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Harry S. Laughran

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# MANAGEMENT AND CONTROL OF COMMUNITY PROPERTY IN CALIFORNIA: "RETROACTIVE" APPLICATION OF THE 1975 AMENDMENTS

Harry S. Laughran\*

## INTRODUCTION

Much attention has been devoted to the identification of certain sex-based inequities in the community property systems of California<sup>1</sup> and the seven other community property jurisdictions of the United States,<sup>2</sup> as well as to proposals for reform.<sup>3</sup> Impetus for these inquiries and

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\* Professor of Law, Loyola University of Los Angeles. The author expresses his appreciation for the research assistance of Anthony J. LaBouff, Loyola Law School, Class of 1975, and Catherine W. Laughran, Loyola Law School, Class of 1976.

1. See, e.g., Grant, *How Much of a Partnership is Marriage?: Community Property Rights Under the California Family Law Act of 1969*, 23 HASTINGS L.J. 249 (1971) [hereinafter cited as Grant]; Comment, *The Equal Rights Amendment and Inequality Between Spouses Under the California Community Property System*, 6 LOY. L.A.L. REV. 66 (1973) [hereinafter cited as *Inequality Between Spouses*]; Note, *Equal Rights and Equal Protection: Who Has Management and Control?*, 46 S. CAL. L. REV. 892 (1973) [hereinafter cited as *Management and Control*]; Comment, *Management and Control of Community Property: Sex Discrimination in California Law*, 6 U.C.D.L. REV. 383 (1973).

2. See, e.g., Bingaman, *The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control*, 3 N.M.L. REV. 11, (1973) [hereinafter cited as Bingaman: *Equal Rights*] (New Mexico); Comment, *Community Property: Male Management and Women's Rights*, 1972 L. & SOC. ORDER 163 (Arizona); Comment, *Management of the Louisiana Community Property System: The Need for Reform*, 48 TUL. L. REV. 591 (1974) (Louisiana).

The seven community property states other than California are Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. The internal features of each state's system may vary greatly. Indeed, the California system has been called *sui generis*, H. VERRALL & A. SAMMIS, CALIFORNIA COMMUNITY PROPERTY LAW 2 (2d ed. 1971) [hereinafter cited as VERRALL & SAMMIS]; see Clark, *Management and Control of Community Property in New Mexico*, 26 TUL. L. REV. 324, n.1 (1952).

For a concise description of the key features of community property systems and the other two basic marital property systems in use in Western societies today (separate property systems derived from the common law, and "intermediate systems"), see Bingaman: *Equal Rights*, *supra*, at 13-16. See also Glendon, *Matrimonial Property: A Comparative Study of Law and Social Change*, 49 TUL. L. REV. 21 (1974). For a detailed exposition and analysis of community property systems, see generally W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY (2d ed. 1971) [hereinafter cited as DEFUNIAK & VAUGHN].

3. See the articles cited in notes 1 & 2, *supra*, most of which contain specific proposals for reform. For analyses of reforms already implemented in Texas, Washington, and

proposals for reform has been prompted by the women's equality movement, by possible ratification of the Equal Rights Amendment,<sup>4</sup> and by recent developments in equal protection litigation.<sup>5</sup> Under the Equal Rights Amendment, many, if not all, of the sex-based differentiations in treatment of spouses under the community property laws doubtless would be held void;<sup>6</sup> arguably, the same result could follow under the equal protection clause.<sup>7</sup>

In 1973 and 1974, the California legislature acted to eliminate many of the sex-based inequities in the community property laws,<sup>8</sup> apparently

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New Mexico, *see, e.g.*, Bingaman, *The Community Property Act of 1973: A Commentary and Quasi-Legislative History*, 5 N.M.L. REV. 1 (1974) [hereinafter cited as Bingaman: *Community Property*]; Cross, *Equality for Spouses in Washington. Community Property Law—1972 Statutory Changes*, 48 WASH. L. REV. 527 (1973) [hereinafter cited as Cross]; Huie, *Divided Management of Community Property in Texas*, 5 TEX. TECH. L. REV. 623 (1974); Comment, *Section 5.22 of the Texas Family Code: Control and Management of the Marital Estate*, 27 SW. L.J. 837 (1973).

4. H.R.J. Res. 208, 92d Cong., 2d Sess. (1972).

The Equal Rights Amendment provides, *inter alia*, that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." *Id.*

5. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). For an analysis of *Frontiero*, *Reed*, and *Sail'er Inn*, *see Note*, 48 TUL. L. REV. 710 (1974).

6. [I]f and when the Equal Rights Amendment becomes part of the United States Constitution, it is clear, from its legislative history, that any state or federal distinction based upon sex, which is not inextricably linked to the biological characteristics of men and women and which does not exist in all men and all women, would be invalid.

Kanowitz, *The New Mexico Equal Rights Amendment: Introduction and Overview*, 3 N.M.L. REV. 1, 8 (1973).

While Professor Kanowitz' statement may be over-broad, it seems clear that ratification of the amendment at least would force states to demonstrate a "compelling state interest" in order to avoid a declaration of unconstitutionality of sex-based differentiations under the community property laws. *See*, Bingaman: *Community Property*, *supra* note 3, at 38-39; *Inequality Between Spouses*, *supra* note 1, at 95; *Management and Control*, *supra* note 1, at 908; Comment, *Management of the Louisiana Community Property System: The Need for Reform*, 48 TUL. L. REV. 591, at 594, n.26 (1974).

7. The California community property system has yet to be challenged on grounds of denial of equal protection. *Inequality Between Spouses*, *supra* note 1, at 95, n.171. For a forceful argument that certain pre-1975 features of the California system were unconstitutional under not only the stringent "compelling state interest" test, but also the more lenient "rational relationship" test, *see Management and Control*, *supra* note 1, at 899-906. Recent statements of the California Supreme Court, respecting other community property legislation, would seem to support this view. *See In re Marriage of Bouquet*, 16 Cal. 3d 583, 588, 546 P.2d 1371, 1373, 128 Cal. Rptr. 427, 429 (1976).

