domestic partner litigation. Combined with the retroactive community property law described in Part II *supra*, reasonable predictions may be made about the court's ultimate decision when the constitutional challenge to section 297.5 finally does arise.

The following section describes the most pertinent litigation involving registered domestic partners and the Act. It is organized by the subject of the litigation and the goal of the parties involved.

1. Wrongful Death and Retroactivity

Retroactive application of the Act was first discussed in terms of the provision for wrongful death standing for registered domestic partners.²⁵⁹ The plaintiff and her partner in *Armijo v. Miles* were in a committed relationship for fourteen years.²⁶⁰ Although the relationship began before the creation of the statewide domestic partner registry, its validity came into question because of the couple's failure to register with the California Secretary of State after the law was passed.²⁶¹ Plaintiff's partner died in 2001 while under the care of the physician defendant; plaintiff attributed the death to the defendant's malpractice.²⁶² Nearly one year after the death,

255. *Knight*, 26 Cal. Rptr. 3d at 700.

256. *Id.*

257. *See id.*

258. *See infra* notes 259-307 and accompanying text.

259. *Armijo v. Miles*, 26 Cal. Rptr. 3d 623 (Ct. App. 2005).

260. *Id.* at 626.

261. *Id.* at 627.

262. *Id.* at 626.

plaintiff brought a suit for wrongful death against the treating doctor and the hospital where her partner passed away.²⁶³

At the time of the death, there was no doubt that plaintiff lacked standing to sue for wrongful death.²⁶⁴ However, legislation passed less than two months after the death which unequivocally allowed domestic partners to bring suits for the wrongful deaths of their partners.²⁶⁵ The new law was also clear in its intent to apply retroactively.²⁶⁶ In 2004, another bill passed which allowed “a cause of action for wrongful death to proceed . . . although a Declaration of Domestic Partnership was not filed with the Secretary of State, if other specified requirements are met.”²⁶⁷ Taken together, the bills created a window of opportunity for the plaintiff to sue despite the couple’s failure to register with the State.²⁶⁸

Armijo is distinguishable from other modern domestic partner litigation in that the constitutional challenge comes from the non-domestic partner defendant.²⁶⁹ Defendant, decedent’s physician, argued that she had a vested right in being free from litigation at the time plaintiff’s partner died.²⁷⁰ Her argument continued that allowing plaintiff wrongful death standing after the enactment of legislation unconstitutionally impaired her vested rights.²⁷¹

263. *Id.*

264. *Id.* at 628. In 2001, the wrongful death statute in California did not include domestic partners as persons with standing to sue. The passage of AB 25 amended section 377.60 of the California Code of Civil Procedure to include domestic partners. *See* CAL. CIV. PROC. CODE § 377.60 (West 2006).

265. *See supra* note 58 and accompanying text. AB 25, although passed in 2001, did not become effective until January 1, 2002. A.B. 0025, 2001 Reg. Sess. (Cal. 2001).

266. This court claims that since subsection (d) of the wrongful death statute was not amended following the enactment of AB 2580, the legislature’s intent was clear that the amendments were to have retroactive application. *Armijo*, 26 Cal. Rptr. 3d at 629.

267. A.B. 2580, 2003-2004 Reg. Sess. (Cal. 2004). The bill further stated: “A person may maintain a cause of action pursuant to this section as a domestic partner of the decedent by establishing the factors listed in paragraphs (1) to (6), inclusive, of subdivision (b) of section 297 of the Family Code . . .” *Id.*

268. *Armijo*, 26 Cal. Rptr. 3d at 631. As for a statute of limitations defense, AB 2580 specifically provided that, “[t]he amendments made to this subdivision . . . are not intended to revive any cause of action that has been finally adjudicated . . . or as to which the applicable limitations period has run.” A.B. 2580, 2003-2004 Reg. Sess. (Cal. 2004). The statute of limitations on wrongful death causes of action in California is two years. CAL. CIV. PROC. CODE § 335.1 (West 2007). Since plaintiff brought her wrongful death action only one year after the death of her partner, the statute of limitations defense had no bearing on the case. *See supra* note 263 and accompanying text.

269. *Armijo*, 26 Cal. Rptr. at 632.

270. *Id.*

271. *Id.* In addition to the due process contention, defendant also posed constitutional challenges under the separation of powers, equal protection, and the prohibition on bills of attainder. *Id.* The defendants’ arguments were novel. In cases where the law provides a cause of action for wrongful death, that right accrues at the time of death of the party in question. *Id.* Once any right has vested, it cannot be constitutionally impaired absent due process of law. *Id.* (citing *Wexler v. City of Los Angeles*, 243 P.2d 868, 872 (Cal. Ct. App. 1952)). Defendants argued basic fairness dictated that the opposite of this proposition should also hold true. *Id.* Consequently, defendant argued, the aforementioned principle provided her with a right not to be sued which vested upon the death of

The court did not agree. According to the opinion, there was no right of defendants to “have the class of potential plaintiffs frozen as of the time of death.”²⁷² The court disposed of the defendant’s constitutional claim because they failed to show that a right even existed.²⁷³

2. Scope of the Statute—Domestic Partners Who Want to Choose

Defining the class of persons able to bring constitutional arguments as the court did in *Armijo* was an initial step in cementing the Act’s application. But, as this section will show, introducing and effecting legislation is merely the first step in changing the law. Individual fact patterns introduce questions that were not previously contemplated and help to define legislative scope. The grant of new rights to domestic partners has been no different. *In re Rabin*²⁷⁴ helped define the Act’s scope in a 2005 bankruptcy action involving two registered domestic partners.²⁷⁵

