REACHING BACKWARD WHILE LOOKING FORWARD: THE RETROACTIVE EFFECT OF CALIFORNIA'S DOMESTIC PARTNER RIGHTS AND RESPONSIBILITIES ACT

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In 1999, California enacted domestic partnership legislation for the first time. In its initial stages, registration of a domestic partnership offered few rights and no responsibilities to partners. Subsequent legislation added greater rights and responsibilities to the skeleton of the registry, culminating in the Domestic Partner Rights and Responsibilities Act of 2003, which conferred upon registrants nearly all the benefits and obligations of marriage. Although the 2003 Act took effect on January 1, 2005, the California Legislature amended the Act in the interim, applying community property law back to the date of registration under the 1999 law. In doing so, it effectively created a period of retroactivity of up to five years.

This Comment examines the permissibility of retroactively applying the Act to conduct occurring before the legislation was enacted. It ultimately concludes that the retroactive portions of the Act violate the Takings Clause of the U.S. Constitution, as well as the Due Process Clause of the California Constitution. While the Comment aims to expose the constitutional infirmity of the Act's retroactivity, its ultimate goal is more prescriptive: It suggests ways in which other states may avoid the pitfalls of California's statute when tailoring their own domestic partnership legislation.

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INTRODUCTION

In California, recent domestic partnership legislation has created new legal rights and responsibilities for same-sex couples and explicitly applied those benefits and burdens retroactively. In 1999, California enacted domestic

partnership legislation for the first time,[1] enabling same-sex couples to register as domestic partners but having little other effect.[2] Either partner could exit the relationship at will without legal ramifications or judicial oversight. There were no dissolution rules concerning property rights and, hence, no dissolution proceedings.[3] A series of incremental increases in rights culminated in the Domestic Partner Rights and Responsibilities Act of 2003 (Act),[4] which conferred upon previously registered domestic partners the rights and responsibilities of marriage. When the Act became effective on January 1, 2005, domestic partnerships were subject to dissolution rules and proceedings based on community property rights. Without offering a separate justification, the California Legislature amended the Act[5] to stretch community property law back to the date of registration, effectively creating a period of retroactivity. Thus, the new set of rules and processes commencing on January 1, 2005, now bind people who registered long before these rules took effect.

This Comment examines the permissibility of retroactively applying the Act to conduct occurring before the legislation was enacted. To illustrate, consider the following hypothetical: A couple with drastically different income levels registers as domestic partners in January, 2000. They split in June 2005. Because the Act became effective on January 1, 2005, they must go through the same dissolution procedures as married couples. This creates retroactivity in a weak sense: A new property regime, distinct from the one under which they registered, now regulates the relationship of the couple. However, the California Legislature elected to create retroactivity in a much stronger sense. The law now treats the couple as if community property rights existed from the initial date of registration. The creation of property rights that reach backward in time would benefit the partner with lower income by taking property of the wealthier individual and recharacterizing it as property of the community. In some cases, where the income disparity is great, the retroactive effect would be substantial. Thus, it is inevitable that as couples dissolve their partnerships, the retroactive portions of the Act will be challenged in court.

Part I explores the history of California's domestic partnership legislation from its inception to its enactment of the Act on January 1, 2005. Part II poses hypothetical situations that illustrate the potential extensiveness of the

1. Act of Oct. 2, 1999, ch. 588, 1999 Cal. Legis. Serv. 3372 (West) (codified as amended at CAL. FAM. CODE §§ 297–299.6 (West 2004)).

2. *See infra* text accompanying notes 10–16.

3. *See infra* text accompanying notes 13–16.

4. Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Legis. Serv. 2586 (West) (codified as amended at CAL. FAM. CODE §§ 297–299.6 (West 2004 & Supp. 2006)) [hereinafter Act].

5. *See infra* text accompanying notes 42–52.

Act's retroactive effect. Part III navigates retroactivity doctrine at both the federal and state levels. Part IV demonstrates that the Act potentially constitutes a taking under the Fifth Amendment of the U.S. Constitution and runs afoul of California's due process clause. Part V steps back and takes a look at the national stage: A handful of states have created domestic partnerships for same-sex couples, and more will surely follow in the coming years.[6] Furthermore, many states will likely follow California in adding rights as acceptance of same-sex relationships and political will grows. Thus, the same constitutional infirmities that mark California domestic partnership law may develop in other states. This part presents ways in which state legislatures may avoid the pitfalls of California's legislation when promulgating their own domestic partnership laws.

I. PHASING IN LEGAL RIGHTS FOR SAME-SEX COUPLES: THE EXAMPLE OF CALIFORNIA

California domestic partnership law[7] unfolded in three major stages.[8] In 1999, the Legislature passed Assembly Bill (AB) 26, which created

6. *See infra* text accompanying notes 222–225. This November, Colorado voters will take part in a referendum either approving or rejecting a domestic partnership bill passed earlier in 2006 by both the state House of Representatives and Senate. *See* Colorado Domestic Partnership Benefits and Responsibilities Act, H.R. 1344, 2006 Gen. Assem., Reg. Sess. (Colo. 2006), *available at* http://www.state.co.us/gov_dir/leg_dir/olls/sl2006a/sl_395.pdf. Although the proposed legislation would operate prospectively and offer the rights and responsibilities of marriage, domestic partnership legislation passed in other states such as New Jersey and Maine does not extend the same level of legal protection, making expansion of rights a distinct possibility. *See infra* notes 223, 225.

7. Some municipalities created domestic partner registries and offered benefits to same-sex partners long before the state promulgated its legislation. For example, the Berkeley City Council

> adopted a Policy in December, 1984 extending employee benefits to domestic partners as a way of addressing inequities that occur when benefits are limited to married couples . . . .
>
> In June, 1991, the City Council extended the policy recognizing domestic partnerships beyond City employees to provide the general public the opportunity to register as Domestic Partners.

Domestic Partnership Information, http://www.ci.berkeley.ca.us/clerk/dom-pol.htm (last visited Sept. 15, 2006). West Hollywood created a similar registry for same-sex couples in 1985. *See* 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 Sept. 15, 2006).

8. Prior to the 2003 Act, gay-rights advocates gradually expanded the rights of registered domestic partners through piecemeal legislation. *See* Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1561 n.36 (2004) (describing six enactments taking place between 1999 and 2002); Evan Halper, *Gay Activists Split Despite Successes*, L.A. TIMES, Sept. 16, 2002, at B5 (discussing the division between gay-rights advocates who favor incremental legislation and those who want to see more drastic gains); Jenifer Warren, *Bill Expanding Domestic Partners' Rights Signed*, L.A. TIMES,

a registry for domestic partnerships and attached nominal rights. Passed in 2001, AB 25 added more rights, notably, stepparent adoption and expanded health-care coverage. The ultimate phase of domestic partnership legislation to date, AB 205, enacted in 2003 and made effective on January 1, 2005, added nearly all the rights and responsibilities of marriage. I address each of these pieces of legislation in turn.

A. 1999 Assembly Bill 26: Domestic Partners—Rights and Obligations

In 1999, California State Assembly Member Carole Midgen opened the door to what eventually became the most expansive domestic partnership legislation in the nation when she introduced AB 26, which created a registry for domestic partnerships. Two unmarried adults of the same sex[9] sharing a common residence, and accepting joint responsibility for each other's basic living expenses, could file a Declaration of Domestic Partnership with the secretary of state.[10] Proof of registration allowed state employees to include their domestic partners as family members for purposes of state health and benefit plans.[11] Registration also required health facilities to allow a domestic partner of the patient to visit, subject to limited restrictions.[12] Perhaps more notable, though, is what AB 26 did not do: (1) It did not create any interest in, or change the character of property—real or personal—of either partner;[13] (2) it did not recharacterize jointly owned property as community property;[14] (3) it did not change the income or estate tax liabilities;[15] and (4) it imposed minimal termination burdens, requiring only one partner to give written notice that he or she was terminating the partnership.[16] Because the law expressly declined to create property rules within the domestic partnerships,

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Oct. 15, 2001, at B6 ("Gay and lesbian advocates say that short of winning passage of the [civil unions] bill, they plan to press for further expansion of rights for domestic partners in the coming year.").

9. Domestic partnerships are also available to opposite-sex couples if one or both persons are over the age of sixty-two. *See* CAL. FAM. CODE § 297(b)(5)(B) (West 2004).

10. CAL. FAM. CODE § 298 (setting out eligibility criteria for domestic partnerships and establishing registration procedures).

11. CAL. GOV'T CODE §§ 22867–22877 (West 2003), *repealed by* Act of June 23, 2004, ch. 69, 2004 Cal. Legis. Serv. 309.

12. CAL. HEALTH & SAFETY CODE § 1261 (West 2000).

13. CAL. FAM. CODE § 299.5, *repealed by* Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, § 11, 2003 Cal. Legis. Serv. 2586, 2592 (West).

14. *Id.*

15. *Id.*

16. CAL. FAM. CODE § 299, *repealed by* Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, § 11, 2003 Cal. Legis. Serv. 2586, 2592 (West). Written notification would not have even been required if one of the partners unilaterally married an eligible individual.

there was no need to create dissolution proceedings upon termination of a domestic partnership; there would be no res to distribute.

AB 26's most enduring contribution to the presently existing legislation was the establishment of the domestic partner registry to which further rights could, and would, attach. AB 26 also provided legal recognition that a same-sex relationship could be "intimate and committed."[17] Assembly Member Midgen asserted that the bill "finally [placed gay couples] on the map, . . . affirm[ing] the legitimacy and sincerity of lesbian and gay families."[18] However, the version that became law was weakened from original legislation that would have required "[private] insurers to offer domestic partner plans to all employers in the state."[19] Although Governor Gray Davis embraced the new law as a weapon to help "beat back the forces of hatred and discrimination that strike at the very heart of what it means to be a Californian,"[20] he made private efforts to "water down or slow its progress."[21]

Public reactions to AB 26 were predictably mixed. Conservative voices decried the legislation as a back door to marriage, and gay couples called it a small step toward equality.[22] Two letters published in the *Los Angeles Times* reflected the uncertainty gay couples felt toward the legislation. One characterized it as follows: "Big doings. Yet one small step for gay people."[23] The other expressed hesitancy to be "on a 'list' that separates us from others."[24] However, opinions on AB 26 only appeared to diverge around the symbolic aspects of the

17. CAL. FAM. CODE § 297(a).

18. Carl Ingram, *Davis Signs 3 Bills Supporting Domestic Partners, Gay Rights*, L.A. TIMES, Oct. 3, 1999, at A24.

19. Greg Lucas, *Domestic Partners Bill to Weaken*, S.F. CHRON., July 7, 1999, at A13.

20. Ingram, *supra* note 18, at A24.

21. Lucas, *supra* note 19, at A13. When drafting Assembly Bill (AB) 26, California Assembly Member Carole Midgen was most likely cognizant of the fact that

> [s]imilar legislation, AB 54 (Murray) of 1997 and AB 627 (Katz) of 1995 both died in the Assembly. [Furthermore] AB 1059 (Midgen) of 1998 was vetoed and in his veto message, Governor Wilson stated: "Domestic partner health benefit coverage is an issue that is more appropriately left to negotiations between employers and employees. This coverage is available for both large and small employers who wish to provide the benefit, as evidenced by the many employers who choose to do so."

Cal. Bill Analysis, AB 26, Assem. Floor, 1999–2000 Reg. Sess. (Apr. 8, 1999), *available at* WESTLAW.

22. *See, e.g.*, Ingram, *supra* note 18, at A24 ("One opponent, the Committee on Moral Concerns, denounced domestic partners legislation as 'lending an air of legitimacy to homosexuality.'"); Amy Pyle, *State Begins Accepting Gays' Domestic Partner Sign-Ups*, L.A. TIMES, Jan. 4, 2000, at A1 ("To some it seemed a giant step, to others a baby step, toward full recognition of their relationships."). Interestingly, it was conservative rhetoric that suggested that the legislation was momentous; same-sex couples seemed to take a more cautious approach.

23. Stephen May, Letter to the Editor, L.A. TIMES, Jan. 11, 2000, at B6.

24. Giovanna Marchese, Letter to the Editor, L.A. TIMES, Jan. 9, 2000, at M4.

legislation. There is no indication in the media that any parties misunderstood the bill as offering more significant rights than those indicated above.

B. 2001 Assembly Bill 25

In 2001, the legislature significantly expanded registered domestic partner rights when it passed AB 25. AB 25 provided, in part, standing to sue for negligent infliction of emotional distress and wrongful death, stepparent adoption rights, continued health coverage for the surviving domestic partner upon the death of an employee or annuitant of state or local governments, authority for one partner to make personal health-care decisions for the other, and requirements that group health care service providers treat domestic partners the same as other dependents.[25] AB 25 also expanded the surviving partner's role in administering a decedent's estate.[26] Intestate succession rights were added a year later.[27] However, none of the expansions following AB 26 created new property rules for registered domestic partners.

C. Domestic Partner Rights and Responsibilities Act of 2003

The incremental domestic partnership legislation culminated on September 19, 2003, when the legislature passed the Domestic Partner Rights and Responsibilities Act of 2003.[28] Introduced as AB 205 by Assembly Member Jackie Goldberg, the Act "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."[29] By focusing not only on the benefits but also on the responsibilities afforded by this new legal status, the framers created a substantial equivalent to marriage.[30]

The Act added Section 297.5 to the California Family Code, which provides that current, former, and surviving registered domestic partners

25. Act of Oct. 14, 2001, ch. 893, 2001 Cal. Legis. Serv. 5633 (West); *see also* Blumberg, *supra* note 8, at 1559–60 nn.19–31 (discussing same).

26. *See* Blumberg, *supra* note 8, at 1559–60.

27. Act of Sept. 10, 2002, ch. 447, 2002 Cal. Legis. Serv. 2133 (codified at CAL. PROB. CODE §§ 6401(c), 6402 (West Supp. 2006)).

28. Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Legis. Serv. 2586 (West) (codified as amended at CAL. FAM. CODE §§ 297–299.5 (West 2004)).

29. *Id.* at § 1(a).

30. *See* Blumberg, *supra* note 8, at 1567 (praising the Act as "more ethically satisfying than the earlier domestic partner legislation" because it emphasizes the reciprocity of rights and obligations and repudiates the "rights but no responsibilities" approach of the former legislation).