8. Law of October 1, 1973, ch. 987, [1973] Cal. Stat. 1897; Law of Sept. 23, 1974, ch. 1206, [1974] Cal. Stat. 2609. The inequities referred to have been examined elsewhere in detail. *See, e.g., Inequality Between Spouses*, *supra* note 1.

motivated, at least in part, by the prospect that, absent legislative reform, the existing sections would have been declared unconstitutional.<sup>9</sup> The first section of this article focuses on these changes, which took effect January 1, 1975, insofar as they relate to management and control of community property in California.<sup>10</sup> The next section states briefly a doctrine which has blocked full and immediate implementation of prior legislation increasing the rights and protections afforded the wife with respect to community property. It goes on to examine hypothetically the effect of the application of that doctrine to the 1975 amendments, and to note the doctrine's demise. Succeeding sections trace the development and lingering death of the doctrine.

### I. THE 1975 MANAGEMENT AND CONTROL AMENDMENTS

Historically, in California, community property<sup>11</sup> has been under the management and control of the husband.<sup>12</sup> Since 1951, the wife has

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Five other community property states—Arizona, Idaho, New Mexico, Texas, and Washington—thus far have acted in an attempt to eliminate such inequities. ARIZ. REV. STAT. ANN. § 25-214 (Supp. 1973); IDAHO CODE § 32-912 (Supp. 1975); N.M. STAT. ANN. § 57-4A-8 (Supp. 1973); TEX. FAM. CODE ANN. § 5.22 (1975); WASH. REV. CODE § 26.16.030 (Supp. 1974).

9. See Comment, *California's New Community Property Law—Its Effect on Inter-spousal Mismanagement Litigation*, 5 PAC. L.J. 723, 723-25 (1974) [hereinafter cited as *Mismanagement Litigation*].

10. The amendments already have been examined in Bonanno, *The Constitution and "Liberated" Community Property in California—Some Constitutional Issues and Problems Under the Newly Enacted Dymally Bill*, 1 HASTINGS CONST. L.Q. 97 (1974) [hereinafter cited as Bonanno]; Kahn & Frimmer, *Management, Probate and Estate Planning Under California's New Community Property Laws*, 49 CAL. ST. B.J. 516 (1974) [hereinafter cited as Kahn & Frimmer]; *Mismanagement Litigation*, *supra* note 9; Reppy, *Retroactivity of the 1975 California Community Property Reforms*, 48 S. CAL. L. REV. 977 (1975) [hereinafter cited as Reppy]; Comment, *Equal Management and Control Under Senate Bill 569: "To Have and to Hold" Takes on New Meaning in California*, 11 SAN DIEGO L. REV. 999 (1974) [hereinafter cited as "To Have and to Hold"]. See also *Review of Selected 1973 California Legislation; Domestic Relations, Community Property*, 5 PAC. L.J. 205, 352-58 (1974) [hereinafter cited as *Review of Selected 1973 Legislation*].

11. Community property is defined in the California statutes by exclusion. Civil Code section 5110 provides that "[e]xcept as provided in Sections 5107 [and] 5108 . . . all real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state . . . is community property . . ." CAL. CIV. CODE § 5110 (West Supp. 1975). Civil Code sections 5107 and 5108 define separate property generally as all property of a married person, owned by that person prior to marriage, or acquired during marriage by gift, bequest, devise, or descent. Rents, issues and profits of separate property are also separate property. CAL. CIV. CODE §§ 5107 & 5108 (West 1970).

12. Law of Sept. 6, 1969, ch. 1608, § 8, [1969] Cal. Stat. 3342, *as amended* Law of Sept. 6, 1969, ch. 1609, § 24, [1969] Cal. Stat. 3358 (former CAL. CIV. CODE § 5125

had the statutory right to management and control of her earnings,<sup>13</sup> the husband retaining that right as to all other community property. In 1973, effective January 1, 1975, the legislature repealed Civil Code section 5124,<sup>14</sup> under which the wife had management and control over specified community property, and amended sections 5125<sup>15</sup> and 5127,<sup>16</sup> under which the husband had management and control over all other community personal and real property, respectively. As a result of these changes, with one exception,<sup>17</sup> neither spouse has exclusive management and control over any of the community property after January 1, 1975—including his or her own salary. Section 5125 now provides that “either spouse has the management and control of the community personal property . . . .”<sup>18</sup> Section 5127, relating to management and control of community real property, contains the same language.<sup>19</sup>

These changes, which mean that married persons in California now

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(West 1970)) [hereinafter cited as Former § 5125]; Law of Sept. 6, 1969, ch. 1608, § 8, [1969] Cal. Stat. 3342, *as amended* Law of Sept. 6, 1969, ch. 1609, § 25, [1969] Cal. Stat. 3358 (former CAL. CIV. CODE § 5127 (West 1970)) [hereinafter cited as Former § 5127]. These sections were in force until January 1, 1975.

13. Law of Sept. 6, 1969, ch. 1608, § 8, [1969] Cal. Stat. 3341, *repealed*, Law of Oct. 1, 1973, ch. 987, § 13, [1973] Cal. Stat. 1901 (former CAL. CIV. CODE § 5124 (West 1970)) [hereinafter cited as Former § 5124]. “[T]he wife has the management and control of the community personal property earned by her . . . .” *Id.* The predecessor of this section, section 171c, was added to the Civil Code by Law of June 18, 1951, ch. 1102, § 1, [1951] Cal. Stat. 2860, which provided that “the wife has the management . . . [and] control . . . of community property money earned by her . . . .”

14. Law of Oct. 1, 1973, ch. 987, § 13, [1973] Cal. Stat. 1901.

15. Law of Oct. 1, 1973, ch. 987, § 14, [1973] Cal. Stat. 1901, *amending* CAL. CIV. CODE § 5125 (West 1970) (now CAL. CIV. CODE § 5125 (West Supp. 1975)).

16. Law of Oct. 1, 1973, ch. 987, § 15, [1973] Cal. Stat. 1901, *amending* CAL. CIV. CODE § 5127 (West 1970) (now CAL. CIV. CODE § 5127 (West Supp. 1975)).

17. The exception, the “business management” exception (CAL. CIV. CODE § 5125(d) (West Supp. 1975)) provides: “A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.”

Actually, the “exclusive” or “sole” management and control exercised by the wife over her earnings (and personal injury damages) and by the husband over all other community property was limited by both statutory restrictions to safeguard the interests of the other spouse (*see* Former §§ 5125, 5127, *supra* note 12; Former § 5124, *supra* note 13) and by a judicially imposed duty of “good faith.” *See, e.g.,* Williams v. Williams, 14 Cal. App. 3d 560, 92 Cal. Rptr. 385 (1971). These restrictions have been continued in the new legislation (CAL. CIV. CODE §§ 5125(b), (c) & 5127 (West Supp. 1975)), and, for the first time, a statutory duty of “good faith” with respect to management and control has been added. CAL. CIV. CODE § 5125(e) (West Supp. 1975).