The facts of the case are as follows: The couple purchased a home together in 1995 which they shared as their common residence.²⁷⁶ In 2000, just after the creation of the domestic partner registry, the couple filed the necessary papers with the Secretary of State to effectuate their

plaintiff’s partner because, when the death occurred, the law granted no such right. *Id.*

272. *Id.* It did not help defendants’ case that they were unable to provide any controlling precedent which validated their argument. *See id.* Additionally, the court held that the amendments to the current law “[did] not change the legal definition of negligence, the standard by which liability is addressed, or the character of defendants’ acts or omissions.” *Id.*

Although the court did not explicitly state that constitutional challenges in this arena would be limited to domestic partners, the implication was evident. Ancillary parties, those indirectly affected by the changes in the domestic partnership laws, would have a hard time finding success in the argument that they had a vested right to reliance on the state of the law prior to the amendments. For a more traditional approach to constitutionality and the retroactive effect of the wrongful death amendments, see *Bouley v. Long Beach Memorial Medical Center*, 25 Cal. Rptr. 3d 813, 820 (Ct. App. 2005) (holding that the state’s significant interest in promoting family relationships by giving rights to domestic partners was sufficient to overcome a constitutional challenge to retroactive application of the wrongful death amendments).

273. *Armijo*, 26 Cal. Rptr. 3d at 632. Ultimately, the court decided only the limited issue of “whether plaintiff stated a cause of action for wrongful death,” in plaintiff’s favor. *Id.* at 638. It held that “AB 2580 simply establishes that the right to sue for wrongful death belongs to registered domestic partners . . . except that for deaths occurring prior to January 1, 2002, [standing] to sue for wrongful death also belongs to nonregistered surviving domestic partners who, like plaintiff, can satisfy six specific criteria.” *Id.* Accordingly, the court reversed the judgment of dismissal and remanded the case to the lower court with instructions to allow defendants time to amend their answers. *Id.*

274. 336 B.R. 459 (Bankr. N.D. Cal. 2005).

275. *Id.*

276. *Id.* at 460.

partnership.²⁷⁷ The relationship endured through 2003 when the Act was passed.²⁷⁸ In August 2005, the couple filed separate bankruptcy actions; each claimed a fifty-percent interest in their home and a \$75,000 homestead exemption.²⁷⁹ Because a single-exemption rule under California law applied for married couples claiming a homestead exemption,²⁸⁰ the issue was whether the Act made this rule equally applicable to domestic partners.²⁸¹

The couple argued they were entitled to separate homestead exemptions because their domestic partner registration was not akin to marriage.²⁸² In light of the Act's mandate that domestic partners have the "same rights . . . , responsibilities, obligations, and duties under law," as married couples, the argument was self-serving and bordering on frivolous.²⁸³ Responding to the rather obvious counter-argument, the couple claimed that even though the Act subjected domestic partners to many of the same obligations as married couples, they remained unmarried.²⁸⁴ Essentially, the couple attempted to choose when the Act should apply and when it should not.

According to the opinion, the couple's arguments were wholly unpersuasive because the intention of the Act was clear.²⁸⁵ The law directed

277. *Id.*

278. *Id.*

279. *Id.* A homestead law is, "[a] statute exempting a homestead from execution or judicial sale for debt . . ." BLACK'S LAW DICTIONARY 751 (8th ed. 2004). The homestead is defined as, "[t]he house . . . occupied by a person or family as a residence." *Id.* Under the California Code of Civil Procedure, if the "debtor or spouse . . . is . . . a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor," the exemption is limited to \$75,000. CAL. CIV. PROC. CODE § 704.730(a)(2) (West 2006). Hence the amount claimed by each of the domestic partners. Despite the statutory language, the bankruptcy trustee acted according to the generally accepted single-exemption rule, selling the property and splitting a single \$75,000 exemption in half, providing each party with \$37,500. *Rabin*, 336 B.R. at 460.

280. CAL. CIV. PROC. CODE §§ 703.110, 704.710(b)-(c), 704.730 (West 2006). Section 703.110(a) proclaims:

The exemptions provided by this chapter . . . apply to all property that is subject to enforcement of a money judgment The fact that one or both spouses are judgment debtors under the judgment or that property sought to be applied to the satisfaction of the judgment is separate or community does not increase or reduce the number or amount of the exemptions.

§ 703.110(a). The court further acknowledged that "[w]hen both spouses are entitled to a homestead exemption, the exemption is apportioned between the spouses on the basis of their proportionate interest in the homestead." *Rabin*, 336 B.R. at 460 (citing CAL. CIV. PROC. CODE § 704.740(b) (West 2007)).

281. *Rabin*, 336 B.R. at 460.

282. *Id.* at 461. The rationale for their argument came from the California Code of Civil Procedure that states that the single exemption rule applies only if the debtors are married. *Id.* (citing CAL. CIV. PROC. CODE § 703.110 (West 2007)).

283. See *supra* note 74 and accompanying text.

284. *Rabin*, 336 B.R. at 461.

285. *Id.* The court noted that "[t]hat the Legislature used the word 'spouse' rather than 'married' to achieve its goal of giving registered domestic partners the same rights and duties as married couples does not reflect any intent to limit the broad scope of the Domestic Partners Act." *Id.*

that domestic partners were subject to the duties of married couples.²⁸⁶ Therefore, there was no reason that the single homestead exemption rule should not apply to registered domestic partners.²⁸⁷ *Rabin* was the first in what will eventually be a line of cases defining the scope of the Act. The court strictly applied the words of the statute, leaving little doubt of the Act's effect.