"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 their marital equivalents.[31] It even went so far as to include a provision allowing the government to construe gender-specific terms referring to spouses as including domestic partners.[32] The Act specifically extended new rights to previously registered domestic partners, including community property rights, ownership and survivorship,[33] liability to their partner's creditors, child support obligations to children of former partners,[34] and dissolution procedures that mirror those for marriages.[35]

Recognizing the significant differences between the Act and previous domestic partnership registration bills, the legislature took several steps to mitigate this transition's disruptive effect. First, the Act required the secretary of state to (1) send notification letters to already-registered domestic partners on three separate dates; (2) attach a notice of the changes to each Declaration of Domestic Partnership form; and (3) post information on the secretary's website.[36] The letters contained the following information: the effective date of the new legislation, changes in property laws (primarily relating to community property and mutual responsibilities for debts),[37] imposition of dissolution requirements, and the importance of opting out of the system before the effective date if the members did not wish to be bound by the new rights and responsibilities.[38] The notice posted on the website contained substantially similar information.[39] None of the information disseminated to registered domestic partners, potential registrants, or the general public mentioned the potentially retroactive effects of the Act.

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31. CAL. FAM. CODE § 297.5(a)–(c) (West Supp. 2006).

32. *Id.* § 297.5(l) ("Where necessary to implement the rights of domestic partners under this act, gender-specific terms referring to spouses shall be construed to include domestic partners.").

33. *Id.* § 299 (repealing previous § 299, which expressly denied domestic partners the option of holding property as a community).

34. *Id.* § 297.5(d).

35. *Id.* § 299. In addition to creating a procedure for summary dissolution where the property and obligations of the partners fall under a statutory maximum, the Act includes choice-of-law provisions that allow either partner to file a dissolution action in California Superior Court even if neither partner is a resident of, or domiciled in, California. *Id.*

36. *Id.* § 299.3.

37. *Id.* ("[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.").

38. *Id.* ("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 . . . by the filing of a court action.").

39. *Id.*

Second, the Act explicitly delayed the operative date for the sections of the Act that changed the substantive rights of the registrants, making those provisions effective on January 1, 2005, over a year after its enactment.[40] The legislators most likely intended to institute a longer phase-in period to give registered couples the opportunity to decide whether to subject themselves to the new legal responsibilities.[41] Registered partners had the ability to terminate their relationship without going through the dissolution process as long as they chose to do so before the effective date.

1. 2004 Amendments—Creating Explicit Retroactivity

In contrast to the public attention surrounding signing the Act into law in September 2003, AB 2580, introduced by Assembly Member Goldberg as a clean-up measure, slid quietly through the legislature and was signed into law on September 30, 2004.[42] When introduced, the bill's purpose was to specify that the Act's benefits only applied to those couples who joined the state's domestic partner registry.[43] There were several later amendments to the bill.[44] One revision created explicit retroactivity, making clear that the date of registration would be equivalent to the date of marriage for purposes of determining community property rights. This change was made so that those who registered under the prior version of the law would not need to reregister

40. Domestic Partner Rights and Responsibilities Act of 2003 § 14, ch. 421, 2003 Cal. Legis. Serv. 2586 (West) ("The provisions of Sections 3, 4, 5, 6, 7, 8, 9, and 11 of this act shall become operative on January 1, 2005.").

41. After mentioning the effective date of the statute, the California Bill Analysis noted that the secretary of state would be required to inform the registrants of the changes under the 2003 Act, and state agencies would be required to change their public-use forms to reflect appropriate references to domestic partnerships. Cal. Bill Analysis, AB 205, S. Floor, 2003–2004 Reg. Sess. (Aug. 21, 2003), *available at* WESTLAW; *see also* Gregg Jones & Nancy Vogel, *Domestic Partners Law Expands Gay Rights*, L.A. TIMES, Sept. 20, 2003, at A1 ("The effective date was deliberately delayed a year to give already registered couples time to decide if they are prepared to live up to the law's expanded responsibilities."); *cf.* Preston v. State Bd. of Equalization, 19 P.3d 1148, 1167 (Cal. 2001) (discussing possible reasons the legislature might have had for delaying the operative date of a tax statute, including allowing "persons and agencies affected by it . . . to comply with its terms" and giving "lead time to the governmental authorities to establish machinery for the operation of or implementation of the new law") (internal citations omitted).

42. Act of Sept. 29, 2004, ch. 947, 2004 Cal. Legis. Serv. 5521 (West). I could not locate any articles mentioning its passage in the major California news sources.

43. Assembly Member Jackie Goldberg claimed she had received "calls from people throughout the state asking if AB 205 provisions apply to people who are registered or domestic partners who are registered at one of the 59 local jurisdictions." Cal. Bill Analysis, AB 2580, Assem. Floor, 2003–2004 Reg. Sess. (Apr. 27, 2004), *available at* WESTLAW (discussing the version of the bill introduced on February 20, 2004).

44. *See* Cal. Bill Analysis, AB 2580, S. Judiciary Comm., 2003–2004 Reg. Sess. (June 22, 2004) (Comm. Rep.), *available at* WESTLAW (discussing the version amended on June 15, 2004).

to enjoy the new rights.[45] Another revision allowed previously registered couples a greater period of time to mitigate the retroactive impact, permitting them to create antenuptial agreements provided that they executed them before June 30, 2005.[46]

At the June 22, 2004, Senate Judiciary Committee hearing, during which the aforementioned changes were discussed, the Committee noted two basic problems with the proposed legislation: First, it would create confusion since the Uniform Premarital Agreement Act (UPAA)[47] does not allow spouses to enter into a prenuptial agreement after marriage; and second, it would require a positive act that might be too costly or burdensome for couples to implement.[48] Further, the Committee grappled with the problem of retroactivity when it weighed the potential for disruption if couples were forced to reregister against the potential unfairness of binding existing couples to new responsibilities without affording them the opportunity to order their property relationships in the same manner as newly registered couples.[49]

The final version of AB 2580 made substantive changes to the Act, clarifying the relationship between formal registration status and wrongful-death standing,[50] revising the letter sent to registered domestic partners to include a clause notifying the couple of their option to effect a premarital agreement,[51] and, most importantly, adding the following subpart to Section 297.5 of the Family Code:

> For purposes of the statutes, administrative regulations, court rules, government policies, common law, and any other provision or source of law governing the rights, protections, and benefits, and the responsibilities,

45. *Id.*

46. *Id.*

47. CAL. FAM. CODE §§ 1600–1601, 1610–1617 (West 2006).

48. *See* Cal. Bill Analysis, AB 2580, S. Judiciary Comm., 2003–2004 Reg. Sess. (June 22, 2004) (Comm. Rep.), *available at* WESTLAW ("Considering how complicated a prenuptial agreement could be, and how even prospective spouses have a difficult time or do not want to spend the money to pay an attorney to draft a prenuptial agreement, there may be a number of domestic partners who will opt not to have the agreement authorized by this bill or will simply ignore that this option exists for them.").

49. *Id.* ("This will give the same rights to those domestic partners who do not wish to disrupt their lives by terminating and then re-registering under the new law, as are given to those who register under the new law.").

50. While formal registration status is statutorily required under CAL. FAM. CODE § 297 (West 2002) to sue for deaths occurring after January 1, 2002, a surviving partner who met most of the criteria of registration at the time of death but had not registered can still bring a cause of action if the death occurred before January 1, 2002. *See* CAL. CIV. PROC. CODE § 377.60(f) (West Supp. 2006).

51. CAL. FAM. CODE § 299.3(a) (West Supp. 2006) ("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."). Given the timing of the passage of AB 2580, it is clear that, at a maximum, two of the letters would contain this provision.

> obligations, and duties of registered domestic partners in this state, as effectuated by this section, with respect to community property, mutual responsibility for debts to third parties, the right in particular circumstances of either partner to seek financial support from the other following the dissolution of the partnership, and other rights and duties as between the partners concerning ownership of property, any reference to the date of a marriage shall be deemed to refer to the date of registration of a domestic partnership with the state.
>
> Notwithstanding [the previous] paragraph, for 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 requirements set forth in Sections 1600 to 1620, inclusive, and which complies with those sections, except for the agreement's effective date, shall be enforceable as provided by Sections 1600 to 1620, inclusive, if that agreement was fully executed and in force as of June 30, 2005.[52]

AB 2580 initially purported to be a mere clean-up statute. However, the statute's clarifications had significant substantive effects: It made the retroactivity of the Act, at least pertaining to community property rights and obligations, explicit; and it provided an ex post premarital agreement as another transition device.

2. Impact of the Act Since Its Effective Date

At the time the Act was passed in September 2003, there were roughly 21,000 registered domestic partnerships in California.[53] During the next calendar year, public discourse centered on whether registered same-sex domestic partners would shy away from or embrace the new legal responsibilities.[54] In 2004, over 1325 couples eliminated their names from the registry, but 4974 signed up during the same period,[55] and more than 26,000 couples became part

52. *Id.* § 297.5(m).

53. *See* Jones & Vogel, *supra* note 41, at A1.

54. *See, e.g.*, Kathy M. Kristof, *Same-Sex Couples to Gain New Rights, Liabilities in California*, L.A. TIMES, Dec. 19, 2004, at C3 (analyzing some of the benefits and burdens of the new law); Rona Marech, *Gays Cautious About New Partners Law*, S.F. CHRON., Sept. 20, 2004, at A1 ("[Gay couples] are dissolving their current legal partnerships or declining to sign up, mainly because they're worried that under the new law . . . their public benefits could be slashed, or they could wind up in a financial or legal quagmire."); Jim Sanders, *New Year, New Laws: Gay Couples to Acquire New Rights*, SACRAMENTO BEE, Dec. 31, 2004, at A3 ("More couples than ever before have eliminated their names this year from the registry: 1,325 through Nov. 30, compared to 1,234 in the previous four years combined."); *see also* Lambda Legal, AB 205: the California Registered Domestic Partner Rights and Responsibilities Act of 2003 (Sept. 19, 2003), *available at* http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/240.pdf (discussing how registering as domestic partners might not be a wise decision for all couples).

55. *See* Sanders, *supra* note 54, at A3.

of the new legal system created by the Act.[56] The Act was upheld against a legal challenge brought by the supporters of Proposition 22[57]—a voter initiative that amended the state constitution to define away the possibility of gay marriage—who alleged that the Act violated the terms of the proposition by amending it without obtaining direct approval of the electorate.[58] The Act also survived an attempt by opponents of domestic partnership rights to revoke the Act in the 2006 elections.[59] Furthermore, it served as a foundation in cases involving child support owed by one former domestic partner to another,[60] marital-status discrimination,[61] and standing to sue for wrongful death.[62] After weathering a few storms, the Act now appears to be on relatively solid ground.

II. THE PROSPECTIVE PROBLEM OF RETROACTIVE DOMESTIC PARTNERSHIP LEGISLATION: THE HYPOTHETICAL CASE OF THE GAY DIVORCEES

Legislation is neither inevitably retroactive nor prospective in nature. Rather, legislators may circumscribe the scope of the legislation, limiting it to specific groups of people, applying it to specific types of acts, or assigning fixed temporal dimensions. In this sense, the Act could have operated entirely prospectively.[63] However, with AB 2580 in 2004, the Assembly extended the

56. *See* Lee Romney, *Though They Can't Wed, Gays May Now Divorce*, L.A. TIMES, Jan. 1, 2005, at A1. As of March 31, 2006, 37,060 couples have registered as domestic partners and 4384 have dissolved their partnerships. E-mail from the Special Filings/Domestic Partnership Section, Cal. Sec'y of State, to Kaiponanea Matsumura (Apr. 17, 2006, 11:21 PST) (on file with author).

57. Defense of Marriage Act, Initiative Measure Proposition 22 (codified at CAL. FAM. CODE § 308.5 (West 2004)) ("Only marriage between a man and a woman is valid or recognized in California."), *invalidated by* Coordination Proceeding, Special Title [Rule 1550(c)], Marriage Cases, No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005).

58. *See* Knight v. Superior Court, 26 Cal. Rptr. 3d 687 (Cal. Ct. App. 2005).

59. *See* Editorial, *Modus Vivendi: Voters Take a Pass on Divisive Social Issue*, SACRAMENTO BEE, Dec. 30, 2005, at B6 (describing failure of ProtectMarriage.com supporters to gain the required signatures to float its initiative, "Elimination of Domestic Partnership Rights," in 2006).

60. *See* Elisa B. v. Superior Court, 117 P.3d 660, 660 (Cal. Ct. App. 2005) ("We perceive no reason why both parents of a child cannot be women. That result now is possible under the current version of the domestic partnership statutes, which took effect this year.") (citation omitted).

61. *See* Koebke v. Bernardo Heights Country Club, 115 P.3d 1212, 1226 (Cal. 2005) (holding in part that the existence of the Act created a cognizable claim for marital-status discrimination where the defendant country club treated registered domestic partners differently than married couples after January 1, 2005).

62. *See* Armijo v. Miles, 26 Cal. Rptr. 3d 623, 630–32 (Cal. Ct. App. 2005) (upholding AB 2580's amendments to earlier versions of the Act against a due process challenge on the basis of retroactivity).

63. Of course, the explicit prospectivity of a statute does not necessarily mean that it does not have the potential to alter the results of actions conducted prior to the effective date of the statute. *See infra* text accompanying notes 83–84.

responsibilities concerning community property obligations, liability to creditors, and any other rights and duties concerning the ownership of property, to the date that the partnership first registered under the 1999 AB 26.[64] This extension effectively transformed separate property acquired during a window of up to five years into community property. Little creativity is required to imagine future situations in which the retroactive provisions will result in contention upon dissolution of the partnership; namely, where there is a large disparity in income or debt, the period of retroactivity could result in a significant windfall for one partner and loss for the other. Thus, it seems inevitable that the retroactive provisions will be challenged in California courts. The following hypotheticals illustrate just two of the problems likely created by the retroactivity provision of the Act.

A. Income Disparities

Poor and Rich committed to a long-term relationship in the late 1990s. When they met, Rich had just begun working in the Los Angeles office of an international law firm. Poor was teaching in the Los Angeles Unified School District. In January 2000, as an expression of their commitment to each other, and to receive some of the benefits they had heard about in the media,[65] Poor and Rich registered in the state's Domestic Partnership Registry. That September, Poor enrolled in a Ph.D. program in English Literature. For the first three years of the program, he received tuition remission and a stipend of $15,000. From 2003 through 2005, Poor worked on his dissertation without carrying a teaching load, in large part due to Rich's financial security, and had no income. At the end of 2004, Poor and Rich grew increasingly dissatisfied with their relationship.