18. CAL. CIV. CODE § 5125(a) (West Supp. 1975).

19. CAL. CIV. CODE § 5127 (West Supp. 1975).

have equal<sup>20</sup> rights to management and control of essentially all community property, represent, at the minimum, a symbolic victory in the battle for women's equality,<sup>21</sup> and should be welcomed at least in principle.

20. The language "either spouse has the management and control" perhaps is not the most felicitous which might have been chosen to effect a system whereby the spouses are to have "equal" rights to management and control. "Equal" management and control rights were, however, the apparent intent of the legislation. See *Mismanagement Litigation*, *supra* note 9, at 724; *Review of Selected 1973 Legislation*, *supra* note 10, at 352.

The "equal rights" system selected by the legislature apparently is the same as the "joint" management and control system proposed in *Inequality Between Spouses*, *supra* note 1, at 91-92. Under this system, subject to certain safeguards, either spouse, acting alone, or both, acting together, may fully bind, dispose of, and control the entire community property. It is perhaps best termed a "joint and several" system. See Bingaman: *Community Property*, *supra* note 3, at 40-41; Bingaman: *Equal Rights*, *supra* note 2, at 44.

The new California "joint and several" system may be contrasted with a true system of "joint" control, as described and criticized in Bingaman: *Equal Rights*, *supra* note 2, at 39-43, under which a joint decision and agreement on all investments, expenditures, and other actions affecting community property would be required. It also differs from a system of "modified joint control," which would provide for "joint and several" management in terms of day-to-day expenditures, while requiring that the spouses agree with respect to transactions in excess of a statutorily predetermined dollar amount, as proposed in *Management and Control*, *supra* note 1, at 915-20, and discussed in Bingaman: *Equal Rights*, *supra* note 2, at 47-54.

Both "joint" and "modified joint" management systems were considered by the California legislature and rejected. *Mismanagement Litigation*, *supra* note 9, at 725-26. The "joint and several" system selected is not unlike the new systems in Arizona (ARIZ. REV. STAT. ANN. § 25-214 (Supp. 1973)), Idaho (IDAHO CODE § 32-912 (Supp. 1975)), New Mexico (N.M. STAT. ANN. § 57-4A-8(a) (Supp. 1973)), and Washington (WASH. REV. CODE § 26.16.030 (Supp. 1974)). However, the New Mexico plan contains two exceptions, which arguably represent improvements. N.M. STAT. ANN. § 57-4A-8(b), (c) (Supp. 1975); see Bingaman: *Community Property*, *supra* note 3, at 39-47.

All of these approaches to management and control reform differ from the Texas approach which is *sui generis*, and might best be described as a "divided and joint" management system. In Texas, each spouse has "sole management, control, and disposition of the community property that he or she would have owned if single," but commingled community property "is subject to the joint management, control, and disposition of the spouses . . ." TEX. FAM. CODE ANN. § 5.22 (1975). The Texas approach is criticized in Bingaman: *Equal Rights*, *supra* note 2, at 39-43, 54-55, and *Management and Control*, *supra* note 1, at 910-14.

21. The laws which designated the husband as manager of the community property undoubtedly reflected cultural values and economic realities when enacted. The change is termed "symbolic" because a change in the law from "male management" to "equal management" will not of itself rid society of sexist stereotypes or alter the position of women in the marketplace. That this is true is demonstrated by a comment made in regard to the "equal management" amendments under discussion:

The legislature, by adopting a scheme of equal management and control . . . , has avoided the requirement of getting the signatures of both husband and wife for all transactions, which could have caused numerous problems in day-to-day transactions, particularly spousal sales of community property. For example, many men felt that requiring their wife's signature every time they wished to make a transac-

The 1973 management and control legislation, while providing that it was to be effective January 1, 1975, was silent as to whether it would apply to all community property, including that acquired prior to its effective date, or only to community property earned after its effective date.

In 1974, in Senate Bill 1601, the legislature acted to amend sections 5125 and 5127, as previously amended by the 1973 legislation, again effective January 1, 1975.<sup>22</sup> The sections now provide that ". . . either spouse has the management and control of the community . . . [personal and real, respectively] property, whether acquired prior to or on or after January 1, 1975. . . ." <sup>23</sup> Thus, the legislature has stated its intention that the management and control amendments shall apply to all community property held on or after the effective date of sections 5125 and 5127, regardless of when such property may have been acquired. For the first time, the legislature has forced the courts to make a choice between specific legislative intent and the court-made Doctrine of Prospective Application (DPA).<sup>24</sup>

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tion in the stock market would be extremely burdensome. Also they were fearful that the consent might be withheld for petty reasons. The ["business management exception" (CAL. CIV. CODE § 5125(d))] also should silence many of these critics. Without this provision it was felt that a spouse who knew nothing about the operation of a particular business could insist on exercising her right to equal management and control.

*Review of Selected 1973 Legislation, supra* note 10, at 357.

I have previously noted, in another context, that "law reflects cultural values," and, "indeed, often lags behind, so that, at a given moment and in a given context, law may reflect outmoded values," but that "[l]aw may, of course, take the lead in some situations, so that legal changes are precursors of value changes." Laughran, *The Law and the Corporate Polluter: Flexibility and Adaption in the Developing Law of the Environment*, 23 MERCER L. REV. 571, 574 (1972). Perhaps the community property amendments under discussion truly reflect altered societal values; to the extent they do not, they may prove to be precursors of an altered cultural consciousness. In the California Constitutional Convention over a century ago one delegate said: "Sir, the God of nature made woman frail, lovely, and dependent . . ." J. BROWNE, DEBATES IN THE CONVENTION OF CALIFORNIA 259 (1850), *quoted in* VERRALL & SAMMIS, *supra* note 2, at 227 n.1. While, to paraphrase a well-known commercial message, "we've come a long way" since then, it truthfully may be said that "we've got a long way to go."

22. Law of Sept. 23, 1974, ch. 1206, §§ 4 & 5 [1974] Cal. Stat. 2609, *amending* CAL. CIV. CODE §§ 5125 & 5127 (West 1970) (now CAL. CIV. CODE §§ 5125 & 5127 (West Supp. 1975)).