Another test to the limits of the Act's application came from *Velez v. Smith*.²⁸⁸ Unlike *Rabin*, the appellant in *Velez* argued for application of the Act.²⁸⁹ The couple first filed simultaneous domestic partner registrations with the City and County of San Francisco in 1994.²⁹⁰ Two years later the couple re-registered and had a "public commitment ceremony" modeled after a traditional marriage.²⁹¹ From that point until the time of the decision, the couple held themselves out as committed domestic partners.²⁹² Even though the couple appeared to desire all the accoutrements of a legal union, they never registered their domestic partnership with the California Secretary of State.²⁹³

In late 2004, respondent filed a "Notice for Ending a Domestic Partnership."²⁹⁴ After receiving the notice, appellant responded by filing a petition for dissolution of domestic partnership in the family law courts.²⁹⁵ She claimed that "registration in accordance with state law [wa]s not a [] prerequisite to" the application of the Act and prayed that the court retroactively apply the Act's amendments to her relationship.²⁹⁶ Effectively,

286. *Id.*

287. *Id.* The court concluded that the application of the rule to domestic partners was justified by the "broad language of the [Act] and the broad statement of legislative purpose accompanying [it]." *Id.*

288. 48 Cal. Rptr. 3d 642 (Ct. App. 2006).

289. *Id.* at 648.

290. *Id.* at 644.

291. *Id.*

292. *Id.* at 645. The opinion noted that the couple "lived and purchased real property together[;] . . . purchased and shared ownership of personal property, including automobiles, pension benefits, insurance coverage and benefits, and family pets[;] . . . [and] were jointly responsible for household living expenses, and maintained joint bank accounts in which they commingled funds." *Id.*

293. *Id.*

294. *Id.*

295. *Id.* The appellant, "requested dissolution of a domestic partnership . . . , division of the accumulated partnership property, termination of jurisdiction to award support to respondent, and attorney fees." *Id.* She claimed that the termination of her domestic partnership should be governed by the rules espoused under the Act. *Id.* at 647.

296. *Id.* Appellant's argument rested on retroactive application. She did "not dispute that as a domestic partner, prior to the 2003 amendment to the law she had no statutory right to bring a

appellant made the same argument posed in *Rabin*; she wanted to define the scope of the Act's application to best fit her circumstances.²⁹⁷ The trial court did not agree with appellant and dismissed the petition for dissolution for lack of jurisdiction.²⁹⁸

On appeal the court reviewed the history of domestic partner legislation and the requirements of the Act.²⁹⁹ The court found that the Act explicitly required couples to register in order to garner the law's benefits.³⁰⁰ This finding pushed appellant's relationship outside the Act's reach and consequently beyond the family court's jurisdiction.³⁰¹ Additionally, because the "Notice for Ending a Domestic Partnership" was filed in November of 2004, it nullified any argument for the Act's application.³⁰²

Appellant's failure to secure family court jurisdiction led to her second contention: the law should be applied to her case retroactively.³⁰³ The court agreed that the Act applied retroactively, but dismissed appellant's claim because she did not meet the requirements that the law expressly placed on those wishing it to govern their affairs.³⁰⁴ Constitutional questions were

dissolution action in the family law court." *Id.* at 648.

This situation can be distinguished from *Armijo*. See *supra* notes 260-73 and accompanying text. In that case, the court held that the domestic partner plaintiff could benefit from the amended domestic partnership laws despite the couples failure to register with the Secretary of State. See *supra* note 273 and accompanying text. The different outcome was justified by the specific language of the statute which provided that the couples need not register to obtain standing in a wrongful death suit.

297. See *supra* notes 284-87 and accompanying text. If the Act applied, community property laws would provide appellant a one-half share in her partner's property. Otherwise, the separate character of each partner's property would not be disturbed. The court recognized appellant's plight as a desire to "receive the benefits of the amendments to the domestic partnership laws, but avoid the registration requirements." *Velez*, 48 Cal. Rptr. 3d at 654.

298. *Id.* at 645.

299. *Id.* at 648-50.

300. *Id.* at 650. The court acknowledged that "[u]nder the Domestic Partner Act, domestic partners, like [f]ormally married couples, have been granted significant rights and bear important responsibilities toward one another which are not shared by couples who cohabit or who have not registered as domestic partners." *Id.* (quoting *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1222 (Cal. 2005)) (quotations omitted).

301. The court noted that the couple's repeated registration with San Francisco did nothing to mitigate their complete failure to register with the state. *Id.* at 651. "Local law and the state Domestic Partner Act are not equivalent; compliance with one is not compliance with the other." *Id.*

302. *Id.* at 652. At that time, domestic partnerships were subject to termination if one of the partners mailed notice to the other. Respondent sent the notice to appellant after the Secretary of State sent notice to domestic partners regarding the changes in domestic partnership law. Even though the couple never registered with the state, the partnership was successfully terminated prior to the enactment of the amendments. *Id.*

303. *Id.* at 653. Appellant's argument was that, since her relationship with respondent began before the effective date of the Act, the law should apply retroactively in order to "give[] practical effect to the mutual promises of the parties related to their domestic partnership." *Id.* at 653-54 (quotations omitted).