On January 31, 2005, they decided to split. Rich suggested that they file a summary dissolution, thinking that his income for the month of January ($15,000) fell within the statutory maximum of $25,000.[66] After engaging a family law specialist, however, Poor sued Rich in Superior Court, claiming, inter alia, an interest in half of Rich's earnings during the time they were

64. *See supra* text accompanying notes 42–43.

65. *See supra* notes 11–12.

66. Family Code Section 299(a) allows domestic partners that fulfill most of the requirements of a summary dissolution to terminate their relationship without legal proceedings if the couple's assets and liabilities are relatively easy to untangle: If the "total fair market value of community property assets . . . is less than the amount described in . . . [the corresponding portion of] Section 2400," and various other requirements are met, a dissolution procedure is not necessary. CAL. FAM. CODE § 299(a)(6) (West Supp. 2006); *see also* CAL. FAM. CODE § 2400(a)(7) (West 2004) (requiring assets of less than $25,000 to qualify for summary dissolution).

registered as domestic partners. Unbeknownst to either partner at the time, all of their income between January 1, 2000, and January 31, 2005, became community property on January 1, 2005. Because the couple did not execute a premarital agreement in accordance with the UPAA,[67] and the total fair market value of the community property assets was well over the statutory maximum for a summary dissolution,[68] the couple was required to follow the same procedures that govern marital dissolution.[69]

The 2003 Act conferred upon registrants nearly equivalent rights and responsibilities of married couples. By making the provisions of the Act explicitly retroactive, the 2004 amendments expanded the community, providing Poor with a more substantial share. Since Poor and Rich registered on January 1, 2000, income acquired after that date—separate property—became community property on January 1, 2005.[70] Even declining to factor in vested pension benefits, tort damages, and other forms of property considered part of the community if acquired during marriage,[71] the disparity between both partners' contributions to the community was substantial. Rich's salary and bonuses during the period of retroactivity could easily amount to $750,000. In contrast, Poor would have contributed $45,000 during the same time period. Thus, prior to deducting tax payments and expenses, Rich would stand to lose up to $352,500 and Poor would gain that same amount. If, after expenses, Rich had $300,000 left in his bank account from that period of time, Poor could take $150,000. Clearly, given the potentially long period between registration under AB 26 and the Act's effective date, the financial impact of retroactively applying the Act could be substantial.

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67. CAL. FAM. CODE §§ 1600–1617 (West 2004).

68. *See supra* note 35.

69. *See* CAL. FAM. CODE § 299(d) (West Supp. 2006) ("The dissolution of a domestic partnership . . . shall follow the same procedures . . . as apply to the dissolution of marriage . . . ."); *cf.* CAL. FAM. CODE §§ 2500–2660 (West 2004) (describing process by which community estate is divided).

70. The California Family Code defines community property as "all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state" absent certain statutory exclusions. CAL. FAM. CODE § 760 (West 2004). Among these exclusions is separate property, defined in part as "[a]ll property owned by the person before marriage . . . [a]ll property acquired by the person after marriage by gift, bequest, devise, or descent . . . [and] [t]he rents, issues, and profits of the property described in this section." CAL. FAM. CODE § 770. Under the 2004 amendments to the Act, therefore, domestic partners who registered on January 1, 2000, would find a statutory presumption that any income, real property purchases, or damages for injuries, for example, accruing after that date would be community property. *See, e.g.*, WILLIAM P. HOGOBOOM & DONALD B. KING, THE RUTTER GROUP, CALIFORNIA PRACTICE GUIDE: FAMILY LAW ¶ 8:11 (2006).

71. *See In re* Marriage of Brown, 544 P.2d 561, 570 (Cal. 1976) ("[A] contingent interest, whether vested or not vested, comprise[s] a property interest of the community and . . . the wife may properly share in it."). Under this generous rubric, community property might include employee-subsidized health insurance, accrued vacation time, causes of action, or copyrights. *See, e.g.*, HOGOBOOM & KING, *supra* note 70, ¶¶ 8:64, 8:96, 8:100.5, 8:101.

B. Creditors in Pursuit

At the onset of Poor and Rich's dissolution process, Poor discloses that he ran up a debt of nearly $30,000 for clothing and other personal items in 2004. His creditor, Big Bank, sues both Rich and Poor for satisfaction of the debt. Poor wants to characterize the liability as community debt since he incurred the obligation after their date of registration.[72] Because Poor has no money in his account on January 31, and Rich's account contains $300,000, Big Bank attempts to extract the $30,000 from Rich. Rich offers the following cognizable defenses: First, Poor acquired the obligation at a time when state law treated Rich and Poor's property as completely separate; and second, even if Poor's debts became part of the community on January 1, 2005, the community only contained $15,000 at the time that dissolution procedures began. Income Rich earned prior to that date was his separate property and, therefore, not liable for any debt incurred by Poor before January 1.[73] Thus, Rich's liability would be limited to half the community, or $7500.

Of course, applying the Act retroactively, as in the first hypothetical, would yield two drastically different results. First, retroactive application would expand the community to property acquired after January 1, 2001. Borrowing figures from the first hypothetical, creditors would have access to up to $300,000. Second, retroactivity would reclassify Poor's debt as community, rather than separate. Under this classification, the debt would be satisfied first with community assets, then with Poor's separate property. This change in the court's order of preference for the satisfaction of debts would result in considerable differences in the distribution of assets, especially in cases where both partners possess valuable separate property.[74] In situations where a spouse commits a tort following coregistration, but preceding the effective date of the Act, the retroactive application of the Act could reclassify the tort as an act performed for the benefit of the community.[75]

72. Absent statutory exclusions, debts incurred by one spouse during marriage become community liabilities: "Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt." CAL. FAM. CODE § 910(a). By considering the date of marriage (for purposes of mutual responsibilities for debts to third parties) to be the date of registration, not the effective date of the 2003 Act, the legislature created a retroactive liability for aforementioned debts that would extend to acts occurring for years before the 2003 Act took effect.

73. *See* CAL. FAM. CODE § 913(b)(1) ("The separate property of a married person is not liable for a debt incurred by the person's spouse before or during marriage.").

74. *See, e.g.*, HOGOBOOM & KING, *supra* note 70, ¶¶ 8:762–8:767.

75. Spouses may even become personally liable; that is, separate property could be subject to divestiture in satisfaction of a debt if his or her spouse incurs a debt for "necessaries of life":

> The separate property of a married person may be applied to the satisfaction of a debt for which the person is personally liable pursuant to this section. If separate property is so

Although this subpart focused on the financial consequences of the Act's retroactive application, there are several other situations in which this legal change could create substantial uncertainty or disruption.[76] This Comment will not explore every iteration, but instead will move on to the potential legal limitations on a retroactive statute's reach.

III. LEGAL LIMITS OF RETROACTIVE LEGISLATION

The presumption against retroactive application of civil legislation is deeply rooted in the notions of fairness and legitimacy that form the basis of a "free, dynamic society."[77] The U.S. Supreme Court recognized the inherent dangers of retroactive legislation early in its jurisprudence, declaring that "a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties."[78] Two policies predating the nation's formation[79] underlie the jurisprudential suspicion of retroactive laws. First, a person should be able to conform his conduct to a reasonable understanding of existing laws. This reliance not only creates a sense of "stability with respect to past transactions,"[80] but allows the law to guide individual

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applied at a time when nonexempt property in the community estate or separate property of the person's spouse is available but is not applied to the satisfaction of the debt, the married person is entitled to reimbursement to the extent such property was available.

CAL. FAM. CODE § 914(b). Furthermore, a spouse might be held liable for injuries caused by the other spouse in certain circumstances, resulting in damages first being satisfied from the community estate:

> (a) A married person is not liable for any injury or damage caused by the other spouse except in cases where the married person would be liable therefor if the marriage did not exist.
>
> (b) The liability of a married person for death or injury to person or property shall be satisfied as follows:
>
> > (1) If the liability of the married person is based upon an act or omission which occurred while the married person was performing an activity for the benefit of the community, the liability shall first be satisfied from the community estate and second from the separate property of the married person.

CAL. FAM. CODE § 1000.

76. *See, e.g.*, 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, 49–54 (2006) (arguing inter alia that the Act may render many preregistration agreements between partners invalid because parties making agreements prior to the Act would not have known that they would eventually be required to conform to Family Code requirements for a valid premarital agreement).

77. Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) (noting that "creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions").

78. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

79. *See* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855–56 (1990) (Scalia, J., concurring).

80. Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960).

conduct.[81] Second, retroactive legislation can often be promulgated with an understanding of who will benefit—or be harmed—by it.[82]

Despite the fact that penumbras of antiretroactivity[83] emanate from parts of the U.S. Constitution, the Court avoids invalidating a statute unless it "contravenes a specific provision of the Constitution."[84] The Court has summarily dispelled any notions to the contrary, stating in *Landgraf v. USI Film Products, Inc.*, that "[a]bsent a violation of [a] specific [constitutional] provision[ ], the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope."[85]

This Part will examine key U.S. and California provisions that the respective courts have relied upon to invalidate retroactive legislation. It begins with an analysis of the Takings Clause of the Fifth Amendment,[86] made applicable to the states through the Due Process Clause of the Fourteenth Amendment.[87] It proceeds to the Fourteenth Amendement's due process protections against retroactive legislation,[88] then moves to separately address California's own Due Process Clause.[89]

A. The U.S. Constitution

1. Takings

A law that applies retroactively to deprive a party of vested property rights potentially runs afoul of the Takings Clause of the Fifth Amendment.[90] There are two categorical situations in which takings claims arise: One is a per se, or pure, taking, where the government exercises its eminent domain powers to

81. To the extent that the passage of a subsequent law ascribes new meaning to pre-enactment conduct, that law had no ability to influence conduct that already occurred. *Id.*

82. James Madison was concerned about protecting citizens from fluctuating policies of the legislature. *See* THE FEDERALIST NO. 44, at 351 (James Madison) (Phila., John C. Hamilton ed., J.B. Lippincott & Co. 1864); Hochman, *supra* note 80, at 693; *cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

83. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994).

84. *See* Hochman, *supra* note 80, at 694.

85. *Landgraf*, 511 U.S. at 267.

86. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

87. U.S. CONST. amend. XIV, § 1 ("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 . . . .").

88. *See id.*

89. CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty, or property without due process of law . . . .").

90. *See supra* note 86 and accompanying text.

acquire property for some public use;[91] the other, a regulatory taking, occurs where governmental action disproportionately burdens the interests of a few—limiting use of real property, for example—in a way that significantly interferes with use of the property.[92] Both pure and regulatory takings claims consist of four elements: "(1) private property; (2) must be taken; (3) for public use; (4) without just compensation."[93] Regulatory takings claims consist of additional analysis to determine whether a taking in fact occurred.

Cases involving the taking of money may sometimes lie on the uncertain line dividing pure and regulatory takings. This is because money, unlike other forms of property, can be characterized as fungible rather than unique: That is, if a governmental regulation results in a financial burden, but that burden can be satisfied with funds from any number of accounts, then identifiable property has not been taken; rather, the net worth of the individual has been reduced. However, several strong arguments exist that refute this logic.[94] Thus, a statute that has the effect of taking either real property or money from one individual and giving it to another without compensation would violate both the public use and just compensation requirements of the Takings Clause. This impermissible effect could arise from a law that retroactively divests a person's property by recharacterizing it as property of another.

2. Due Process Clause of the Fourteenth Amendment

The Court has most often turned to the Due Process Clause[95] to strike down retroactive legislation.[96] However, substantive due process protection of

91. *See, e.g.*, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (concerning the ability of a municipal government to condemn a private residence in furtherance of an economic-development plan).

92. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 107 (1978) (determining "whether a city may, as part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks—in addition to those imposed by applicable zoning ordinances—without effecting a 'taking' requiring the payment of 'just compensation.'").

93. Jeremy R. Polk, Comment, *Compensation for the Fruit of the Fund's Use: The Takings Clause and Tax Refunds*, 98 NW. U. L. REV. 657, 677 (2004).

94. For a detailed argument that taking money should be considered a per se taking, see *id.* at 685–92.

95. U.S. CONST. amend. XIV, § 1 ("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 . . . ."). The Fifth Amendment also contains a Due Process Clause that provides procedural and substantive rights against the federal government. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."). Because the statute at issue is the creation of a state legislature, the Due Process Clause of the Fourteenth Amendment is applicable in this instance, though analysis under both clauses is generally interchangeable.

96. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1074 (1997) ("The Due Process Clause appears to be most directly on point . . . ."); Matthew

economic interests has diminished since the New Deal era,[97] with courts now looking to see only whether "retroactive application is so harsh and oppressive as to transgress the constitutional . . . prohibition against arbitrary and irrational legislation."[98] Under this deferential standard, as long as the U.S. Congress intended for a statute to apply retroactively (now a question resolved under *Landgraf*),[99] it must only show that "the retroactive application of the legislation is itself justified by a rational legislative purpose."[100]

Two decisions of the Rehnquist Court indicate that the extreme deference with which the Court approaches retroactive legislation may be a thing of the past.[101] In *United States v. Carlton*,[102] the majority did not find any due process infirmity with a retroactive alteration of an estate-tax statute, but it appeared to apply a more searching analysis, scrutinizing not only the remedial purpose of the legislation but also the period of retroactivity.[103]

Justice O'Connor wrote separately to emphasize her view that there are limits to Congress's power to "readjust rights and burdens . . . and upset otherwise

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A. Schwartz, Comment, *A Critical Analysis of Retroactive Economic Legislation: A Proposal for Due Process Revitalization in the Economic Arena*, 9 SETON HALL CONST. L.J. 935, 941 (1999) ("In modern times, the Due Process Clause has been the primary constitutional provision used to challenge retroactive economic legislation.").

97. *See* United States v. Carlton, 512 U.S. 26, 34 (1994) (noting that cases relied on by the respondent, decided in the 1920s, "were decided during an era characterized by exacting review of economic legislation under an approach 'that has long since been discarded'") (internal citation omitted).

98. *Id.* at 30 (quoting Welsh v. Henry, 305 U.S. 134, 147 (1938); Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984)).

99. If the U.S. Congress expressly proscribes the statute's proper reach, the inquiry is over (and the law is presumably applied subject only to constitutional limitations). When the statute has no express command, courts must analyze "whether [the statute] would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).

100. *Pension Benefit Guar. Corp.*, 467 U.S. at 730. Implicit in the Court's recent decisions has been the acknowledgement that Congress possesses the institutional competence to weigh the benefits and burdens of legislating retroactively, notwithstanding its "responsivity to political pressures," or the "risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 266.