23. CAL. CIV. CODE §§ 5125 (personal property) & 5127 (real property) (West Supp. 1975).

24. Armstrong, "Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity?, 33 CALIF. L. REV. 476, 481, 503-04 (1945) [hereinafter cited as Armstrong]. Professor Armstrong refers to the DPA as the "prospective application" rule. *Id.* at 477. It has also been termed The Doctrine Against Retroactive Application of Amendments. VERRALL & SAMMIS, *supra* note 2, at 37.

## II. THE DOCTRINE OF PROSPECTIVE APPLICATION AND ITS HYPOTHETICAL EFFECT ON THE 1975 AMENDMENTS

The DPA is based on the less than universally accepted idea that the right to management and control of community property is itself a property right, and that to decrease one spouse's right to management and control amounts to an unconstitutional impairment of a vested property right of the other spouse without due process.<sup>25</sup> Briefly stated, the DPA, which dates back to *Spreckels v. Spreckels*,<sup>26</sup> holds that an amendment to the community property law which would affect the rights of one of the spouses (historically, the husband) to management and control, can apply neither to community property acquired prior to the effective date of the amendment,<sup>27</sup> nor to property acquired after that date, if such property is acquired in exchange for, or represents rents, issues, or profits of, property acquired prior to that date.<sup>28</sup> The effect of the DPA has been that

the marital property rule which applies at any one time to identical types of property [e.g., earnings] in the hands of existing married couples is not one invariable rule, but one of a *series* of rules; which one of the series depends upon when the property or the corpus from which it originally derived, came into the hands of the spouses.<sup>29</sup>

To illustrate, assume the existence of a hypothetical couple, Harold and Wanda Smith, residents of California, who were married in 1970. Harold is employed in industry. Wanda was employed in business from 1970 to 1973; using savings from her earnings, she opened a small business. The two spouses keep separate bank accounts, and after January 1, 1975, each keeps money traceable to his or her pre-1975 activities segregated from money earned after that date.<sup>30</sup> If the DPA were to be applied to the "equal rights" management and control

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25. See, e.g., *Boyd v. Oser*, 23 Cal. 2d 613, 619-20, 145 P.2d 312, 315-16 (1944); *McKay v. Lauriston*, 204 Cal. 557, 566, 269 P. 519, 523 (1928); *Roberts v. Wehmeyer*, 191 Cal. 601, 218 P. 22 (1923); *Spreckels v. Spreckels*, 116 Cal. 339, 348-49, 48 P. 228, 231 (1897); *Paley v. Bank of America*, 159 Cal. App. 2d 500, 506-07, 324 P.2d 35, 40 (1958).

26. 116 Cal. 339, 48 P. 228 (1897).

27. E.g., *id.*; *McKay v. Lauriston*, 204 Cal. 557, 567, 269 P. 519, 522-23 (1928).

28. See, e.g., *Boyd v. Oser*, 23 Cal. 2d 613, 145 P.2d 312 (1944).

29. *Armstrong*, *supra* note 24, at 477.

30. Segregation of the wife's earnings was necessary under Former § 5124, *supra* note 13, since she retained management and control only until such earnings were "commingled with community property subject to the management and control of the husband . . . ." *Id.* Segregation of pre-1975 assets would be necessary after January 1, 1975 for both husband and wife, since the pre-1975 law would apply only to those assets, the acquisition of which could be traced to the earlier date.



amendments under discussion, so that "new" sections 5125 and 5127 could apply prospectively only, the Smiths' situation would be as follows.<sup>31</sup>

Harold would have management and control over his pre-1975 earnings; over any income, such as interest, derived from those earnings, whether before or after January 1, 1975; and over any investments, in real or personal property, made with that money, whether before or after January 1, 1975. Harold and Wanda would have "equal" rights to management and control over his post-January 1, 1975 earnings, and over investments made therewith.

Wanda would have management and control over her pre-1975 earnings,<sup>32</sup> and, even after January 1, 1975, would retain management and control over the business,<sup>33</sup> sharing "equal" rights to management and control of profits from the business with Harold after January 1, 1975. However, such equal management and control would exist only to the extent that profits earned after that date are withdrawn by her as salary or its equivalent.<sup>34</sup>

31. For illustrations of the effect of the DPA on married couples with respect to earlier changes in the community property laws see Armstrong, *supra* note 24, at 477-81.

32. Under former section 5124 the wife had management and control over "community personal property earned by her . . . until it is commingled with community property subject to the management and control of the husband . . ." Former § 5124, *supra* note 13. Under former section 5127, the husband had "management and control of the community real property . . ." Former § 5127, *supra* note 12 (emphasis added). By necessary implication, the wife lost all rights to management and control the moment she invested her earnings in real property. See Comment, *Management and Control of Community Property: Sex Discrimination in California Law*, 6 U.C.D.L. REV. 383, 383-84 (1973). However, the husband had no legal right to interfere with the wife's management and control of her own earnings, and thus could not object if she chose to invest in real property. Moreover, as to acquisitions of real property prior to January 1, 1975, where the wife took title in her own name, the property is presumed to be her separate property. CAL. CIV. CODE § 5110 (West Supp. 1975). As to this discussion generally, and the effect of the presumption see *In re Marriage of Mix*, 14 Cal. 3d 604, 610-11, 536 P.2d 479, 482-84, 122 Cal. Rptr. 79, 82-84 (1975).

33. This is provided by the "business management" exception. CAL. CIV. CODE § 5125(d); see note 17, *supra*.

34. *But see "To Have and to Hold," supra* note 10.

The consequences of one spouse asserting sole control over a community personal property business may not be as drastic as it might seem; that is, the sole control will be limited to managing the business or interest therein, and not to control over the profits or earnings therefrom. *Id.* at 1004. This statement seems ill-considered. Surely one of the primary functions of the manager of a business is the basic business decision of whether to reinvest profits. It would seem, therefore, that one spouse's right to "equal" management and control of community property generally would extend to earnings of a community property business under the management of the other spouse only to the extent that those earnings are "withdrawn" from the business. Such business decisions would be subject to the

If, in 1979, Harold wished to purchase an apartment building, using his segregated pre-1975 earnings as a down-payment, Wanda would have no right to object. Likewise, if, in 1983, Harold decided to sell the apartment building, Wanda would have no right to object.<sup>35</sup> If, in 1985, Wanda wished to sell the business and invest in utility stock, Harold arguably would have no right to object.<sup>36</sup>

Were the DPA to be applied to the 1975 management and control amendments, the resolution of marital property disputes involving management and control issues would continue to hinge on the application of "one of a *series* of rules."<sup>37</sup> If the proponent of the application of a rule no longer generally in force at the time of the dispute could succeed in the "often . . . tortuous process"<sup>38</sup> of tracing the acquisition of the property in question, or "the corpus from which it originally derived,"<sup>39</sup> to an earlier date, the rule in force on the earlier date would apply.