304. *Id.* at 654. Absent the registration problem, this case was poised to be the case that analysts have been waiting for; and the court recognizes this fact. See *infra* notes 313-18 and accompanying

never reached in this case because the parties did not correctly follow the procedures which would have provided those rights.³⁰⁵ Once again the court strictly construed the scope of the Act as falling directly in the plain meaning of the words used in the statute. The court's holding was clear: if a couple wants their relationship to fall under the Act, they should follow the Act's requirements.³⁰⁶

IV. IMPACT AND SIGNIFICANCE—FUTURE TRENDS

Creation of new rights unavoidably generates questions about the application and scope of those rights. The Domestic Partner Rights and Responsibilities Act, merely five years old (effective for only three), has already seen lawsuits challenging its applicability and pushing its outer limits. Perhaps the largest area of speculation arises from the Act's retroactive application.³⁰⁷ Since the domestic partner registry opened January 1, 2000 and the Act became effective on January 1, 2005, there is a five-year period of questionable application.³⁰⁸

Imposition of the community property scheme is central to the constitutional debate because of its potentially large implications.³⁰⁹ As in

text. Had the couple registered their domestic partnership with the State of California, the court says that it "would have no difficulty in applying the new law to their previously existing and registered partnership, as the [Act] intends." *Velez*, 48 Cal. Rptr. 3d at 654.

305. The court did come to a conclusion about vested rights. However, it was not the typical analysis we are used to seeing at this point. The court held that, "[a]ppellant has no *vested rights* to proceed with dissolution of a domestic partnership that was not properly registered . . ." *Velez*, 48 Cal. Rptr. 3d at 654 (emphasis added). Recognizing that the parties may have other recourse under the rules that existed before the enactment of the Act, specifically contractual rights, the court did not rule out any discussion of vested rights. It simply put to rest the idea that parties can use retroactivity arguments to make the Act apply to all domestic partner situations regardless of compliance with the law's requirements.

306. *Id.* at 655.

307. *See supra* note 12.

308. *Matsumura*, *supra* note 5, at 197. Registration with the Secretary of State is a prerequisite to considerations of retroactivity under the Act. *See supra* notes 288-307 and accompanying text.

309. In one example from Bill Harper's article in the *East Bay Express*, a lesbian couple filed for divorce after registering their domestic partnership with the Secretary of State. Harper, *supra* note 5. One of the individuals was a real estate agent earning upwards of a quarter million dollars annually. *Id.* The other partner was an animal control officer and, while it is a noble profession, she clearly was not matching her partner's income. *Id.* In the divorce proceedings, the animal control officer demanded spousal support. *Id.* Although the real estate agent was abhorred by her former partner's lawsuit for support, the couple ended up settling out of court for an undisclosed amount. *Id.*

Another example from the same article involved a wealthy financial adviser and a college student. *Id.* The student not only sued for support, but also for a community property share in the home the couple shared together, worth well over one million dollars. *Id.* This was all despite the fact that the partnership lasted only fifteen months, and the wealthier partner had made the half

the many precedent cases dealing with amendments to the community property laws, disadvantaged parties will categorically argue that retroactive application of the law impairs their vested property rights without due process of law.³¹⁰ After all, there is unquestionably a vested right in property acquired by an individual outside the grips of the community property scheme.³¹¹ Forcing a one-half share for the less financially endowed partner may well be an infringement of that constitutional right.

Many potential areas for litigation arise from the California community property system. However, this article's scope restricts itself to property distribution upon dissolution. California courts have yet to hear the case which would determine the Act's constitutionality. This part will attempt, through the use of hypothetical situations and a modified precedential fact pattern, to predict the likely outcome of such cases.

A. *Altering Velez v. Smith—Creating the Perfect Case*

*Velez v. Smith*³¹² was almost the perfect case.³¹³ Recall the facts of *Velez*: a homosexual couple, who registered their partnership with the city and county but never with the state, terminates their partnership.³¹⁴ The court refused to apply California community property law in a judicially supervised dissolution proceeding because the couple did not properly register.³¹⁵ However, the court explicitly stated that it would have had no problem doing so had the couple met the Act's prerequisites.³¹⁶

Imagine *Velez* and *Smith* had registered their partnership with the Secretary of State as required under the California Family Code section 297. The court claimed that it would have had "no difficulty" applying community property laws to the distribution of the couple's property had they done so.³¹⁷ But would it have been that easy?

Forecasting the outcome of such a case requires the creation of new facts based upon the following assumptions. First, the key assumption allowing for this analysis is that the couple registered their domestic partnership with the California Secretary of State, following all the procedural requirements provided under the California Family Code, on or shortly after January 1, 2000. Second, for illustrative purposes, assume that

million dollar down payment on the house out of her employment bonus. *Id.* This case also settled, and the wealthier partner paid the student's legal fees. *Id.*

310. See *supra* notes 106-236 and accompanying text.

311. See *supra* note 171.

312. 48 Cal. Rptr. 3d 642 (2006).

313. *Id.*

314. See *supra* notes 290-95 and accompanying text.

315. See *supra* note 301.

316. *Id.*

317. *Velez*, 48 Cal. Rptr. 3d. at 654.

one partner, Smith, had a job which paid her a handsome salary.³¹⁸ Third, assume that the other partner, Velez, did not have such employment.³¹⁹ From this point, the case begins as it actually did with Velez filing a petition for dissolution of domestic partnership in the family courts.³²⁰ The couple purchased real and personal property throughout the course of their partnership and commingled their separate funds in joint bank accounts.³²¹ Yet, in the interest of simplicity, we shall make one final assumption: all property and joint accounts acquired by the couple were acquired after January 1, 2000.³²² To summarize, a California same-sex couple registers their domestic partnership in 2000, commingles both personal and real property, and seeks dissolution in early 2005.