101. The Rehnquist Court's willingness to strike down expansive federal statutes based on the commerce power, *see* United States v. Morrison, 529 U.S. 598 (2000) (5–4 decision) (striking down the civil-remedy provision of the Violence Against Women Act as outside the scope of Congress's Commerce Clause and Fourteenth Amendment powers); United States v. Lopez, 514 U.S. 549 (1995) (5–4 decision) (striking down the Gun-Free School Zones Act under the same reasoning), and its more searching analysis of regulatory takings, *see* Dolan v. City of Tigard, 512 U.S. 374 (1994) (5–4 decision) (requiring nexus between administrative regulation and public use), seems in line with this development.

102. 512 U.S. 26 (1994).

103. *See id.* at 32–33 (looking at the statute's remedial period, and commenting that the period of retroactivity was a "modest" year).

settled expectations."[104] She appeared to give more weight to a party's interest in finality and repose,[105] as well as the extent to which the retroactive change would disrupt a person's use of his capital.[106] Furthermore, she expressed her belief that "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions."[107] The theme of fairness permeates Justice O'Connor's opinion: She suggested that the more people would likely rely on a law, and the more significant that reliance, the more the Constitution needs to protect that reliance.

Eastern Enterprises v. Apfel,[108] a regulatory takings case,[109] is also relevant. Justice Kennedy's concurring opinion may augur a revised approach to retroactive laws under the Due Process Clause.[110] Justice Kennedy positioned his analysis firmly within the mainstream of due process analysis. He analyzed the law under the traditional rational basis rubric, looking only to see whether "the remedy created . . . bears [a] legitimate relation" to the state interest.[111] However, Justice Kennedy found that the remedy did not bear a legitimate relation to the

104. *Id.* at 37 (O'Connor, J., concurring in judgment) (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 229 (1986) (O'Connor, J., concurring)).

105. *See id.* at 37–38 ("The governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose.").

106. *See id.* at 38 ("Because the tax consequences of commercial transactions are a relevant, and sometimes dispositive, consideration in a taxpayer's decisions regarding the use of his capital, it is arbitrary to tax transactions that were not subject to taxation at the time the taxpayer entered into them.").

107. *Id.* Justice O'Connor does not explain the relationship between the time period she selected, one year, and any specific provision in the Constitution. She did note, though, that Congress's practice of limiting the period of retroactivity of tax provisions generally made changes to the tax code permissible. *See id.*

108. 524 U.S. 498 (1998).

109. *Eastern Enterprises v. Apfel* was decided on takings grounds. *See* E. Enters. v. Apfel, 524 U.S. 498 (1998) (plurality opinion) (finding that provisions of the Coal Act of 1992, which would have the effect of assigning to Eastern Enterprises, a former mining company, the obligation to fund benefit plans for an additional 1000 employees who had worked for the company prior to 1966, constituted an unconstitutional taking). This decision has been criticized for unnecessarily juxtaposing the Court's regulatory takings jurisprudence with substantive due process protections against retroactive laws. *See* Ronald J. Krotoszynski, *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 725–26 (2002).

110. While there is no way of knowing whether the plurality would have found the applicable provisions of the Coal Act unconstitutional on due process grounds, there is at least some suggestion that the result reached might have been the same, given the substantial overlap between the takings and due process analyses. *See E. Enters.*, 524 U.S. at 538 ("Because we have determined that the third tier of the Coal Act's allocation scheme violates the Takings Clause as applied to Eastern, we need not address Eastern's due process claim.").

111. *Id.* at 549. This approach is in line with *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984), which claimed that retroactive legislation might face a higher level of scrutiny but only applied a rational basis test.

government's interest because the degree of retroactive effect was significant,[112] and there was not a close enough relationship between Eastern's past conduct and the liabilities imposed upon it to find that the statute was truly remedial in nature.[113] Justice Kennedy did not look to see whether there was any conceivable relationship between the purpose of the retroactive statute and the liability imposed, but he insisted on relative—though not absolute—congruence.[114] Thus, while the Court has disclaimed that it analyzes retroactive legislation within a rational basis framework, its statements belie the increased tendency to subject such legislation to a more scrutinizing glare.

B. Due Process Clause of the California Constitution

States have the power and the obligation to determine the extent of due process protections under their constitutions.[115] The California Supreme Court interprets the state's Due Process Clause[116] to offer more stringent barriers to retroactive legislation than the federal Clause.

California courts employ a three-step inquiry when entertaining claims that a legislative enactment has retroactively violated a plaintiff's due process rights. The first step of the inquiry is one of statutory construction, where the court

112. *See E. Enters.*, 524 U.S. at 549 (Kennedy, J., concurring) ("In our tradition, the degree of retroactive effect is a significant determinant in the constitutionality of a statute.").

113. *See id.* ("While we have upheld the imposition of liability on former employers based on past employment relationships, the statutes at issue were remedial, designed to impose an 'actual, measurable cost of [the employer's] business' which the employer had been able to avoid in the past.") (citations omitted).

114. Justice Kennedy claims that "there is no need for mathematical precision in the fit between justification and means" when examining retroactive legislation, but he clearly requires something that fits rather well. *Id.* at 550 (internal citations omitted). Indeed, as the dissents of Justices Stevens and Breyer point out, the record contained evidence that Eastern had contributed to the implicit understanding, even prior to acts that explicitly provided for lifetime health benefits, that their employees would have received the type of benefits imposed by the Coal Act. *See, e.g., id.* at 551 & n.2 (Stevens, J., dissenting).

115. *See, e.g.*, Barron v. Mayor of Baltimore, 32 U.S. 243, 247 (1833) ("Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests."); *see also* Hans A. Linde, *E Pluribus: Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984) ("The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand. . . . The state's law may prove to be more protective than federal law. The state law also may be less protective.").

116. CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty, or property without due process of law . . . .").

determines whether the legislature intended the statute to apply retroactively.[117] The second step involves analyzing whether the retroactive application deprives the plaintiff of a vested right.[118] Third, even a vested right may be impaired if the court determines that the retroactive legislation is "sufficiently necessary to the public welfare as to justify the impairment."[119] Also, California courts perform a more searching investigation than federal courts, considering such factors as "the 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, and the extent to which the retroactive application of the new law would disrupt those actions."[120] Because the statutory language leaves no question that the California Legislature intended to apply the Act retroactively, this Comment focuses its analysis on whether the Act impairs vested rights, and whether such impairment is necessitated by a significant state interest.[121]

117. Applying a presumption that the legislation is prospective, the court will look at statutory language and other factors such as the "context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction." *In re* Marriage of Bouquet, 546 P.2d 1371, 1373 (Cal. 1976) (quoting Alford v. Pierno, 104 Cal. Rptr. 110, 114 (Cal. Ct. App. 1972)). *Landgraf* articulated the same general approach of looking first to congressional intent. *See supra* note 99 and accompanying text.

118. *See id.* at 1376; *see also* Preston v. State Bd. of Equalization, 19 P.3d 1148, 1167 (Cal. 2001) (finding no state due process impediment to retroactive application of a tax regulation on the ground that it did not impair any vested property right). The absence of vested-rights analysis in recent U.S. Supreme Court jurisprudence has been conspicuous. The one notable exception comes in Justice Blackmun's dissent in *Landgraf*, where he argued that the new punitive damages section of the Civil Rights Act of 1991 should be retroactively applied since the defendant never had a vested right to sexually harass the plaintiff, and thus would not be deprived of anything the Constitution protects. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 296–97 (1994) (Blackmun, J., dissenting).

119. *Bouquet*, 546 P.2d at 1376 (quoting Addison v. Addison, 399 P.2d 897, 902 (Cal. 1965)). Enrique Monagas applies the same constitutional framework but comes to a different result concerning the constitutionality of the Act. *See* Monagas, *supra* note 76, at 56–58.

120. *Bouquet*, 546 P.2d at 1376. While the factors listed above have been widely used in the family law context, *see, e.g.*, *In re* Marriage of Buol, 705 P.2d 354, 360 (Cal. 1985), they have also been used outside of that context, *see, e.g.*, Yoshioka v. Superior Court, 68 Cal. Rptr. 2d 553, 558 (Cal. Ct. App. 1997) (applying *Bouquet* factors to determine whether a state ballot proposition violated petitioner's due process rights).

121. Those who wish to argue for the Act's constitutionality may assert that the Act does not apply retroactively since it only changes property rights as between the partners *after* January 1, 2005, and only upon dissolution or death. This argument is without merit. While this logic was the cornerstone of *Addison*, the value of that case in this regard has subsequently eroded. The *Addison* court looked at the validity of legislation that would treat property acquired in a different state during marriage as quasi-community property. *See Addison*, 399 P.2d at 902. Even though the application of the statute, passed in 1961, would have the practical effect of transforming property acquired between 1939 and 1961 from personal property to quasi-community property, the court declined to understand the law as retroactive since "the legislation . . . neither create[d] nor alter[ed] rights

1. Analysis of Vested Rights

As noted above, the vesting of a right is a prerequisite for due process analysis.[122] However, the courts have taken an expansive view of vesting, using the term "to describe property rights that are not subject to a condition precedent,"[123] including income.[124]

2. Means/Fit Analysis

California courts look carefully at the stated purpose of a law when evaluating whether the statute satisfies due process. The courts have long required more than a legitimate state interest when the law operates retroactively. In cases where the courts have upheld the retroactive legislation, they required "significant,"[125] "substantial,"[126] and "paramount"[127] interests that justify retroactive application of the laws. Additionally, the means of the law must carefully fit the stated purpose to justify retroactive application.

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except upon divorce or separate maintenance." *Id.* at 904. In other words, the court viewed the relevant action to occur *after* the enactment of the statute, thus circumventing an inquiry into the constitutionality of the retroactivity. This defense would now fail. First, *Addison* has been interpreted as a case about retroactivity even though it claimed to bypass such analysis. *See Bouquet*, 546 P.2d at 1377 (claiming that in *Addison*, "[t]he application of the quasi-community property legislation to property acquired before its effective date clearly impaired the husband's vested property rights," but that the state's interest in equitable distribution of property justified the impairment). Second, the *Bouquet* court explicitly refuted the *Addison* court's claim that the statute was not being applied retroactively, stating that "*Addison* clearly clothed the quasi-community property legislation with retroactive effect and so the commentators have universally recognized." *Id.* at 1377 n.10. Third, the courts have exhibited a tendency to look at the substantive effect of the law imposed to determine if it is retroactive. For example, in *Buol*, the court criticized two courts of appeal for "unnecessarily exalt[ing] form over substance" when it found a retroactive change to the Civil Code impaired only procedural rights. *Buol*, 705 P.2d at 358. Fourth, and most dispositively, courts have analyzed laws and declared them unconstitutionally retroactive even if they were enacted *before* a divorce proceeding, as long as they deprived parties of substantive rights. *See In re* Marriage of Heikes, 899 P.2d 1349 (Cal. 1995). Thus, it is likely that *Addison* would not serve as much of an obstacle to a California due process claim.

122. In *Buol*, for example, the court noted that the legislature "is not so unrestrained when . . . changes directly affect [vested] rights." *Buol*, 705 P.2d at 358. In contrast, California courts rejected two recent challenges to the retroactive application of the wrongful-death provisions of the Act on the theory that one does not have a vested right to injure another. *See* Armijo v. Miles, 26 Cal. Rptr. 3d 623, 632–33 (Cal. Ct. App. 2005); Bouley v. Long Beach Mem'l Med. Ctr., 25 Cal. Rptr. 3d 813, 818 (Cal. Ct. App. 2005).

123. *Bouquet*, 546 P.2d at 1376 n.7.

124. *See id.* at 1376 (concluding that a wife "gained vested property rights when . . . her husband earned income").

125. *Yoshioka*, 68 Cal. Rptr. 2d at 558 n.2 (requiring a significant state interest).

126. *Addison*, 399 P.2d at 902 ("Clearly the interest of the state of the current domicile in the matrimonial property of the parties is substantial . . . .").

127. *Bouquet*, 546 P.2d at 1377 (holding that the state's "paramount interest in the equitable distribution of marital property" justified infringing on vested rights).

In *Addison v. Addison*,[128] for example, a husband challenged the validity of a California statute that would have converted property in Illinois registered solely in the husband's name but allegedly acquired during the course of the marriage, into community property.[129] The court noted that the state had a substantial interest in regulating the marital relationships of persons domiciled within its borders.[130] More importantly, the court reasoned that without being able to apply its quasi-community property laws to married couples who moved to the state, California would not be able to protect a class of people who lack means of achieving the equitable distribution of property held outside its borders.[131] In other words, retroactive imposition of the statute was necessary if the law was to have its intended effect of distributing property fairly among divorcees.

In re Marriage of Bouquet[132] involved a challenge brought by a wife to the retroactive application of a change to the Civil Code that deprived her of a share of her husband's postseparation income.[133] The court noted that the effect of the former statute would be to treat the postseparation incomes of the spouses differently based solely on gender,[134] and that retroactive application was needed to cure "the rank injustice of the former law."[135]

In contrast, California courts have not found state interests to be significant when they do not provide a compelling justification for retroactivity. In *In re Marriage of Buol*,[136] a wife challenged Civil Code Section 4800.1, which created a statute-of-frauds requirement to prove that property taken in joint tenancy was not community property.[137] The provision applied retroactively to proceedings not finalized by January 1, 1984.[138] The court rejected the argument that a statute-of-frauds requirement would make property distribution more fair

128. 399 P.2d 897.

129. CAL. FAM. CODE § 125 (West 2004).

130. *See Addison*, 399 P.2d at 902.

131. *See id.* at 904.

132. 546 P.2d 1371 (Cal. 1976).

133. The former version of the statute, applicable at the time of their separation, made the earnings of the wife while the spouses lived apart separate property but treated those of the husband during that same time as community property. The 1971 amendment, becoming effective just over three years after the couple's separation, had the effect of treating the earnings the same. CAL. FAM. CODE § 771.

134. *Bouquet*, 546 P.2d at 1373 ("[W]e can nonetheless observe that [the prior version] would be subject to strong constitutional challenge . . . [given] our recognition that sex based classifications are inherently suspect.").

135. *Id.* at 1377.

136. 705 P.2d 354 (Cal. 1985).

137. At issue in the case was a home the wife purchased with funds from her separate bank account. Although title was taken in joint tenancy, both parties made an oral agreement during the marriage that the home was the wife's separate property. *Id.* at 355–56.