That result would continue a situation with which California judges, lawyers, and married persons have had to contend since the *Spreckels* decision in 1897.<sup>40</sup> Another consequence would be that since the old law(s)<sup>41</sup> would continue to apply to assets of married Californians traceable to the pre-1975 period, application of the old laws still would be open to challenge on equal protection grounds, and almost certainly would be declared invalid in event of ratification of the Equal Rights Amendment.<sup>42</sup> As a result, substantial uncertainty would continue,

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statutory interspousal "good faith" requirement. CAL. CIV. CODE § 5125(e) (West Supp. 1975).

35. It would, however, be necessary for her to join with him in executing the deed. CAL. CIV. CODE § 5127 (West Supp. 1975). Presumably, he could force joinder in a proper case, since her refusal to join could be viewed as an unreasonable restraint on his legitimate rights to management and control, and, if a sale were prevented, would amount to a deprivation of those rights. *Cf. Wilcox v. Wilcox*, 21 Cal. App. 3d 457, 98 Cal. Rptr. 319 (1971).

36. This assumes that the wife's statutory right to management and control of her uncommingled pre-1975 earnings extended to control over personal property investments made with those earnings. If it did not, the "right" to management and control would have been empty indeed. To the effect that it did, see *In re Marriage of Mix*, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975).

37. *Armstrong*, *supra* note 24, at 477.

38. *Id.*

39. *Id.*

40. *Spreckels v. Spreckels*, 116 Cal. 339, 48 P. 228 (1897).

41. For example, acquisitions traceable to pre-1951 earnings of a married woman would continue to be under the management and control of her husband. See notes 11-13 *supra* and accompanying text.

42. See notes 4-7 *supra* and accompanying text. *But see Bonanno*, *supra* note 10, at 120-27 (arguments for the proposition that the Equal Rights Amendment would not dictate "retroactive" application of "equal" management and control provisions).

particularly in the area of creditors' rights.<sup>43</sup> Happily, the recent decision of the California Supreme Court in *In re Marriage of Bouquet*<sup>44</sup> indicates almost conclusively that the amendments will be applied "retroactively,"<sup>45</sup> and that the DPA is dead. The following section traces the history of the Doctrine.

### III. THE DOCTRINE OF PROSPECTIVE APPLICATION

#### A. *Development and Criticism*

The soundness of the DPA has been questioned since its inception.<sup>46</sup>

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An attack on the old laws based on denial of equal protection or violation of the Equal Rights Amendment due to sex-based discrimination could be mounted by either spouse in a proper case. For example, although most commentators have focused on discrimination against the wife under the general management and control provisions of former sections 5125 and 5127 (Former §§ 5125 & 5127 *supra* note 12), it must be recalled that under former section 5124 (Former § 5124 *supra* note 13), the wife had sole management and control of certain items of community property, notably her uncommingled earnings. Access to such property could be important to a husband in a given case. *See, e.g., In re Marriage of Mix*, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975) (wife was attorney); *Garfein v. Garfein*, 16 Cal. App. 3d 155, 93 Cal. Rptr. 714 (1971) (wife was movie star).

43. The uncertainty mentioned in the text would ensue because creditors' rights of access to community property generally have followed management and control. Thus, under the pre-1975 law, the earnings of the wife generally were not liable for debts of the husband contracted during marriage (Law of Sept. 4, 1969, ch. 1608, § 8, [1969] Cal. Stat. 3340 (former CAL. CIV. CODE § 5117) (repealed 1974)), but were liable for her own debts. Law of Sept. 4, 1969, ch. 1608, § 8, [1969] Cal. Stat. 3340 (former CAL. CIV. CODE § 5116). Other community property generally was not liable for debts of the wife, contracted during marriage, but was liable for debts of the husband. *Id.*

Both the 1973 and 1974 amendments made extensive changes in the law relating to creditors' rights of access to community property. "New" section 5116 provides that: "The property of the community is liable for the contracts of either spouse which are made after marriage and prior to or on or after January 1, 1975." CAL. CIV. CODE § 5116 (West Supp. 1975). A holding of "non-retroactivity" of the recent amendments would mean that a husband's segregated, traceable pre-1975 earnings would, as a general rule, continue unavailable to satisfy debts contracted by the wife.

A thorough discussion of the recent amendments is beyond the scope of this article. For an analysis of these changes with respect to creditors' rights, and their constitutional ramifications see Bonnano, *supra* note 10; Reppy, *supra* note 10.

44. 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976).

45. In the present context, there are two possible meanings of the word "retroactive." In the narrow or technical sense, the legislation will be applied "retroactively," in that it will apply to property acquired prior to its effective date. A broad definition of the term would imply that the legislation purported to affect transactions entered into prior to its effective date, which it does not. Law of Sept. 23, 1974, ch. 1206, § 7, [1974] Cal. Stats. 2609 provides: This act shall not apply to or affect any act or transaction which occurred prior to January 1, 1975."

46. The DPA has been roundly criticized by the bench and, most notably, in the scholarly journals, since its inception. *See, e.g., Boyd v. Oser*, 23 Cal. 2d 613, 623, 145

In 1944, in *Boyd v. Oser*,<sup>47</sup> the California Supreme Court held that a 1923 statute which granted to the wife rights of testamentary disposition over one half the community property<sup>48</sup> constitutionally could not apply to property which, although acquired after 1923, represented rents, issues, or profits of property acquired prior to that date. To permit such application would allow the wife, through exercise of testamentary disposition, to deprive the husband of the right to manage and control such property.<sup>49</sup> Justice Traynor, concurring in the result, wrote:

The decisions that existing statutes changing the rights of husbands and wives in community property can have no retroactive application have become a rule of property in this state and should not now be overruled. It is my opinion, however, that the constitutional theory on which they are based is unsound. . . . That theory has not become a rule of property and should not invalidate future legislation in this field intended by the Legislature to operate retroactively.<sup>50</sup>

Justice Traynor relied on two United States Supreme Court cases, *Warburton v. White*<sup>51</sup> and *Arnett v. Reade*,<sup>52</sup> as well as a law review comment,<sup>53</sup> as authority for his proposition that the constitutional underpinning of the DPA was unsound.