318. In fact, we know that the respondent, Krista Smith, was an employee of the San Francisco Fire Department. See Arthur S. Leonard, Leonard Link, Gays on the Outside Looking In?, http://newyorklawschool.typepad.com/leonardlink/2006/09/gays_on_the_out.html (last visited Jan. 27, 2007). The 2007 median salary of San Francisco Fire Department employees was \$45,513. Salary.com, Salary Wizard, http://swz.salary.com/salarywizard/layoutscripts/swzl_matchjob.asp?searchtextvalue=Firefighter&zipcode=94104&x=0&y=0 (click on "Base Salary Range") (last visited Jan. 27, 2007). With overtime pay, most make substantially more.

Additionally, same-sex households average a higher income than their heterosexual married counterparts. According to the United States Census Bureau, the median household income for married couples in 2005 was \$66,067. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & CHERYL HILL LEE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005 6 (United States Census Bureau, 2006), available at <http://www.census.gov/prod/2006pubs/p60-231.pdf>. Conversely, the average household income of same-sex households, as measured by the 2000 census, was \$72,122. Gaydemographics.org, Same Sex Couples A-Z, http://www.gaydemographics.org/USA/USA_A_Z.htm (last visited Jan. 29, 2007). Thus, assuming that significant financial accumulations could be at stake is not overly speculative.

319. While Ms. Velez's employment status was not disclosed, the case did evidence the fact that Smith claimed Velez as a dependent so that she would be able to take advantage of Smith's fire department health benefits when she became ill. *Velez*, 48 Cal. Rptr. 3d. at 645; see also Leonard, *supra* note 319. It would be safe to assume that Ms. Velez did not have independent health benefits. Assuming that Velez's employment was therefore financially inferior to Smith's is purely for the sake of debate but perhaps not overly attenuated. The constitutional argument below further assumes that, since Smith brought most of the money to the relationship, most property acquired by the couple was acquired with Smith's earnings. See *infra* notes 328-70 and accompanying text.

320. See *supra* note 295. Dates are of supreme importance in this analysis because they define the outer limits of the retroactivity period. Velez actually filed her amended petition, which requested the court supervised dissolution, on January 31, 2005. *Velez*, 48 Cal. Rptr. 3d. at 645.

321. *Id.*

322. While this is undoubtedly false (the couple began their relationship in 1989), this assumption allows us to maximize the interests at stake in the retroactivity issue without substantially damaging the reality of the situation. Thus, the hypothetical creates the ideal factual scenario to test the constitutional limits of retroactive application of California's community property laws to the termination of registered domestic partnerships.

1. Property Distribution

When the above case hits the court, what does the financially advantaged partner (Smith) stand to lose? If California community property law is applied to the relationship, the general community property presumption would guide the court's distribution of the couple's property.³²³ Thus, "all property, real or personal, wherever situated" acquired by either partner after the date of registration would be presumed to be the property of both.³²⁴ Upon acquisition of community property, each member of the community immediately would have a one-half interest in that property.³²⁵ Thus, here, Velez would already own one-half of any property that the couple acquired after January 1, 2000, regardless of how it was attained.³²⁶

If the cases of legally married spouses discussed above³²⁷ are any indication, the next step would be a constitutional argument by Smith. As of the time the property was acquired, between January 1, 2000 to December 31, 2004, the law provided that it was the separate property of the person acquiring it.³²⁸ Registration of the domestic partnership in 2000 had no effect on either partner's property rights at that time. Thus, to the extent Smith's rights in property were acquired with her earnings, and they were not contingent upon anything, they would be vested.³²⁹ Under both the California and United States Constitutions, legislation cannot be enacted which impairs a vested property interest without due process of law.³³⁰ Smith's argument would be the now familiar constitutional challenge: applying community property laws retroactively, effectively giving Velez a one-half interest in everything Smith acquired, was an unconstitutional impairment of her vested property interests.³³¹

The analysis for such constitutional claims in community property law comes from *Bouquet*.³³² Under *Bouquet's* two-step analysis, the court would

323. See CAL. FAM. CODE § 760 (West 2006) (providing for the general community property presumption).

324. *Id.*

325. See CAL. PROB. CODE § 100 (West 2006).

326. This statement necessarily presumes that the property does not fit into any of the separate property exceptions which would rebut the general community property presumption. See generally CAL. FAM. CODE § 760. The Law Revision Commission Comments of 1993 states the basic separate property exceptions. *Id.*

327. See *supra* notes 106-236 and accompanying text.

328. This inference is derived from earlier California law which did not apply community property law to unmarried couples prior to the creation of the domestic partner registry. Therefore, the law that would apply would be the same as that for any other unmarried cohabitants.

329. See *supra* note 171.

330. CAL. CONST. art. I, § 7(a) (2006) (stating that "[a] person may not be deprived of life, liberty, or property without due process of law"); see also U.S. CONST. amend. XIV, § 1 (stating, "nor shall any State deprive any person of life, liberty, or property, without due process of law").

331. See *supra* note 226 and accompanying text.

332. See generally *In re Marriage of Bouquet*, 546 P.2d 1371 (Cal. 1976).

first have to determine if the Legislature intended the Act to apply retroactively.³³³ This determination is made with the general presumption against retroactivity in close view.³³⁴ In this case, Velez would have no problem rebutting the general presumption against retroactivity because the statute expressly declares retroactive intent.³³⁵ Thus, the constitutional analysis continues since the Legislature unmistakably intended the Act to apply to situations such as the hypothetical.