138. *Id.* at 356. Provisions of the section are codified as amended at CAL. FAM. CODE § 2581.

or easy to administer.[139] Instead, it declined to infer how such benefits might arise from the new requirement.[140] Thus, the court concluded that there was not a compelling reason to apply the statute retroactively.[141]

Considering a similar statutory requirement, the court in *In re Marriage of Heikes*[142] made a substantially similar determination. At issue was Civil Code Section 4800.2,[143] effective January 1, 1984, which reimbursed spouses for separate property contributions to the acquisition of community property unless the contributing spouse waived the right of reimbursement in writing.[144] The *Heikes* court dismissed the state's interest in "provid[ing] uniformly and consistently for the standard of proof in establishing the character of [the] property acquired by spouses during marriage" and creating "reliable expectations as to the characterization of [spousal] property and the allocation of interests therein . . . ."[145] The court still found that the stated interests were "insufficient to justify retroactive impairment of a vested right."[146] Thus, it is clear that the state must provide a specific and compelling justification for the retroactive application of the Act to property acquired before January 1, 2005.

3. Fairness Concerns

In addition to requiring a significant state interest necessitating retroactive legislation, the *Bouquet* court also articulated three factors that are best understood as fairness concerns: (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.[147] As a practical matter, the three factors tend to blend together conceptually. Nonetheless, the following three cases illustrate how the California Supreme Court has applied the factors when assessing the fairness of retroactive legislation. *Buol* considered the retroactive imposition of

139. 705 P.2d at 361.

140. *Id.* ("[T]he report states that a writing satisfying the statute of frauds is necessary to rebut the community property presumption, but fails to set forth the reasoning underlying that conclusion.").

141. The court compared the state interest in this case unfavorably to the interests approved in *Addison* and *Bouquet*: equitably dividing marital property and curing "rank injustice." *Id.* at 360.

142. 899 P.2d 1349 (Cal. 1995).

143. CAL. CIV. CODE § 4800.2 (recodified at CAL. FAM. CODE § 2640).

144. This enactment effectively reversed the presumption that, "absent an agreement to the contrary, separate property contributions to a community asset were deemed gifts to the community." *Heikes*, 899 P.2d at 1353 (citations omitted).

145. *Id.* at 1355 n.8. These interests were specifically articulated by the legislature in response to challenges to the statute made in the *Buol* line of cases. *See supra* text accompanying note 139.

146. *Heikes*, 899 P.2d at 1356.

147. *See supra* note 120 and accompanying text.

a statute-of-frauds requirement for property acquired during marriage. *In re Marriage of Fabian*[148] and *Heikes* focused on the retroactive application of a presumption tracing ownership of community property to contributions of separate property. The first two cases stand for the proposition that if the retroactive application of a statute reverses a long-accepted understanding of the law upon which a party relies, resulting in great financial loss, the statute may be unconstitutional. *Heikes* adds that a party's reliance cannot be undermined by a mitigation device unless the opportunity to mitigate is genuine rather than theoretical.

Buol concerned the application of the statutory condition requiring evidence of a written agreement to rebut the presumption that property acquired in joint tenancy was community property. Applying that condition to the wife's pending divorce case would have deprived her of a lower-court judgment awarding her a house valued at approximately $167,500.[149] Instead, only $17,500 would have been credited as her separate property, and the remaining $150,000 would have been attributed to the community.[150] In finding that the fairness factors weighed against retroactive application of the law, the court did not even insist on a showing of actual reliance.[151] However, it noted the extent of the differences between the new law and the old law, the fact that the change in the law occurred after the trial took place, and, finally, the extent to which the law disrupted the wife's settled expectations.[152] The fact that she could not have adjusted her conduct in light of a law passed after litigation had begun most likely persuaded the court that her reliance was legitimate. And the effect of the new law, stripping her of property to the tune of $75,000, most likely constituted a significant disruption of her expectations.

Fabian involved a dispute between spouses over the division of a motel they had purchased after marrying, valued at $790,391 at the time of divorce. The trial court entered an interlocutory judgment on April 23, 1982, finding that the husband invested $275,000 of his separate property into the motel, but concluding that the contribution was a gift to the community since the spouses did not promise or agree that the husband would receive reimbursement for his separate contribution.[153] While the husband's appeal was pending, the legislature

148. 715 P.2d 253 (Cal. 1986).

149. *In re* Marriage of Buol, 705 P.2d 354, 356 (Cal. 1985).

150. *Id.* at 357.

151. *Id.* at 361–62 ("The extent and legitimacy of [the wife's] reliance on former law is, of course, difficult to gauge with certainty. . . . Had existing law required the parties to execute a writing as proof that the property was to remain separate, the likelihood that [they] would have done so appears great.").

152. *Id.* (concluding that retroactivity would destroy the wife's property interest "as a penalty for lack of prescience of changes in the law occurring after trial").

153. *Fabian*, 715 P.2d at 254.

amended Civil Code Section 4800.2,[154] instituting a presumption that separate property contributions to the community would be reimbursed "unless the contributing spouse has waived the right to reimbursement in writing."[155] The California Supreme Court found, given that the previous presumption had been in force since 1966,[156] that "the legitimacy of [the wife's] reliance [was] clear."[157] Finally, the new law caused a great disruption since it reversed a property presumption in a way that could have significant financial effects at a time when the wife was completely incapable of complying with the new law.[158]

Nevertheless, the inability to mitigate the impact of retroactive laws is not a dispositive factor in the above analysis. *Heikes* involved a challenge to the retroactive impact of the provision at issue in *Fabian* that reversed the presumption that contributions to the community were gifts. In 1976, a husband conveyed separate property to himself and his wife as joint tenants.[159] Based on *Fabian*, the trial court issued a ruling on December 11, 1992, declining to retroactively apply the statute-of-frauds requirement. However, the husband successfully convinced the court to apply a subsequent decision[160] that suggested that prior retroactivity challenges only prevailed because laws changed during the pendency of appeals.[161] In this case, the dissolution proceeding began at least five years after the then-current law took effect. The court recognized, accordingly, that "there was an interval . . . during which the parties were on notice of the existence of a statute entitling husband to reimbursement for his contribution . . . unless he waived reimbursement in writing."[162] However, the California Supreme Court considered that possibility "too insubstantial" because a husband could hardly be expected "to waive his newly created right to be reimbursed for his contribution in the event the marriage should break up."[163] The court did not even bother to consider whether the wife attempted to extract this waiver from her husband, holding that the statute could not be applied retroactively.

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154. *See supra* note 143 and accompanying text.
155. *Fabian*, 715 P.2d at 255.
156. *Id.* at 259.
157. *Id.* at 258.
158. *Id.* at 259.
159. *See In re* Marriage of Heikes, 899 P.2d 1349, 1351 (Cal. 1995).
160. *In re* Marriage of Hilke, 841 P.2d 891 (Cal. 1992) (holding that the application of former Civil Code Section 4800.1, declared unconstitutionally retroactive in *Buol*, was not unconstitutional in this case since the husband was not being deprived of a vested right).
161. *Id.* at 896–97 (emphasizing that both *Buol* and *Fabian* contemplated the constitutionality of changes that took place after an initial judgment had already been reached).
162. *Heikes*, 899 P.2d at 1357.
163. *Id.*

IV. THE UNCONSTITUTIONALITY OF RETROACTIVE PORTIONS OF THE ACT

The Act converts property that was once separate property into community property. It also reaches back in time to effect this transmutation. Because the Act seems to violate several notions of fairness—which gave rise to both the Takings Clause as well as the presumption against retroactivity[164]—it could potentially run afoul of the Takings Clause as well as the California Due Process Clause.

A. The Act May Constitute a Taking of Property Without Just Compensation

If the Act results in the taking of private property, the government must provide just compensation. It is clear that money constitutes private property for the purposes of the Takings Clause.[165] Looking back to the hypothetical case of Rich and Poor, the Act deprives Rich of this property ($150,000) by recharacterizing his money as community property. In simple terms, the Act takes the property of A and gives it to B.[166] Whether or not the Act satisfies the public use requirement,[167] it still fails to compensate Rich for the property. This requirement is strict, mandating that the government pay the fair market value for the property it has appropriated.[168] Because the Act does not pay this compensation, Rich can satisfy all of the elements of a pure takings claim.

There is, however, one paramount argument against applying a takings analysis in this situation: Takings claims do not commonly arise in the context of disputes about division of marital property because the state has the authority to regulate marriages and marital property. The U.S. Supreme Court acknowledged as much when it stated that "[t]he relation of husband and wife is . . . formed subject to the power of the State to control and regulate both

164. *See* Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489, 506–07 (2003) (citing the views of Blackstone and Montesquieu in making the argument that the founders promulgated various constitutional structures in order to guard against retroactive laws).

165. *See* RICHARD A. EPSTEIN, TAKINGS 99–100 (1985) (treating government taxation of income as a taking of property). In *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998), the Court found that interest income is private property that cannot be taken subject to a statutory scheme.

166. This argument would be even clearer if the hypothetical involved real property: If Rich had used his $300,000 to acquire a house and held the title in his own name, the Act would have the effect of recharacterizing the house as community property. Thus, Rich would lose his interest in half the house.

167. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2661 (2005) ("[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation" unless "'use by the public' is the purpose of the taking . . . .").

168. *See* Polk, *supra* note 93, at 697–98.

that relation and the property rights directly connected with it . . . ."[169] Takings claims are rarely raised between spouses upon divorce because marriage is a status relationship created by the state, to which the state is a party. Marriage recharacterizes property pursuant to this status, and states have always had the power to form laws that regulate marriage.

Therefore, the key question when ascertaining whether the Act takes Rich's property is whether domestic partnerships are analogous to marriages. If there is an affirmative answer to that initial question, one must also consider whether, between January 1, 2000, and January 1, 2005, California's domestic partner registry provided a status relationship like marriage, as opposed to a contractual relationship. Only if both questions are answered in the affirmative can the Act withstand a takings challenge.

The first question is tricky. On the one hand, domestic partnerships are not the equivalent of marriage. California courts have explicitly recognized a distinction between the two, pointing out that domestic partners do not receive the same state and federal tax benefits, may meet different prerequisites than those required for marriage, may file a summary dissolution in certain circumstances where married couples would require judicial intervention, and lack the freedom to travel out of state and still retain the benefit of their unions.[170] The result is the creation of an inferior relationship without some of the rights appurtenant to marriage. On the other hand, it is clear that the Act creates a status relationship. Family Code Section 297.5 assigns to registered same-sex couples most of the rights and responsibilities of marriage, in language that equates domestic partnerships with marriage.[171] By creating domestic partnerships and endowing them with substantive rights, the legislature recognized a new legal relationship. Like marriages, the Act defines the parameters of the relationship with entry and exit requirements, and also provides many rights. Because domestic partnerships seem more like marriages than not, it would appear that they are within the state's power to control and regulate.

Even if the state clears the first hurdle, though, it would stumble on the second: Old registrants signed up under a drastically different legal regime that created a contractual relationship instead of a status relationship. When Rich

169. Neilson v. Kilgore, 145 U.S. 487, 491 (1892); *see also* Maynard v. Hill, 125 U.S. 190, 205 (1888) ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.").

170. *See* Knight v. Superior Court, 26 Cal. Rptr. 3d 687, 699–700 (Cal. Ct. App. 2005) (holding that the state did not violate Proposition 22 by creating, in effect, same-sex marriages).

171. *See supra* notes 28–30 and accompanying text.

and Poor registered in 2000, they received limited rights that did not instantiate a marriage-like relationship. For example, they did not have community property rights or protections, they were not recognized within the intestacy regime, and dissolution did not involve judicial supervision.[172] In fact, the legislation explicitly noted that it would not create "rights similar to community property or quasi-community property."[173] It is true that AB 26 involved legal recognition of registered same-sex relationships. However, it conferred minimal status-invoking benefits of marriage. Thus, until the Act took effect on January 1, 2005, the only property relationship that Rich and Poor could have was a private, contractual one. This case, then, is not one in which a party to a marriage is deprived of a property interest because of a change in marital-property laws subsequent to marriage but prior to divorce. Instead, it involves a situation where property that was previously separate is recharacterized after the fact in a way that would result in divestment of a property interest. This seems like a classic taking.[174]

B. The Act Divests Partners of Rights Without Due Process of Law

The retroactive portions of the Act also must pass muster under the Due Process Clauses of both the Fourteenth Amendment and the California Constitution. As I will argue below, the Act probably satisfies the heightened[175] rational basis analysis of the U.S. Supreme Court because the provisions of the statute bear a close relation to the legislative purposes of the Act. Furthermore,

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172. *See supra* notes 12–15 and accompanying text.

173. CAL. FAM. CODE § 299.5(d) (West 2004), *repealed by* Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, § 11, 2003 Cal. Legis. Serv. 2586, 2592 (West).

174. At this point, I will set aside the discussion of whether various mitigation devices defeat the takings claim. I will instead address this point when dealing with the due process analysis *infra* Part IV.B.2. However, it is important to note that even if these devices provided notice that registration would result in a taking, no U.S. Supreme Court cases stand for the proposition that prior notice defeats a per se taking claim. Put simply, if the government wants to take property, the Fifth Amendment compels "just compensation." *See supra* note 90. If the issue of notice has figured into takings analysis, it has done so in disputes over regulatory takings. For example, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the justices split over the issue whether a private landowner's knowledge of wetlands regulations would moot any claim that the regulations interfered with his or her investment-backed expectations. The Court ultimately seemed to reject a formulation that would bar a regulatory takings claim in such a situation. *Id.* at 627 (noting that "[a] blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken"). For a discussion of the Court's decision, and the uncertainty left in its wake, see Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 250–51 (2004); Max Gibbons, Comment, *Of Windfalls and Property Rights:* Palazzolo *and the Regulatory Takings Notice Debate*, 50 UCLA L. REV. 1259 (2003).

175. *See supra* notes 103–114 and accompanying text.

while the law results in unfairness to the partner whose property is taken, the magnitude of the unfairness alone would fall short of triggering a due process violation. On the other hand, under California's more searching test,[176] the Act would fail for two reasons: first, because none of the legislative purposes necessitate retroactivity in the manner prescribed, and second, because its precedents view retroactivity more suspiciously.

1. Relationship Between the Purpose of the Act and the Retroactive Means

There is no doubt that the legislature intended to retroactively apply the Act.[177] Thus, the Act's retroactive reach may violate substantive due process limitations. The first step in this analysis is to identify the purpose of the legislation. The next step is to determine whether the statute effectuates that purpose, taking into account the importance of the retroactive provisions.