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P.2d 312, 318 (1944) (Traynor, J., concurring); *Spreckels v. Spreckels*, 116 Cal. 339, 350-51, 48 P. 228, 231-32 (1897) (Beatty, J., concurring); *Armstrong*, *supra* note 24; *Knutson, California Community Property Laws: A Plea for Legislative Study and Reform*, 39 S. CAL. L. REV. 240 (1966) [hereinafter cited as *Knutson*]; Comment, *Community and Separate Property: Constitutionality of Legislation Decreasing Husband's Power of Control over Property Already Acquired*, 27 CALIF. L. REV. 49 (1938) [hereinafter cited as *Community and Separate Property*]; *cf.*, *Bodenheimer, Justice Peters' Contribution to Family and Community Property Law*, 57 CALIF. L. REV. 577, 577-88 (1969) [hereinafter cited as *Bodenheimer*].

47. 23 Cal. 2d 613, 145 P.2d 312 (1944).

48. Now codified as CAL. PROB. CODE ANN. § 201 (West 1956).

49. The court had previously held, in *McKay v. Lauriston*, 204 Cal. 557, 269 P. 519 (1928), that the same statute constitutionally could not apply to community property acquired prior to its effective date.

50. 23 Cal. 2d 613, 623, 145 P.2d 312, 318 (Traynor, J., concurring) (citations omitted).

The original reasons for adopting a rule are of course immaterial when by long usage and continued judicial sanction, it has become a rule of property. The rule of property receives legal respect by virtue of a species of public estoppel, i.e. because of long established dealings in reliance upon it. Under no circumstances, however, does the legal respect which is held to be due to the rule of property carry over to the *reasons* for its adoption in the first place. Indeed, it is because the foundation for the rule in question has slipped away (or never really had been there) that it needs to be recognized as a rule of property.

*Armstrong*, *supra* note 24, at 504-05.

51. 176 U.S. 484 (1900).

52. 220 U.S. 311 (1911).

53. *Community and Separate Property*, *supra* note 46. In regard to that Comment, Professor Armstrong's landmark 1945 article, written after the decision in *Boyd*, repre-

In *Warburton v. White*, the Supreme Court considered the effectiveness of a Washington statute, passed in 1879, which gave each spouse rights of testamentary disposition as to one half of the community property, such one half passing to decedent's issue in case of intestacy. The statute was applied to property acquired in 1877, at which time neither spouse had testamentary power over community property (it passing to the survivor on the death of either). The husband, both at the time of purchase of the property in controversy and the time of passage of the new succession statute, had sole powers of management and control over community property. The Court held, after an analysis of the Washington community property law, that when one of the spouses died the marital community came to an end, and disposition of the decedent's interest was a matter of succession.<sup>54</sup>

In *Arnett v. Reade*, the Supreme Court, in an opinion by Mr. Justice Holmes, held that a 1901 New Mexico statute which prohibited the conveyance, mortgaging, or encumbering of community real property without joinder of both spouses could be applied to land acquired as community property prior to 1901, even though at the time of the acquisition the wife's joinder would not have been necessary.

In *Spreckels v. Spreckels*,<sup>55</sup> the case which "gave birth" to the DPA,

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sents, in her words, an "amplification of [the] argument" made therein. *Armstrong, supra* note 24, at 476 n.1.

54. The Court's treatment of the problem presented in *Warburton* as merely a matter of succession is similar to the analysis of the California Supreme Court in *In re Estate of Phillips*, 203 Cal. 106, 263 P. 1017 (1928), in dealing with a different feature of the 1923 amendments to former Civil Code section 1401 (now CAL. PROB. CODE ANN. § 201 (West 1956)) than that considered in *Boyd v. Oser*, 23 Cal. 2d 613, 145 P.2d 312 (1944) and, *McKay v. Lauriston*, 204 Cal. 557, 269 P. 519 (1928).

Prior to the amendments, upon the death of the wife, the community property belonged to the husband entirely; upon the death of the husband, one half of such property went to the wife, the other half, absent testamentary disposition, went to his descendants. After the amendments, upon the death of either spouse, one half of the community property went to the surviving spouse, the other one half was subject to testamentary disposition by the decedent; in the absence of testamentary disposition, that one half passed to the surviving spouse. *See* CAL. PROB. CODE ANN. § 201 (West 1956). In *McKay*, the court held that the extension of testamentary disposition to the wife could not apply to community property acquired prior to the effective date of the amendment. In *Phillips*, the court held that the amendment,

in so far as it provides that the wife in case of the death of her husband intestate shall inherit the half of the community property which was subject to his testamentary disposition, is a statute of descent and succession, or a rule of inheritance. . . . [T]he law of inheritance in force and effect at the date of acquisition of the property does not determine the right to inherit it upon the death of the owner . . . the law in force at the date of . . . death of the owner of the property determines who shall inherit it . . . .

203 Cal. 106, 109-10, 263 P. 1017, 1019 (1928).

55. 116 Cal. 339, 48 P. 228 (1897).

the California Supreme Court considered an amendment to then-section 172 (present section 5125) of the Civil Code.<sup>56</sup> Prior to the amendment, section 172 provided that "[t]he husband has the management and control of community property, with the like power of disposition (other than testamentary) as he has of his separate estate."<sup>57</sup> The amendment added the following restriction: "Provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto."<sup>58</sup>

The *Spreckels* court held that the requirement that the wife consent to gifts of community property by the husband could not apply to property acquired prior to the effective date of the amendment. The court concluded that, prior to the 1891 amendment, "the code vested in the husband, with reference to the community property, all the elements of ownership, and in the wife none,"<sup>59</sup> and went on to say that "[a]s the law stood prior to the amendment . . . [no] happier phrase could have been devised to express the interest of the wife in the community property than . . . 'a mere expectancy.'"<sup>60</sup> Counsel for the wife admitted that "if the husband is the owner of the property, then a statute which makes the exercise of the right to dispose of it subject to the will of another is unconstitutional."<sup>61</sup> Thus, the basic constitutional foundation of the DPA, that application of amendments altering rights to management and control of previously acquired community property represents an unconstitutional deprivation of vested property rights, never was argued in the *Spreckels* case, but was adopted by the court on the basis of a concession of counsel.<sup>62</sup>

The United States Supreme Court, having based its decision in *Warburton v. White*<sup>63</sup> on the theory that disposition of a decedent's estate was a matter of succession, the marital community of property having

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56. Law of March 31, 1891, ch. 220, § 1, [1891] Cal. Stat. 425, as amended CAL. CIV. CODE § 5125 (West Supp. 1975).