The second step in the analysis is to determine whether or not applying the law retrospectively violates constitutional guarantees to property.³³⁶ This portion of the analysis can be further dissected into two inquiries. First, the court must determine whether or not the property right in question was vested; if not, the inquiry stops.³³⁷ Many of the precedent cases discussed definitions of vested interests in their opinions.³³⁸ The consensus among the various opinions is that vested property interests are those that are not subject to a condition precedent.³³⁹

Here, the property Smith acquired while registered with the State of California as Velez's domestic partner would be treated the same as any property acquired by unmarried cohabitants. The lack of any legally recognized marriage or any type of contractual agreement would leave the property entirely in the name of the person who acquired it—in this case, Smith. Her interest in the property was absolute at the time of acquisition and, therefore, not subject to the occurrence of any condition.³⁴⁰ Smith, therefore, had a vested right.

Determination that Smith's property interests were vested leads us to the second inquiry: does impairment of those rights violate due process?³⁴¹

333. *Id.* at 1372-73; *see also supra* note 41 and accompanying text.

334. *Bouquet*, 546 P.2d at 1372-73; *see supra* note 96 and accompanying text.

335. *See supra* note 82 and accompanying text. The provision in the amendment to the Act (AB 2580) clarified that the date of registration was intended to correspond to the date of marriage for the administration of rights and responsibilities. A.B. 2580, 2003-2004 Reg. Sess. (Cal. 2004). This has been interpreted as an express provision for retroactivity. *See Matsumura, supra* note 5, at 193.

336. *In re Marriage of Buol*, 705 P.2d 354, 357 (Cal. 1985); *see also supra* note 168 and accompanying text. As previously noted, the *Buol* court explicitly directed that, "the retrospective application of a statute may be unconstitutional if it is an ex post facto law, if it deprives a person of a vested right without due process of law, or if it impairs the obligation of a contract." *Buol*, 705 P.2d at 357. The focus of this inquiry is the deprivation of a vested right without due process.

337. *See supra* note 169.

338. *In re Marriage of Hilke*, 841 P.2d 891, 896 (Cal. 1992); *Bouquet*, 546 P.2d at 1376 n.7; *Buol*, 705 P.2d at 357 n.6.

339. *See supra* note 339.

340. *Bouquet*, 546 P.2d at 1376; *see also supra* note 171 (stating that the character of property is determined at the time it is acquired).

341. *Supra* note 168 and accompanying text.

Vested property interests may be impaired by legislation that protects the “health, safety, morals, and general well being of the people” or some other sufficiently significant state interest.³⁴² In other words, as long as the state interest is important enough to override the guarantees of the Constitution, the court will not interfere. Therefore, the analysis is incomplete without knowledge of the state interest for the Act.

Unlike many of the precedent cases where the court had to uncover the state interest behind the respective legislation, the bill in this case explicitly announces California’s interest in promulgating domestic partner legislation. It said: “[t]his act is intended to . . . further the state’s interests in promoting stable and lasting family relationships, and protecting Californians from the economic and social consequences of abandonment, separation, the death of loved ones, and other life crises.”³⁴³ While the state interest is clear, determining whether or not it is weighty enough to justify abrogating vested property rights leaves the court with little more than a decision between two sides.

It is at this point that our analysis is further aided by *Bouquet*. That court provided factors to be considered in making this constitutional determination. First, the state’s position is accounted for by considering the following: (1) “the significance of the state interest served by the law” and (2) “the importance of the retroactive application of the law to the effectuation of that interest.”³⁴⁴ Against the state concern should be weighed the interests of the individual affected: (3) “the extent of reliance upon the former law;” (4) “the legitimacy of that reliance;” (5) “the extent of actions taken on the basis of that reliance;” and (6) “the extent to which the retroactive application of the new law would disrupt those actions.”³⁴⁵

Surely the state’s interest in protecting its citizens and promoting stable relationships is significant.³⁴⁶ Yet the significance of the state interest in both *Addison* and *Bouquet* was reinforced by the “rank injustice of the former law.”³⁴⁷ Thus, the two government factors not only involve current

342. *Addison v. Addison*, 399 P.2d 897, 902 (Cal. 1965); see also *supra* note 126.

343. A.B. 205, 2003-2004 Reg. Sess. (Cal. 2003).

344. *Bouquet*, 546 P.2d at 1376; see also *supra* note 156 and accompanying text; Reppy, *supra* note 142, at 1048. Reppy’s article blends *Bouquet*’s factors with the balancing test from *Tennis*’ article. *Tennis*, *supra* note 107, at 518.

345. *Bouquet*, 546 P.2d at 1376; see also *supra* note 156 and accompanying text; Reppy, *supra* note 142, at 1048; *Tennis*, *supra* note 107, at 518.

346. In both *Addison* and *Bouquet*, the courts justified their intrusion on vested property interests by noting a significant state interest in “supervision of material property and dissolutions.” *Bouquet*, 546 P.2d at 1377. The interest stated in this case does not directly mention property distribution; rather, it refers to property in its statements on protecting citizens from the financial hardships occasioned by ill occurrences in relationships. See *id.* Thus, while the two state interests are not identical, they are congruent.