Section 1 of the Act articulates the Act's purpose:

> This act is intended to help California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in . . . the California Constitution 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 and 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.
>
> The Legislature hereby finds and declares that despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex. . . . Expanding the rights and creating responsibilities of registered domestic partners would . . . reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution.[178]

The recitation articulates the following four state interests: (1) providing equality for couples regardless of their sexual orientation; (2) promoting stable and lasting family relationships by assigning the rights and responsibilities of marriage; (3) protecting members of domestic partnerships during life crises;

176. *See supra* notes 117–121 and accompanying text.

177. *See supra* notes 43–45.

178. Domestic Partner Rights and Responsibilities Act, ch. 421, § 1(a)–(b), 2003 Cal. Legis. Serv. 2586, 2587–88 (West).

and (4) reducing discrimination based on sex and sexual orientation.[179] The following arguments address these interests in turn.

Returning to the hypothetical, Poor would attempt to analogize the interest in providing equality for same-sex couples to *Bouquet*'s interest in reversing a law that required patently unfair treatment based on gender. Poor could argue that the unequal treatment of same-sex couples in previous domestic partnership legislation would necessitate the retroactive application of the Act in order to correct the former injustice. However, *Bouquet* is distinct in the sense that the former version of the law required courts to treat parties differently solely on the basis of gender, a protected class. In contrast, former versions of the Act did not create unequal treatment per se: The absence of equality under the law is more of an omission than affirmative legislation that compels improper governmental conduct. Thus, the state interest would probably not suffice to apply the statute retroactively instead of just prospectively. Although there is something inherently prospective about a statute creating legal equivalence—after all, even if the statute could permissibly reach back to January, 2000, could it really create equality in a time already in the past?—one might argue that retroactivity would serve an expressive function in this context.[180] The Act, by creating a substantial equivalent to marriage, would therefore acknowledge that even prior to its passage, gays and lesbians took part in committed, meaningful relationships.[181] If the law can create social meaning, retroactively applying the Act would likely further the goal of promoting equality because it would acknowledge that the previous denial of rights was wrong. Even accepting this argument, though, it is not clear that retroactivity is the best means to serve this expressive function, simply because it would also harm one of the partners. Finally, much of the expressive function probably results from the passage of the law itself, not its retroactive reach.

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179. The California Supreme Court also identified these interests as the purposes of the Act in *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1218 (Cal. 2005).

180. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996). Cass Sunstein provides the following example:

> Individual acts that are expressive in character—a refusal to make dinner, for example—are an important part of modern feminism. But the expressive function of law is often especially important here, and it can move to the fore in public debates. If a discriminatory act is consistent with prevailing norms, there will be more in the way of discriminatory behavior. If discriminators are ashamed of themselves, there is likely to be less discrimination. The social meaning of an act of sexual harassment will have a great deal to do with the amount of sexual harassment in that particular environment.

Id. at 2043.

181. Although he recognizes the expressive value of legislation in the civil rights context, Professor Sunstein does argue later in his article that the use of legislation to serve this purpose should not run unchecked: "Thus, for example, government should not be permitted to invade rights, whatever our understanding of rights may be." *Id.* at 2049.

The state also claims an interest in promoting stable and lasting family relationships. Given the state's "inherent sovereign power" to protect "the health, safety, morals, and general well being of the people,"[182] including the regulation of the institution of marriage, this articulated interest would suffice to pass domestic partnership legislation generally, since it falls within the protection of the well being of the people. It is reasonably certain that assigning the rights and responsibilities of marriage to same-sex couples would mimic the function of marriage laws, providing more security for gay parents,[183] and encouraging more financial interdependence.[184] However, it is unclear why retroactivity would be necessary to effectuate this interest; that is, this interest is not remedial but prospective. There is no rational relationship between the promotion of stable family relationships after the effective date of the statute and the retroactive imposition of community property obligations upon dissolution. Increasing the obligations for acts already completed would not serve to strengthen those relationships.[185] Thus, courts would most likely reject this purpose as a justification for retroactivity.

Another aim of the Act is to reduce discrimination based on sex and sexual orientation. While this aim no doubt comports with the state's police

182. *In re* Marriage of Bouquet, 546 P.2d 1371, 1376 (Cal. 1976).

183. The Act treats parental rights of registered domestic partners as it would treat those of married spouses: "The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses." CAL. FAM. CODE § 297.5(d) (West 2004); *see also* Marech, *supra* note 54, at A1 ("[R]egistering is critical for some gay couples, particularly those starting families, because the new law guarantees parental rights to the nonbiological parent."). Furthermore, it provides protections for children of former partners by increasing the responsibilities of the former parent.

184. *See* Romney, *supra* note 56, at A1 ("Sociologists have suggested that the rights and responsibilities of marriage benefit both partners . . . . If you are liable for your partner's debts, you may pay more attention to his spending patterns, and if you are entitled to half his income, you may be more supportive of his long work hours.") (quoting Frederick Hertz, Oakland attorney). Generally, marriage laws provide community stability:

> [M]arriages contribute to social stability, including families whose members provide each other support. Marriage increases the number of persons who are supported by employers and even businesses in the form of employee benefits and family discounts. Marriage reduces homelessness, joblessness, mental illness, juvenile delinquency and violence. Marriage reduces the number of people reliant on government support for health care, mental health care, homeless programs, welfare and other government benefits and programs, and reduces the need for law enforcement.

Therese M. Stewart, *Position Paper For Hastings Constitutional Law Quarterly Symposium on Gay Marriage*, 32 HASTINGS CONST. L.Q. 677, 680 (2005).

185. The one possible counterargument Poor could make is that by applying the statute retroactively, the state would discourage dissolution by increasing the burdensomeness of the process. However, since all couples would have to go through dissolution procedures prospectively, it is unclear how the punitive element of adding to the community would really add to the stability of families.

powers,[186] it has nothing to do with retroactively regulating the property relationships between former partners, especially since both partners would be of the same sex and presumably the same sexual orientation.

The most salient interest that could justify the retroactive imposition of community property rights and responsibilities is protecting members of domestic partnerships during life crises, specifically, at abandonment, separation, or death. The legislature appears motivated by the same interest that informed the legislation in *Addison*: the protection of the economically weaker partner through laws that would make more property available for division upon dissolution. The *Addison* court satisfied the patent unfairness[187] requirement by showing that a significant class of people would be left unprotected if the quasi-community property legislation did not apply retroactively,[188] especially since much of the property at issue in future divorce proceedings would have been acquired prior to the passage of the law. Here, Poor could argue that the purpose of protecting members of partnerships against a financial crisis resulting from abandonment or dissolution also requires retroactive application of the community property rights. By reaching back for a period of five years, the law would do a better job of dividing property evenly among partners. The law would also protect the interests of one partner if the other died, expanding the community and shrinking separate property, leading to a larger share if the partner died intestate.

However, there are two critical distinctions between the Act and the legislation that *Addison* deemed constitutionally retroactive. First, the court explicitly considered that the wife would have a remedy had the divorce action been litigated in Illinois; thus, the legislation was simply restoring a lost protection. The unfairness the state was interested in correcting was that a change in domicile placed the wife at a substantial legal disadvantage. In the case of couples domiciled in California who registered under prior versions of the Act, neither partner had any initial claims on the other's property. Thus, neither partner suffered the unfairness of having a legal right taken away by virtue of moving to a different state.

The second distinction stems from the first: The quasi-community property legislation in *Addison* applied to property "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."[189] Because the property would have

186. *See supra* note 179 and accompanying text.

187. *See In re* Marriage of Heikes, 899 P.2d 1349, 1353 (Cal. 1995) (requiring the former law to be "patently unfair" to justify retroactivity).

188. *See supra* notes 130–133 and accompanying text.

189. CAL. FAM. CODE § 125 (West 2004).

been community property had it been acquired in the state, the state had a substantial interest in distributing that property equally. Moreover, it would have been fundamentally unfair to deprive the wife of a property interest she would have retained had she remained in the state. In this case, Poor had absolutely no claim to Rich's property before January 1, 2005. By applying this law, the court would not be restoring a remedy to Poor that, in all fairness, he already had in some prior form. Furthermore, Rich could assert that the recharacterization of quasi-community property is vastly different from the retroactive recharacterization of separate property into community property. In fact, the Family Code makes numerous distinctions between the two and does not generally divide separate property upon divorce.[190]

Under the Due Process Clause of the Fourteenth Amendment, the state's articulated interests would no doubt pass rational basis muster. Even under a more searching review, it would seem as if the legislative means are relatively congruent to its purposes, especially since the state's police powers are quite broad, and the foregoing analysis reveals many rational justifications for its exercise. However, applying the California purpose-means analysis in this case,[191] it appears that the stated interests do not compel retroactivity.

2. Balancing Fairness Concerns

This subpart provides a framework for understanding the competing fairness concerns at issue when legislatures pass retroactive legislation. At the outset, it is important to note that fairness has played a central role in the U.S. Supreme Court's retroactivity jurisprudence.[192] In this respect, the Court is

190. For one thing, separate property may be conveyed by its owner "without the consent of the person's spouse," CAL. FAM. CODE § 770(b), and is not subject to equitable division upon dissolution, *see id.* § 2550 (providing for the equitable division of community property but not separate property).

191. *See supra* Part III.B.2.

192. Fairness is inextricably tied to the presumption against retroactive laws. Even during the post–New Deal era, when challenges to retroactive legislation were held to a minimal rational basis standard, *see, e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1983), the Court did not ignore fairness concerns; rather, the Court deferred to congressional determinations of fairness, *see Turner Elkhorn Mining Co*, 428 U.S. at 18 ("[I]t is for Congress to choose between imposing the burden of inactive miners' disabilities on all operators, including new entrants and farsighted early operators who might have taken steps to minimize black lung dangers, or to impose that liability solely on those early operators whose profits may have been increased at the expense of their employees' health."). The Court has made clear in its more recent decisions that it is willing to substitute its own judgments of fairness for the legislature's in certain circumstances. Where Congress has not explicitly manifested its intent to apply a law retroactively, the Court evaluates the fairness of giving the law retroactive effect. *See* Landgraf v. USI Film Prods., 511 U.S. 244 (1993).

ensconced in the natural-law tradition embodied in English Common Law.[193] However, recent scholarship has favored an alternative consequentialist approach that tolerates retroactivity. Under this model, placing the burden on private parties to anticipate legal change results in efficiency since it encourages conduct based on a careful analysis of the law.[194] Furthermore, the Court's natural-law-based reliance on fairness has also been criticized on the ground that such an analysis is generally unworkable. After all, what is fair to one party in a dispute is usually unfair to the other.[195] This phenomenon is clearly illustrated by the interests the Act creates. On the one hand, it would be unfair to Rich to pass a law in 2005 that says that personal property earned in 2000 is now community property. On the other, it would be unfair to Poor if he had no legal protection after years of living with Rich. Finally, a recent critic has addressed the Court's incoherent retroactivity jurisprudence by proposing a separation-of-powers-based model for invalidation of retroactive legislation.[196] Under this approach, the Court would invalidate legislation that retroactively altered private rights such as property ownership because "the judiciary acted as the special guardian of private rights, and also as the branch that, consistent with due process, was empowered to divest such private rights retroactively."[197]

Whatever the doctrinal infirmities of both the U.S. and California Supreme Courts' approaches to retroactive legislation, they have given no indication of abandoning fairness analysis for one of the aforementioned models. Thus, the following subparts will endeavor to analyze competing fairness interests as courts would, and also provide a general framework for analyzing fairness interests in the context of retroactivity. Before embarking on this task, though, I will quickly dispatch the federal due process analysis. Although recent U.S. Supreme Court opinions have demonstrated a willingness on the part of the justices to entertain fairness arguments,[198] the rational basis test is nonetheless

193. *See* Richard A. Epstein, *Beware of Legal Transitions: A Presumptive Vote for the Reliance Interest*, 13 J. CONTEMP. LEGAL ISSUES 69, 70 (2003); Natelson, *supra* note 164, at 500 & n.56 (describing the various natural-law principles disfavoring retroactivity).

194. *See* Epstein, *supra* note 193, at 70. Richard Epstein refers to the work of Michael Graetz and Louis Kaplow, both of whom argue that efficient conduct is not only based on reliance upon old laws but anticipation of future legal change. *See generally* Michael J. Graetz, *Retroactivity Revisted*, 98 HARV. L. REV. 1820 (1984); Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGAL ISSUES 161 (2003).

195. As Jill Fisch has pointed out—in the context of civil litigation—fairness is a zero-sum game: "If retroactive application of a new legal rule disfavors one litigant, it favors the other." Fisch, *supra* note 96, at 1085.

196. *See* Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015 (2006).

197. *Id.* at 1019.

198. *See supra* notes 104–113 and accompanying text.

still good law. Thus, while an analysis of fairness concerns in the context of the California Due Process Clause implicates federal due process, and perhaps suggests a proper outcome under the federal Clause, it would not invalidate the Act under the Due Process Clause of the Fourteenth Amendment.

a. Extent of Reliance

Looking at the retroactive impact of the Act on Rich's vested property rights, it is fairly clear that, as in both *Fabian* and *Buol*, Rich would stand to lose a substantial amount. Furthermore, like the changes made in those cases, courts would note that the legal changes found in the Act could substantially impact property relationships. Rich could also argue that the Act constituted a more significant about-face in the law than Civil Code Section 4800.1, which was considered in *Buol*. After all, imposing a statute-of-frauds requirement would only shift the burden of disproving a presumption. While the court noted the significance of the impact that such a requirement might make,[199] it did not replace one type of property regime with a completely different one. In that respect, the Act even exceeds the changes contested in the statute-of-frauds cases. While reversing presumptions was substantial, there was a history of legislative decisions about community property presumptions. In contrast, the Act's extension of community property rights represented an unprecedented shift.

Furthermore, the various mitigation devices created by the legislature—the three notification letters, website notification, premarital agreement extension, and phase-in period[200]—would not necessarily defeat Rich's reliance claim. In *Heikes*, for example, eight years passed between the change in the law and the divorce action at issue.[201] People are presumed to have knowledge of the law. Thus, Mrs. Heikes would have had eight years to get her husband to waive his separate contribution to the community in writing, as the law then required. Nevertheless, the 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.