57. Former CAL. CIV. CODE § 172 (1872), as quoted in 116 Cal. at 341, 48 P. at 228.

58. Law of March 31, 1891, ch. 220, § 1, [1891] Cal. Stat. 425, as amended CAL. CIV. CODE § 5125 (West Supp. 1975) (emphasis deleted).

59. 116 Cal. at 342, 48 P. at 229.

60. *Id.* at 347, 48 P. at 231 (citation omitted).

61. *Id.* at 349, 48 P. at 231.

62. Professor Armstrong pointed out not only that the constitutional doctrine grew out of the concession of counsel in *Spreckels*, but also that its doctrinal vitality continued to be conceded by counsel in such later cases as *McKay v. Lauriston*, 204 Cal. 557, 269 P. 519 (1928), and *Roberts v. Wehmeyer*, 191 Cal. 601, 218 P. 22 (1923). See Armstrong, *supra* note 24, at 497-501.

63. 176 U.S. 484 (1900).

ended on the death of the wife,<sup>64</sup> refused to consider *Spreckels* and instead distinguished it on the ground that it involved a question of *inter vivos* control during the existence of the community.<sup>65</sup> Although in *Warburton* the wife had died intestate, the same result presumably would have been reached had she purported to leave the property by will. In either case the wife's death would result in community property passing from the husband's control; the distinction between *Warburton* and *Spreckels* thus may be viewed as spurious, since *Spreckels* was based on the idea that the husband owned the community property.

It is clear that legislation granting testamentary disposition over part of the community property to the wife, if applicable to property previously acquired and over which the husband retained during his lifetime sole rights to management and control, could be construed as depriving him of those rights in a case where the wife predeceases him, just as to subject his rights "to the will of another" was held to represent a deprivation in *Spreckels*. That, in fact, was the exact construction accorded the 1923 amendments to present Probate Code section 201 in *McKay v. Lauriston*<sup>66</sup> and *Boyd v. Oser*.<sup>67</sup> Thus, despite the Supreme Court's attempt to distinguish *Spreckels*, *Warburton* may be read as inconsistent,<sup>68</sup> and certainly is inconsistent with *McKay* and *Boyd*.

In *Arnett v. Reade*, the Supreme Court did not resolve the issue of whether or not the wife in New Mexico had a vested interest in the community property. Whatever the exact nature of her interest, it was held to be at least "a greater interest than the mere possibility of an expectant heir,"<sup>69</sup> and, even prior to the statutory amendment under consideration, she was said to have had "a remedy for an alienation

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64. See text accompanying note 54, *supra*.

65. 176 U.S. 484, 497 (1900).

66. 204 Cal. 557, 269 P. 519 (1928).

67. 23 Cal. 2d 613, 145 P.2d 312 (1944).

68. Such a reading is bolstered by the Court's statements in *Warburton* that the control powers vested in the husband were granted him purely in the capacity of agent or trustee for the marital community. 176 U.S. at 490, 494, 497. This indicates the Court's view that the rules relating to "*inter vivos* control were not frozen to those in existence at the acquisition of community property." Armstrong, *supra* note 24, at 492 n.41. See also *Holyoke v. Jackson*, 3 P. 841, 842 (Wash. 1882) (the husband's management power is "a mere power conferred upon him as member and head of the community in trust for the community, and not a proprietary right . . ."). This continues to be the view in Washington. See Cross, *supra* note 3, at 551-53.

69. 220 U.S. 311, 320 (1911). Compare this statement of the Court quoted in the text with the California court's statement in *Spreckels*: "[No] happier phrase could have been devised to express the interest of the wife in the community than . . . 'a mere expectancy.'" 116 Cal. at 347, 48 P. at 231 (citation omitted).

made in fraud of her by her husband."<sup>70</sup> Since "she was protected against fraud already," Justice Holmes concluded, "we can conceive no reason why the legislature could not make that protection more effectual by requiring her concurrence in her husband's deed of the land."<sup>71</sup>

Since it was argued in *Arnett* that the husband had absolute and vested property rights in the community property, and that the wife had a mere expectancy, so that to permit the statute to apply to the property in question would represent a deprivation of the husband's vested rights, that case represents an implicit repudiation of the *Spreckels* doctrine, in that it indicates "that the question of whether the marital property right [of husband or wife] . . . is or is not *vested* is not the controlling . . . question. . . ."<sup>72</sup> The holding in *Arnett* directly conflicts with *Roberts v. Wehmeyer*,<sup>73</sup> which held that Civil Code section 172a, enacted in 1917,<sup>74</sup> could not apply to previously acquired community real property. That section, the equivalent of the New Mexico statute at issue in *Arnett*, required the wife's joinder with the husband in executing any instrument by which community real property was conveyed, encumbered, or leased for more than a year.<sup>75</sup>

As Professor Armstrong pointed out in 1945, the opinion in *Arnett*

70. 220 U.S. at 320.

71. *Id.* It is noteworthy that the California Supreme Court, in *Stewart v. Stewart*, 199 Cal. 318, 249 P. 197 (1926), made statements fully in accord with the language from *Arnett* quoted in the text, and indicated that such always had been the law in California:

[T]he interest of the wife in the property of the community . . . while it has not yet reached the status of a vested interest therein, is and has always been . . . a much more definite and present interest than is that of an ordinary heir. She has . . . rights therein which have been always safeguarded against the fraudulent or inconsiderate acts of her husband with relation thereto and for the assertion and safeguarding of which he has been given access to appropriate judicial remedies

199 Cal. at 342-43, 249 P. at 207.

In 1927, section 161a of the Civil Code was enacted by Law of April 28, 1927, ch. 265, § 1, [1927] Cal. Stat. 484, as amended CAL. CIV. CODE § 5105 (West Supp. 1975) which provided that:

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband . . . . This section shall be construed as defining the respective interests and rights of husband and wife in the community property.

This section survives as Civil Code section 5105, but was amended in 1973, effective January 1, 1975, to delete the reference to management and control by the husband. Law of October 1, 1973, ch. 987, § 4, [1973] Cal. Stat. 1898, amending CAL. CIV. CODE § 5105 (West 1970).

72. Armstrong, *supra* note 24, at 495.

73. 191 Cal. 601, 218 P. 22 (1923).