347. *Id.* The former law in *Addison* would have left the faithful party to a marriage without any spousal protection while the infidel of the relationship was left to maintain his property as if the

legislation, but they should also consider the state of the law as it existed previously.³⁴⁸

In this case, nothing in California law provided for court supervised property distributions for couples like Smith and Velez. The only way they could have gotten the court to intervene was to contractually provide for property rights at the beginning of the relationship. The court would have then supervised effectuation of the contract.³⁴⁹ But in the absence of such an agreement, there is the potential that Velez will be left with nothing after contributing her energies to the relationship. Potentially, Velez (or others similarly situated) could exit litigation unprotected from “the economic and social consequences of abandonment, separation . . . and other life crises.”³⁵⁰ This possibility directly contravenes the very interest which the Legislature claims motivated the Act.³⁵¹

According to *Buol*, the inquiry could stop here; yet for the sake of illustration, the analysis continues to the other side of the balance.³⁵² The individual interests of Velez, Smith, and other California registered domestic partners also should be considered.³⁵³ The extent of reliance which Smith and Velez placed on the former law is hard to gauge in this hypothetical. We know the couple purchased both real and personal property and had joint bank accounts.³⁵⁴ These property acquisitions were made in reliance upon what they believed to be the prevailing state of the law. The couple had nothing else to rely upon in ordering their affairs.³⁵⁵ Reliance alone is not sufficient; it must also be legitimate. In light of the ever-changing nature of

relationship had never occurred. *Addison*, 399 P.2d at 903. According to the court, this was not permissible; a sufficient state interest was thereby augmented by the patent unfairness of the prior law. *But see In re Marriage of Buol*, 705 P.2d 354, 360 (Cal. 1985) (noting that *Bouquet* and *Addison* stood for the “proposition that the state’s paramount interest in the equitable dissolution of the marital partnership justifies legislative action abrogating rights in marital property where those rights derive from manifestly unfair laws” but that “[n]o such compelling reason exist[ed]” in that case).

348. *Bouquet*, 546 P.2d at 1377.

349. *See supra* notes 21-41 and accompanying text.

350. A.B. 205, 2003-2004 Reg. Sess. (Cal. 2003).

351. *See supra* note 344 and accompanying text.

352. *Buol*, 705 P.2d at 360 (“Where ‘retroactive application is necessary to subserve a sufficiently important state interest,’ the inquiry need proceed no further.” (quoting *Bouquet*, 546 P.2d at 1376)).

353. *See supra* note 346 and accompanying text.

354. *See supra* note 322 and accompanying text.

355. The importance of providing stability in regulation is discussed in Part II. *See supra* note 97 and accompanying text.

registered domestic partnerships,³⁵⁶ it would be an act of judicial hindsight to claim that the couple's reliance was anything other than legitimate.³⁵⁷

Despite the clarity of Smith and Velez's legitimate reliance on prior law, there is some possibility that California mitigated the ill effects of retroactively applying the Act to domestic partners registered before its enactment.³⁵⁸ The Act specifically required the Secretary of State to send out three separate notice letters to domestic partners for whom it had contact information (i.e. those registered at the time).³⁵⁹ The letters were to be sent, "[o]n or before June 30, 2004 . . . again on or before December 1, 2004, and again on or before January 31, 2005"³⁶⁰

According to at least one observer, these letters, in addition to the website notice and extension for filing pre-registration agreements, likely defeated any legitimacy couples had in reliance on the old law.³⁶¹ The argument goes that the practical issues involved in correcting the situation after proper notice of the law has been provided, outweigh the very purpose of providing notice.³⁶² However, this position presumes an even more fundamental problem with practicality—that the notice reached its intended recipients.

This article takes no issue with the methods employed by the Secretary of State to alert registered domestic partners of the statutory amendments directly affecting them. To the contrary, it is readily recognizable that the Secretary of State employed all measures reasonable, short of personally knocking on the doors of each couple that had registered.³⁶³ Yet, the interest being protected here is significant enough to override any claims of constructive notice.³⁶⁴ It matters little whether couples actually received the

356. See *supra* notes 42-94 and accompanying text.

357. For a statement on the legitimacy of reliance on California community property laws, see *Bouley v. Long Beach Memorial Medical Center*, 25 Cal. Rptr. 3d 813, 818 (Ct. App. 2005). In dealing with the wrongful death amendments, that court recognized, "[i]t is easy to see how an individual could have relied on the community property laws *Bouquet* considered." *Id.* The court also identified the extent of citizens' actions in light of their reliance: "People may spend or save, marry or divorce, in reliance on those laws" *Id.*

358. See *Matsumura, supra* note 5, at 192-93.

359. See *supra* note 90.

360. CAL. FAM. CODE § 299.3(a) (West 2006).

361. *Matsumura, supra* note 5, at 221. The author cites to *Heikes*, where the court did not allow the fact that the law had been passed eight years prior to the suit to affect its holding against retroactive application. *Id.*

362. *Id.* at 221. *Matsumura* identifies the practicality issue of Mrs. Heikes obtaining notice from her husband after the law was enacted. *Id.* Recognizing this problem, *Matsumura* claims, "it appears that the mitigation devices of the Act will not suffice to make the retroactive imposition of community property responsibilities constitutional." *Id.*

363. See *supra* notes 90-92 and accompanying text.

364. There are two types of due process: procedural and substantive. *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 530 (Va. 1989). As to the former, "[p]rocedural due process guarantees a litigant the right to reasonable notice and a meaningful opportunity to be heard [T]he purpose of the guarantee is to provide procedural safeguards against a government's arbitrary deprivation of

notice letters in the mail or whether they were diligent in checking the Secretary of State's website for updates. Mitigation efforts by the Secretary of State fail in the face of the rights the court would potentially sacrifice by not applying the Act retroactively.³⁶⁵

Here, Smith stands to lose one-half of her interest in property she acquired during the five-year period of partnership in question. This is a prospect that married men and women have dealt with since the introduction of the community property system.³⁶⁶ On the other side, Velez may have relied, to her detriment, on her interests in shared property and Smith's financial support. Leaving Velez without recourse for the five years in question is a greater harm than that faced by Smith and is not affected by the provision of notice required under the Act.

certain interests." *Id.* Substantive due process on the other hand "tests the reasonableness of a statute vis-à-vis the legislature's power to enact the law." *Id.* The substantive component of due process is what is at issue here—being determined by the balancing of interests laid out above. *See supra* note 333 and accompanying text. Thus, while a state's showing of constructive notice may meet the procedural due process requirements, the substantive due process analysis will fail because of the balancing of interests in favor of the individual.