From this perspective, it appears that the mitigation devices of the Act will not suffice to make the retroactive imposition of community property responsibilities constitutional. While Rich was given the opportunity to create a premarital agreement post hoc,[202] the court would not be able to conclude that it would be any easier for Rich to get Poor to sign away his interest in a potentially large sum of money than it would be for Mrs. Heikes to extract a

199. *See In re* Marriage of Buol, 705 P.2d 354, 358 (Cal. 1985).
200. *See supra* notes 35–38 and accompanying text.
201. *In re* Marriage of Heikes, 899 P.2d 1349, 1350 (Cal. 1995).
202. *See* CAL. FAM. CODE § 297.5(m)(2) (West Supp. 2005).

waiver from her husband. When considering AB 2580, the California Senate Judiciary Committee discussed two problems arising from the premarital-agreement provision: First, "it [would] create confusion because under the Uniform Premarital Agreement Act, even spouses cannot enter into a prenuptial agreement after marriage."[203] Second,

> [c]onsidering how complicated a prenuptial agreement could be, and how even prospective spouses have a difficult time or do not want to spend the money to pay an attorney to draft a prenuptial agreement, there may be a number of domestic partners who will opt not to have the agreement authorized by this bill or will simply ignore that this option exists for them.[204]

Rich also had the opportunity to end the domestic partnership before the new laws went into effect. However, it is unclear whether a court would buy the argument that terminating the partnership was a realistic option, especially since the stated purpose of the legislation was to encourage the development of stable families, not to break them up. Placing the problem in the context of marriage, in 1984, if the Civil Code had allowed Mrs. Heikes to avoid the presumption shift by either getting a written waiver of her husband's property right or getting a divorce, it is extremely unlikely that any court would force her to pursue the latter option. The law simply cannot expect a spouse to get divorced rather than be burdened by a retroactive law. Such a move would violate the public policy of the state in promulgating and protecting the institution of marriage. Similarly, California courts cannot expect Rich to dissolve his partnership in order to avoid an unfavorable property change. Since Rich had no satisfactory means of minimizing the retroactive impact of the Act, it is likely that retroactive application would be found to violate due process.

b. Legitimacy of Reliance

The legitimacy of reliance depends upon both the state of the law and the state of mind of the party claiming it. The longer a law has remained the same, the more justified a party is in believing it will endure. On the other hand, if a party engages in strategic behavior, such conduct would seem to eviscerate claims that reliance was genuine. At the time Rich registered, legislated domestic partnership rights were unprecedented, and no state had created protections for same-sex partners amounting to marriage rights. A strong argument

203. Cal. Bill Analysis, AB 2580, S. Judiciary Comm., 2003–04 Reg. Sess. (June 22, 2004) (Comm. Rep.), *available at* WESTLAW.

204. *Id.*

exists, then, that the lack of any community property rights at the inception of the domestic partner registry led to Rich's reasonable reliance that his property would be kept separate. Several facts justify this inference: (1) The legislation was the first of its kind in the United States;[205] (2) the bill was heavily opposed by opponents of same-sex relationships, seen in the passing of Proposition 22 in March, 2000;[206] (3) since opponents of domestic partnership legislation repeatedly accused the legislature of creating a "back door"[207] to marriage prior to its adoption, Proposition 22 could have been seen as foreclosing that option; and (4) most fundamentally, at the time, the Family Code explicitly disclaimed that the registry would have any impact on property relationships.[208] When Rich and Poor registered in 2000, it was difficult to foresee that they would one day have community property rights arising from their registration. Furthermore, as far as same-sex relationships were concerned, the law at the time of registration was settled. Until 2003, no state in the nation had ever solemnized same-sex marriages.[209] The unequivocal language of the 1999 Act, which explicitly limited the scope of the law by stating that property relations between the registered partners would remain unchanged,[210] makes Rich's reliance on prior law even more reasonable because he would have had little reason to believe that as a signatory to that Act, his property rights would shift.

However, several theories challenge the legitimacy of one's reliance on legislation in flux. The equilibrium theory, applied to the context of retroactivity by Jill Fisch, posits that the less settled a law, the less reasonable one's reliance since one would not be able to credibly believe that the law would stay the same.[211] This theory of fairness suggests that Rich's reliance was misplaced

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205. *See* Blumberg, *supra* note 8, at 1558.

206. *See* Romney, *supra* note 56. Proposition 22 was approved by 61 percent of the vote. *Proposition 22*, L.A. TIMES, Sept. 20, 2002, at A2 (correcting a misstated figure in Halper, *supra* note 8, at B5).

207. *See* Pyle, *supra* note 22, at A1.

208. *See* CAL. FAM. CODE § 299.5 (West 2004):

> (c) The filing of a Declaration of Domestic Partnership pursuant to this division shall not change the character of property, real or personal, or any interest in any real or personal property owned by either domestic partner or both of them prior to the date of filing of the declaration.
>
> (d) The filing of a Declaration of Domestic Partnership pursuant to this division shall not, in and of itself, create any interest in, or rights to, any property, real or personal, owned by one partner in the other partner, including, but not limited to, rights similar to community property or quasi-community property.

209. *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003), declared that the practice of denying same-sex couples marriage licenses under the Massachusetts Constitution was impermissible, in effect legalizing same-sex marriage. Previous court decisions, however, were quickly abrogated by constitutional amendments.

210. *See supra* note 13.

211. The equilibrium theory, as applied by Professor Fisch to retroactivity, posits that

> a given regulatory context can be viewed as a legal equilibrium and described as stable or unstable based on its response to a disturbance. . . . A stable equilibrium can be disrupted,

since domestic partnership laws were so new. Furthermore, fairness would dictate that only rational expectations should be protected.[212] Stephen Munzer defines rational expectations as those where the "probability assigned to the predicted event corresponds suitably to the actual likelihood that it will occur, and . . . the person has good grounds for assigning the probability he does."[213] Professor Munzer's criteria provide another metric for assessing Rich's reliance argument. Due to unknown variables surrounding the law at the time of its passage,[214] Rich would not have grounds for believing that the law would not change. If the law was likely to change, then reliance would not be justified.

Another problem with Rich's reliance speaks to what Professor Munzer labels legitimacy—"first, . . . the underlying justifications of the laws inducing [an expectation], and second, . . . the fundamental principles embedded in the legal system itself."[215] Poor could frame Rich's expectation as follows: Rich entered into a long term relationship, formalized by the state, with the expectation that if the relationship ever ended, he would not owe any obligation to Poor. This expectation, even if rationally based on a grounded understanding of the law, would not be legitimate since "it is not consonant with the justifications for that statute, or, [even] if so, is nevertheless out of step with weighty fundamental principles embedded in other areas of the law."[216] Poor could argue that Rich's

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> but only through the application of substantial force. . . . The existence of a stable equilibrium justifies the protection of reliance-based interests . . . [since] people's reliance on such a rule in planning their conduct is reasonable.

Fisch, *supra* note 96, at 1102, 1105.

212. *See* Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 428 (1982), at 428 (arguing that the law should "[n]o doubt . . . protect *some* expectations, but it cannot protect *all* expectations" as the incompatibility, cost, and desirability of some expectations place them beyond protection).

213. *Id.* at 430. Stephen Munzer notes that the rationality of an expectation depends on layering—the dependence of expectations on expectations of another. He uses the example of Congress wanting to stimulate investment in bonds: Congress might amend the Internal Revenue Code to make bonds tax exempt; Congress would expect that state and local authorities would then sell bonds below the usual rate; investors would expect that it would be advantageous to purchase tax-exempt bonds over others. Thus, the view that actors rely directly on laws does not take into account the "more complicated and qualified way that . . . individuals actually form expectations in a mature legal system." *Id.*

214. *See supra* notes 207–210 and accompanying text.

215. Munzer, *supra* note 212, at 432.

216. *Id.* Professor Munzer later argues that insisting the expectation be both rational and legitimate leads to an efficient use of legal resources. *Id.* at 433. Grace Blumberg makes the argument that regardless of the formal status of the relationship, partners receive benefits from the relationship itself and should be jointly responsible for each other. Thus, the claim by Rich that he would owe nothing to Poor is morally dubious. Professor Blumberg notes:

> Family law, in its allocation of rights and responsibilities, recognizes and responds to the dependence and vulnerability that arises from family relationships, particularly conjugal relationships. Yet, the existence of dependence and vulnerability does not depend

reliance on the view that he could escape scot free from a relationship is at odds with the Act's stated purpose. Even if that argument failed, Poor could point out the inequity that would result if Rich owed him no legal responsibilities after over five years of partnership.

While it is generally useful to factor in the rationality and legitimacy of reliance when making fairness calculations, it is also important to consider the deeper implications of those theories in this particular case. If we discount Rich's reliance by saying that expectations are only legitimate when law is settled, we create a future in which same-sex individuals cannot rely on domestic partnership laws. After all, the law in this area is constantly changing. In California, opponents of same-sex relationships have already begun a voter initiative to overturn domestic partnership laws.[217] Although the effort has temporarily stalled, proponents plan to bring an anti-gay-marriage amendment to the ballot in 2008.[218] Surely, this cannot mean that a registered partner's reliance on the Act would be irrational for the next several years. In certain areas of the law, dislike of a particular group of people may render them vulnerable to new, hostile legislation. Thus, it does not make as much sense to treat their reliance on the law the same way one would treat reliance on a particular refundable tax credit. To do so would potentially result in discouraging those very practices that the legislation was designed to encourage.

Finally, to this point, this discussion has avoided the most significant fairness concern animating discussions of retroactivity; namely, the inherent unfairness of retroactive laws from a natural-law perspective. Given that the purpose of law is "the governance of human conduct by rules," "a retroactive law is truly a monstrosity."[219] Regardless of how opportunistic a party's behavior might be, it is important to keep in mind the purpose of laws in guiding behavior. That purpose is always frustrated when a new law applies retroactively. Therefore, if neither party's fairness arguments clearly prevail, courts should generally favor the prospective application of laws.

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on the formality of a relationship. On the contrary, dependence and vulnerability may be equally great, or even greater, in informal than in formal relationships.

Blumberg, *supra* note 8, at 1568.

217. *See supra* note 59 and accompanying text.

218. *See* ProtectMarriage.com Looks to 2006 as Significant for the Protection of Traditional Marriage (July 2006), http://www.protectmarriage.com/index.aspx?protect=index ("The coalition is already assessing the prospects for a second ballot initiative—one that would place a marriage amendment on the June ballot in 2008.").

219. LON L. FULLER, THE MORALITY OF THE LAW 53 (1964).

c. Extent to Which Retroactive Law Would Disrupt Settled Expectations

The hypotheticals provided in Part II should illustrate the extent to which applying the law retroactively would disrupt settled expectations. Obviously, the greater the property disparity between the two partners, the larger the disruption would be. However, it is difficult to measure the extent of the psychological disruption that ensues when the law changes retroactively. Consider the following three situations.

First, there are a great number of couples who probably greeted the legal changes with enthusiasm. For these couples, retroactive application of the Act may be a step toward honoring the depth of their commitment. Thus, the Act would be a fulfillment, rather than a disruption, of their hopes and expectations.

In a second situation, a couple might have negotiated a contract-based property arrangement after January 1, 2000, but prior to the passage of the Act. In a case where the partners do not have equal income or assets, the contractual agreement might have created unequal interests in shared property. Even if the couple agreed, pursuant to Family Code Section 297.5(m)(2), to create a new premarital agreement in accordance with the UPAA[220] prior to June 30, 2005, the change in law would have disrupted settled expectations by requiring the partners to go through a potentially stressful negotiation. Such a change could create tensions in the relationship that would otherwise not have existed.

Third, consider a member of a same-sex couple who registered pursuant to AB 26 and found out, during the course of 2004, that he would share his partner's property obligations and have to go through formal dissolution procedures if the relationship were to end after January 1, 2005. It is conceivable that this individual, upon learning of this significant change in his rights and responsibilities, would feel that this change placed him in the uncomfortable position of deciding between terminating his relationship or accepting more rights than he was comfortable with. To illustrate, consider for a moment the possibility that a state creates community property rights and obligations for opposite-sex, cohabiting couples who have lived together for more than one year.[221] Suppose further that the state would engage in a fact-intensive inquiry into when the cohabitation began, and apply the community property regime retroactively to a date one year after the cohabitation began. This could have the effect of turning committed, opposite-sex relationships into de facto marriages. Regardless of one's feelings about the normative implications of such a change,

220. CAL. FAM. CODE §§ 1600–1617 (West 2004).

221. Professor Blumberg presents a compelling normative argument that states should in fact offer these protections. *See* Blumberg, *supra* note 8, at 1594–1610.

de facto marriages would most likely be viewed as a significant disruption of expectations. People who have not yet married often decline to do so for a reason. Although the same-sex couple in this scenario was already registered, there is no reason why a complete change in regulatory regime could not have the same basic effect. Clearly, the Act has the potential to significantly disrupt not only economic but emotional expectations. For the foregoing reasons, the fairness calculus tilts toward a contravention of due process.

V. LEARNING FROM CALIFORNIA: MAKING CHANGES PERMANENT

This part shifts gears. Although the preceding parts attempted to prove that the Act is unconstitutional based both on the Fifth Amendment Takings Clause and the California Due Process Clause, this part will focus on how to permissibly preserve the benefits of retroactively applying domestic partnership legislation. After analyzing the normative desirability of retroactivity in the domestic partnership context, the following subparts will suggest ways in which states may follow California's model of incremental legislation without running into constitutional obstacles. Specifically, they advocate (1) a selective and measured approach to retroactivity; (2) implementation of mitigation devices including notice of future legislative changes, opt-in requirements for the imposition of legal burdens, and a phase-in period; and (3) carefully tailored state interests.

A. Future Domestic Partnership Legislation in Other States

Unconstitutional retroactivity is a lurking issue that will threaten to ambush incremental domestic partnership legislation in other states. Currently, there are only a few other states—Hawaii,[222] New Jersey,[223]

222. Reciprocal Beneficiaries Act, HAW. REV. STAT. § 572C-1 to c-7 (1997).

223. Domestic Partnership Act, N.J. STAT. ANN. §§ 26:8A-1 to 26:8A-13 (West Supp. 2006). Among the important benefits provided by the New Jersey Act are health benefits for state employees, *see id.* § 52:14-17.26(d)(1), (3), hospital visitation rights, *see id.* § 26:2H-32(d), and protections against discrimination based on domestic partner status, *see id.* § 10:5-12. However, New Jersey does not provide for the joint ownership of property, nor does it extend parental rights similar to those of married couples. *See* David M. Stauss, Note, *The End or Just the Beginning for Gay Rights Under the New Jersey Constitution?: The New Jersey Domestic Partnership Act, Lewis v. Harris, and the Future of Gay Rights in New Jersey*, 36 RUTGERS L.J. 289, 309–12 (2004) (discussing the differences between New Jersey's Domestic Partnership Act and those of Hawaii, California, and Vermont). In terms of the rights it offers, New Jersey's Domestic Partnership Act offers benefits similar to those provided by California prior to the expansion of rights in 2001. *See supra* notes 11–14. Gay-rights advocates in the state will most likely follow the lead of California and add certain rights as they become less objectionable to the general public.