365. *See In re Marriage of Heikes*, 899 P.2d 1349, 1357 (Cal. 1995) (holding that a six-year period between the initiation of the law and the commencement of the divorce action constituted notice but was insufficient "to offset the other factors that . . . call[ed] for protection of [the wife's] vested property right against retroactive enforcement of husband's claim to reimbursement"); *see also* Matsumura, *supra* note 5, at 221-22. Matsumura's analysis of the same topic, although reaching a different conclusion, states a helpful proposition:

[T]he various mitigation devices created by the legislature . . . would not necessarily defeat [a] reliance claim [Even though p]eople are presumed to have knowledge of the law . . . the [*Heikes*] court ruled that notice of the change in law does not 'cure' the otherwise suspect retroactivity if the ability to cure is theoretical and not realistic.

Id. at 221.

Similar to the *Heikes* holding, the court would likely find it equally difficult for an individual to obtain a written waiver of any and all rights to property interests and future support claims from his or her partner, especially in the case of financial dependence. *Id.* at 221-22.

Additionally, the content of the notice is critical to determining whether or not it was sufficient to override the rights threatened. While the letters and web posting advised partners of the expansion of rights and the providence of consulting an attorney, they said nothing about retroactivity. *See supra* note 90; *see also* Matsumura, *supra* note 5, at 192. In fact, the letters gave the impression that the new rights and responsibilities only applied after January 1, 2005. *See supra* note 90. Thus, even if every registered domestic couple were to have physically received the letters or read the website, actual notice of the Act's potential affects and the ability of partners to cure, remains questionable.

366. Comparing Smith's risk of losing property to that of married couples is not intended to belittle the extent of the loss. The point of the comparison is to demonstrate that courts and society have long accepted this eventuality as part of the cost of admission. Entering oneself into a state-recognized relationship directly places one under the structure of the state-sponsored property distribution scheme—in this case, community property. One should expect when entering into such a relationship that his or her property interests may be altered should he or she choose to later terminate the relationship.

As for the extent to which the proposed legislation disrupts individual actions taken in reliance on the former law, *Buol* states that, “[t]he net effect of retroactive legislation is that parties . . . cannot intelligently plan a settlement of their affairs nor even conclude their affairs with certainty after a trial based on then-applicable law.”³⁶⁷ This same concern applies to retroactive application of community property laws as to Velez and Smith. Smith can very well argue that the state’s interest in stability of the laws and predictability of their effect should force the holding in her favor.³⁶⁸ Yet, courts have often validated retroactive laws in spite of this very contention.³⁶⁹

Despite strong countervailing concerns, the interest in providing rights for domestic partners where none previously existed is significant. In fact, the complete lack of protection for registered domestic partners before the Act is amply repugnant to justify this divestiture of Smith’s vested property rights. Due to the above balancing of interests, when faced with whether to retroactively apply the California community property system to domestic partners registered before January 1, 2005, California courts will likely decide in the affirmative. To hold to the contrary would abrogate the protections central to the Act’s purpose for a significant number of individuals.

V. CONCLUSION

With the exception of the Domestic Partner Rights and Responsibilities Act of 2003, California same-sex couples have seen slight and slow changes to the legal rights they are afforded.³⁷⁰ Not only do the minds of the public have to bend themselves to new ideas, but citizens have to exercise their rights and sue under the laws so they are tested and sufficiently defined. Although this process has yet to occur for the Act, the case testing its constitutionality will inevitably arise. As for predicting the outcome of that case, nothing is a better predictor of future behavior than past performance. Such is the American system of justice. It is for that reason that the Act’s resilience can be reasonably anticipated. It is also for that reason that future amendments will likely add to the panoply of rights granted same-sex couples. Future advancement will likely come in a fashion similar to past progress—slow and steady. In fact, legislation in this area is constant. In January 2007, new legislation passed granting domestic

367. *In re Marriage of Buol*, 705 P.2d 354, 362 (Cal. 1985) (quotations omitted).

368. *See supra* note 98 and accompanying text.

369. *See Addison v. Addison*, 399 P.2d 897 (Cal. 1965); *see also In re Marriage of Bouquet*, 546 P.2d 1371 (Cal. 1976).

370. *See supra* notes 42-94 and accompanying text.

partners eight additional protections.³⁷¹ One bill required equal benefits in state contracts after the first of the year.³⁷² Another gave domestic partners the right to file joint state tax returns for the 2007 tax year.³⁷³ The list of advances continues as it began—incrementally. As the gap between domestic partners and married couples narrows, new issues will arise. New laws will be challenged and new rights questioned. But in that slow development, it is not the speed at which the rights arrive that is important; what is crucial is the power of those new rights to withstand inevitable challenges.

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371. A.B. 17, 2003 Reg. Sess. (Cal. 2003).

372. Equality California, *Eight New Laws Advancing LGBT Equal Rights and Protections Go Into Effect January 1* (Dec. 21, 2006), available at <http://www.eqca.org/site/apps/nl/content2.asp?c=9ofNKWMCF&b=40337&ct=3318667>. The right to file the returns does not accrue until 2008 but provides for joint tax status for the 2007 tax year. *Id.*

373. S.B. 1827, 2006 Reg. Sess. (2006).

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