Connecticut,[224] and Maine[225]—that have created statewide registries. However, there are dozens of municipalities that offer domestic partner registries,[226] and many states offer some form of domestic partner benefits to their employees.[227] It seems likely that as time goes by, states will follow California's lead and add rights incrementally, avoiding substantial public backlash and resultant legal challenges.[228] And it seems only natural that both legislators and registrants will want some of those rights to apply retroactively. Retroactivity serves the purpose of protecting the more economically vulnerable partner at dissolution or death.[229] While savvy same-sex couples can no doubt protect many of their property interests contractually, those with less know-how will benefit from greater community property or intestate-succession rights. That benefit will increase the further back the rights are extended. Retroactivity can also provide remedies to redress wrongs suffered by partners.[230] In a recent California case, *Koebke v. Bernardo Heights Country Club*,[231] the California Supreme Court relied on the Act to support a marital-status discrimination claim where the defendant treated the domestic partner of one of its members differently than spouses of members.[232] However, the plaintiff did not pursue the argument that the Act applied retroactively, and the court found that previous versions of

224. CONN. GEN. STAT. ANN. §§ 46b-38aa to 46b-38pp (West Supp. 2006).

225. ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2005). Maine's legislation provides a domestic partnership registry but no specified substantive rights. Furthermore, the statute provides minimal termination burdens. *See id.* § 2710.

226. *See* Lambda Legal, Partial Summary of Domestic Partner Registry Listings, http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=403 (last visited Sept. 15, 2006).

227. *See* Lambda Legal, Partial Summary of Domestic Partner Benefits Listings, http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=21 (last visited Sept. 15, 2006) (in addition to the various municipalities, Connecticut, the District of Columbia, Iowa, New Mexico, New York, Oregon, Rhode Island, and Washington offer same-sex benefits to their employees).

228. *See* Blumberg, *supra* note 8, at 1565–66 (arguing that in hindsight, the moderation of the legislation avoided any noticeable backlash).

229. *See supra* notes 187–188 and accompanying text.

230. In California, the Act has already been relied on to support wrongful-death claims. *See* Armijo v. Miles, 26 Cal. Rptr. 3d 623 (Cal. Ct. App. 2005); Bouley v. Long Beach Mem'l Med. Ctr., 25 Cal. Rptr. 3d 813 (Cal. Ct. App. 2005). While the Act was not specifically called on in the following disputes, there is no reason why other states could not tailor their domestic partnership statutes to resolve conflicts in parentage, child support, and discrimination cases. *See* K.M. v. E.G., 117 P.3d 673 (Cal. 2005) (involving a claim brought by one lesbian partner to establish parental status for children born of eggs donated to the other partner); Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005) (determining that a former unregistered domestic partner owed child support to the other partner's child); Koebke v. Bernardo Heights Country Club, 115 P.3d 1212 (Cal. 2005) (finding that the Act provided a basis for a marital-status discrimination claim where a registered domestic partner was treated differently than a spouse).

231. 115 P.3d 1212.

232. *Id.* at 1227.

the Act would not sustain the same discrimination claim.[233] There is some support, based on the language of the current Act, for the proposition that the Act may function retroactively to prohibit such discrimination, even though such retroactivity would raise the same due process problems analyzed above. A more adventurous state legislature might attempt to create a law that would retroactively provide such protections. Finally, retroactivity could be seen as a way of compensating for the historical absence of rights.[234] The importance of this last function cannot be overstated: Many same-sex couples have significant long-term relationships and will no doubt want legal recognition of the extent of their commitment to each other. Thus, there are strong potential state interests in legislating retroactively in certain circumstances.

B. Legislating Within the Limits of Due Process

1. Brief Period of Retroactivity and Carefully Tailored Retroactive Provisions

As a general rule, when legislating retroactively, the smaller and more clearly defined the window of retroactivity, the more likely that the statute will be upheld. While the U.S. Supreme Court has not set down a bright-line rule, any period longer than one year becomes suspect based on *United States v. Carlton*.[235] In general, longer periods of conduct exposed to retroactive legislation lead more easily to the conclusion that the legislation would be unfair.

More importantly, legislatures should consciously tailor laws to situations that logically call for retroactivity, while providing clearly defined limits. For example, if New Jersey, which currently does not provide wrongful-death standing for domestic partners, were to promulgate new legislation in 2006 creating that right, it would make sense to extend standing retroactively to deaths occurring prior to 2006. If the law did not readjust the statute of limitations for such suits, its scope would naturally limit the retroactive impact in a way that would not expose tortfeasors to unfair liability. While the change would create a new class of people able to sue, it would not create a new liability for the underlying action since liability already existed.[236] One can imagine that the extension of intestate-succession rights to domestic partners would function in

233. *Id.* at 1228 n.10 (noting that plaintiffs did not assert that marital-status discrimination was prohibited by prior versions of the Act).

234. Telephone Interview with Brian Chase, Staff Attorney, Lambda Legal, in Los Angeles, Cal. (Nov. 16, 2005). *See also supra* notes 180–181 and accompanying text.

235. 512 U.S. 26, 32–33 (1994) (upholding the retroactivity of a tax statute partly on the grounds that the period of retroactivity was only one year).

236. *See, e.g.*, Armijo v. Miles, 26 Cal. Rptr. 3d 623 (Cal. Ct. App. 2005); Bouley v. Long Beach Mem'l Med. Ctr., 25 Cal. Rptr. 3d 813 (Cal. Ct. App. 2005).

the same way if the law did not reopen final judgments or alter the limitations period.[237] Alternatively, laws extending community property obligations or common law spousal obligations to already-separated same-sex couples would be immediately suspect since they would reach back to completed actions and assign new responsibilities. It is clear that if there is a logical reason for the period of retroactivity, the constitutional objections fade away.

2. Mitigation Strategies

a. Adequate Notice

Notice factors heavily into the fairness analysis of the federal due process test. To the extent that a party can foresee the type of governmental involvement that is retroactively imposed, his claim loses validity. Thus, states increasing the scope of their domestic partnership laws would be wise to include personalized notice when any portion of the law might have retroactive impact. In the case of California's Act, if the remedies provided by the legislature were considered legitimate, the personalized notice would most likely have been sufficient to diminish the legitimacy of a registered partner's reliance on preexisting law.

However, those states that have yet to institute domestic partner registries are in the advantageous position of being able to learn from existing shortcomings. To the extent possible, states creating new registries should place registrants on notice at the time of its inception that the legal rights associated with the registry might change, and that registrants may have the affirmative duty to opt out of the system if they do not want to abide by future laws. If couples' registration is conditioned on this consent, a party would have no legitimate reliance argument for the purpose of the federal due process test, and revisions to existing laws would likely survive state scrutiny as well.

b. Opting in as Opposed to Opting out

Incremental legislation, though politically advantageous, comes hand in hand with problems of inclusivity; that is, when new rights and responsibilities are added, who becomes eligible to receive them? It would be cumbersome to

237. Furthermore, any fairness claims by former beneficiaries would likely be diminished by the simple facts of the case. For example, a child of the deceased would have known that his or her parent had a domestic partner and could thus have expected that the partner might receive some share of the deceased's property; if the child was taken completely by surprise, one would also be able to question the strength of the child's relationship to the parent.

force couples to reregister with the passage of every successive amendment. And, it would be an administrative nightmare to grandfather couples so that they receive the rights under their version of the Act, in effect creating a tiered system of partially coextensive rights and responsibilities. Alternatively, it would be potentially unconstitutional to retroactively readjust responsibilities without mitigation strategies. The California Senate Judiciary Committee discussed this specific problem when it questioned whether it would be better to "declare that those persons who registered prior to January 1, 2005, pursuant to the Domestic Partnership Act shall be deemed to have met the requirements of those registering on or after January 1, 2005, and therefore entitled to the same rights and privileges and burdened with the same responsibilities"[238] or "allow these already-registered domestic partners to simply re-register without terminating their partnership, at a reduced registration fee."[239] While the legislature eventually chose the first option, requiring couples to opt out of the system if they did not want the rights to roll over, an opt-in system would have averted many of the problems that may arise.

This Comment does not suggest that registered couples should be forced to opt in when any legal change is made. It does not make sense, for example, to require partners to opt in if the state affirmatively creates standing for the partners to sue for wrongful death. After all, few registered partners would likely protest the creation of that right. It is also not necessary for couples to opt in when responsibilities are added prospectively. For example, if the legislature adds child-support obligations for children conceived or adopted after the effective date of the statute, the partners would be presumed to have made choices regarding children with knowledge of the law. However, when the law would add significant legal obligations to conduct begun before the effective date of the legislation, amounting to a regime shift as was the case in California, states should employ a minimally burdensome opt-in technique for partners who want the law to apply retroactively. While the opt-in technique would have the disadvantage of leaving out some individuals that the legislation was intended to protect, the impact would not necessarily be significantly more adverse than the mitigation techniques that California offered its registrants, including the option to create a premarital agreement or to unilaterally terminate the partnership. Furthermore, opting in would make whatever retroactivity provisions it imposes virtually bulletproof. Any partner who opted in would have no actual or legitimate reliance on the former law. To the extent that

238. Cal. Bill Analysis, AB 2580, S. Judiciary Comm., 2003–04, Reg. Sess. (June 22, 2004), (Comm. Rep.) *available at* WESTLAW (capitalization altered).

239. *Id.* (capitalization altered).

couples do not opt in, they could still be bound by the rights and responsibilities prospectively. Any claim that this bifurcated system would result in administrative difficulty or inconvenience would be undermined by the documentary evidence conclusively establishing whether a couple opted in or not.

c. Phase-in Period

A phase-in period is necessary to give registrants notice of the legal changes and the opportunity to make legally significant decisions. However, such a period, without more, simply cannot be relied upon to cure due process violations. Thus, any significant legal change should include such a period but should also take the various other measures proposed in this part.

3. Clearly Worded State Interests

California carefully studies the articulated state interest to determine whether retroactivity is required to bring it about.[240] While the U.S. Supreme Court has articulated a rational basis standard for laws that function retroactively, it is clear from *Eastern Enterprises* that the Court was looking for some degree of overlap between the statute and the governmental interest beyond a purely rational relation.[241] Given the likelihood that a state court's analysis may be more searching, state legislatures need to clearly articulate an interest that can only be accomplished through retroactive means. The strongest legislative purposes are those that are remedial; if a law is clearly designed to address an identifiable problem within a state's police powers, a state court would have to uphold it unless the law made impermissible distinctions based on some other constitutional provision.[242] There are at least three examples of acceptable legislative purposes: (1) A state interest in protecting children of individuals who would otherwise have been classified as parents might justify the imposition of child support obligations; (2) the state might also extend certain antidiscrimination provisions retroactively as long as the conduct would already have been cognizable as a violation of the state's civil rights laws if the state expresses a desire to make up for a failure to protect same-sex couples in the past; and (3) a state may even be able to retroactively impose obligations upon cohabiting couples if it clearly articulates a need to adjust the balance of power between partners. Of course, when the legislature speaks clearly on these

240. *See supra* notes 127–135 and accompanying text.
241. *See supra* notes 114–116 and accompanying text.
242. For example, a remedy that explicitly used race as a classification, or an ex post facto law, might be struck down no matter how necessary a legislature might determine it to be.

matters, it also provides a powerful endorsement of the importance of same-sex relationships; every accumulation of new rights becomes a step on the path toward legitimacy and equality.

C. Some Notes About Fairness

While the analysis in Subpart IV.B.2 might lead to the conclusion that the fairness analysis is a wash, the analysis of fairness concerns within the context of domestic partnership legislation leads to several conclusions. First, uncertainty about the law is negative. Whenever possible, laws should speak clearly to promote and facilitate law-abiding behavior.[243] If the meaning of a law is uncertain, it follows that the law cannot be effectively followed. Second, the status of legal protections for same-sex relationships is uncertain. Same-sex couples have been placed at the center of a nationwide debate that has extended unprecedented rights and also taken them away. Third, laws that introduce legal transitions place emotional and social strains on relationships.[244] This is to say nothing of legal strains, which can be costly.[245] Transitions that cause disruptions of this nature should be avoided or minimized—for example, by making legislation prospective. Fourth, same-sex relationships also face greater-than-normal societal strains.[246] Thus, this area of the law is in need of as much certainty as possible. Legal changes are being welcomed—even solicited—by many members of the gay community. However, even advocates of domestic partnership rights must take into account the need for certainty as they fill the regulatory vacuum. If the legislation is to be attractive to same-sex couples, it must speak clearly about its rights and obligations so that gay couples will be able to rely on the legislation in ordering their lives.

CONCLUSION

The last decade witnessed a subtle shift in the U.S. Supreme Court's retroactivity jurisprudence. It remains to be seen whether the rational basis

243. *See* FULLER, *supra* note 219, at 63 ("[O]bscure and incoherent legislation can make legality unattainable by anyone . . . .").

244. I am indebted to Eugene Volokh for this point. *See* discussion *supra* Part IV.B.2.c.

245. *See* Epstein, *supra* note 193, at 69, 71 ("Transitions are, by nature, always dangerous . . . . Unfortunately, most modern legal transitions have . . . dramatically increased the administrative costs of legal rules.").

246. *See* Zachary A. Kramer, *After Work*, 95 CAL. L. REV. (forthcoming 2007) (illustrating various strains placed on gay relationships that are specific to same-sex relationships); Holning Lau, Essay, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1291 (2006) (discussing how nonrecognition of same-sex couples by private businesses leads to perceptions of inferiority and stigmatization).

analysis that has endured for nearly eighty years will survive, or whether recent cases foreshadow a new, stiffer examination of laws that reach back and impose unforeseen consequences on completed conduct. It also remains to be seen how receptive state courts will be to the various fairness claims of former domestic partners. Unfortunately, the ineluctable overlap of retroactivity and domestic partnership laws will result in legal challenges to domestic partnership legislation and place courts in the position of balancing competing notions of fairness. While the difficulty inherent in the process of crafting legal protections and regulations for same-sex partnerships speaks to the extent of social and legal inequality that remains within our society, it also provides a unique opportunity for conscious reflection and deliberate self-definition. The difficulty that legislatures will face may, in some instances, cause them to reexamine the legal framework of all sorts of intimate relationships. For gays and lesbians, the ever-changing legal landscape will constantly compel awareness, and, hopefully, conscious political and legal participation.