74. Law of May 23, 1917, ch. 583, § 2, [1917] Cal. Stat. 829 (now CAL. CIV. CODE § 5127 (West Supp. 1975)).

75. Armstrong, *supra* note 24, at 494.



“strongly suggests that a challenge of [the California Supreme Court’s] constitutional theory would have been sympathetically received by the United States Supreme Court”<sup>76</sup> at least as early as 1911. Indeed, the California Supreme Court, in its first opinion in *In re Estate of Thornton*<sup>77</sup> (*Thornton I*), appeared to recognize the unsoundness of the constitutional dogma of *Spreckels* and its progeny, and, even in the second *In re Estate of Thornton*<sup>78</sup> (*Thornton II*) opinion, arguably recognized that the DPA really represented only a “rule of property.”

*B. The Doctrine of Prospective Application and Reclassification Legislation: Estate of Thornton and Probate Code Section 201.5*

The *Thornton* controversy involved 1917 and 1923 amendments to then-section 164 (present section 5110) of the Civil Code,<sup>79</sup> which represented the first attempts to legislate with respect to what is now termed “quasi-community property.”<sup>80</sup>

In 1917, the legislature amended section 164 so as to define as community property any property within California’s jurisdiction (*i.e.*, California realty and personal property wherever situated) acquired by married persons while domiciled elsewhere, which would have been community property had the parties been domiciled in California at the time of acquisition.<sup>81</sup> In other words, what would have been the separate property of the acquiring spouse in the state of domicile at the time of acquisition was reclassified as community property upon establishment of the marital domicile in California. This legislation afforded the protection of California community property law to married persons who, upon establishing domicile in California, lost the protection of the marital property laws of the former domicile, and who, absent the legislation, would have had no protection in California.<sup>82</sup>

76. 19 P.2d 778 (Cal. 1933), *vacated*, 1 Cal. 2d 1, 33 P.2d 1 (1934).

77. 1 Cal. 2d 1, 33 P.2d 1 (1934).

78. Law of May 23, 1917, ch. 581, § 1, [1917] Cal. Stat. 827 (now CAL. CIV. CODE § 5110 (West Supp. 1975)).

79. Law of June 14, 1923, ch. 360, § 1, [1923] Cal. Stat. 746 (now CAL. CIV. CODE § 5110 (West Supp. 1975)).

80. CAL. CIV. CODE § 4803 (West 1970); *see* CAL. PROB. CODE ANN. § 201.5 (West 1956). A full discussion of quasi-community property is beyond the scope of this article. For an exhaustive treatment, *see* Schreter, “*Quasi-Community Property*” in *the Conflict of Laws*, 50 CALIF. L. REV. 206 (1962).

81. Law of May 23, 1917, ch. 581, § 1, [1917] Cal. Stat. 827 (now CAL. CIV. CODE § 5110 (West Supp. 1975)).

82. Thus, while on dissolution of a marriage, each spouse is awarded one half of the community assets (CAL. CIV. CODE § 4800 (West 1970)), neither spouse is awarded any of the separate property of the other. On death of a married person, the surviving

The 1917 legislation was held inapplicable to property brought to California prior to its passage in *Estate of Frees*.<sup>83</sup> In 1923,<sup>84</sup> the legislature "supplemented and clarified the amendment by the use of appropriate words to make its provisions apply . . . [to the defined class of property] whether brought into the state before or after passage of the act."<sup>85</sup> In *Estate of Drishaus*,<sup>86</sup> it was again held that the legislation could not apply to property reaching a California domicile prior to its passage.

In *Thornton*, domicile was established in California in 1919, the property involved having been acquired as the husband's separate property under Montana law between 1885 and 1919. In 1929, he died testate, still domiciled in California, attempting by his will to dispose of all said property as his separate property to someone other than his wife. Mrs. Thornton petitioned for distribution of one half of the property under Probate Code section 201, alleging that it was community property under Civil Code section 164, as amended in 1917.

In *Thornton I*, the supreme court, holding amended section 164 effective to give the surviving spouse a community property interest under Probate Code section 201, stated:

[E]ven if . . . [section 164] does constitute a deprivation of a property right in the constitutional sense . . . *such legislation is permissible under the power of the Legislature to control and regulate the marriage relation and its incidental property rights.*<sup>87</sup>

This seems to represent a clear recognition by the supreme court "that the question of whether . . . [a] marital property right . . . is or is not *vested* is not the controlling . . . question in constitutional review,"<sup>88</sup>

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spouse takes one half of the community property of right, the other one half being subject to the testamentary disposition of the decedent. CAL. PROB. CODE ANN. § 201 (West 1956). As to separate property, however, the surviving spouse shares only in event of the decedent's intestacy. *E.g.*, CAL. PROB. CODE ANN. § 221 (West 1956). Civil Code section 4803 and Probate Code section 201.5 are designed to remedy this situation as to property which would have been community property had the parties been domiciled in California at the time of its acquisition. CAL. CIV. CODE § 4803 (West 1970); CAL. PROB. CODE ANN. § 201.5 (West 1956).

83. 187 Cal. 150, 201 P. 112 (1921).

84. Law of May 23, 1917, ch. 581, § 1, [1917] Cal. Stat. 827 (now CAL. CIV. CODE § 5110 (West Supp. 1975)).

85. *In re Estate of Thornton*, 1 Cal. 2d 1, 4, 33 P.2d 1, 2 (1934).

86. 199 Cal. 369, 249 P. 515 (1926).

87. 19 P.2d 778, 784 (Cal. 1933), *vacated*, 1 Cal. 2d 1, 33 P.2d 1 (1934) (emphasis added).

88. *Armstrong*, *supra* note 24, at 495.

and that vested rights may, in proper circumstances, be impaired *with* due process of law.<sup>89</sup> In Professor Armstrong's words:

The constitutional question, on principle, . . . would seem to be, not whether a vested right is impaired by a marital property law change, but whether such a change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment.

. . . .

The stability of the marital unit, while of course not dependent exclusively upon marital property rules, is not uninfluenced by them. So complete is the concern of the state in the preservation of its basic institution, . . . that there would seem to be no field of regulation that would be more obviously within the limits of legislative action than that of the marital institution and its incidents.<sup>90</sup>

On rehearing in 1934 the court reversed its ruling in *Thornton I* and held, in *Thornton II*,<sup>91</sup> that the amendments to section 164 were unconstitutional. Professor Armstrong asserts that it is implicit in the decision in *Thornton II* that the court really was continuing to recognize the DPA merely as a "rule of property,"<sup>92</sup> and that the court reversed itself not because "[i]t had ceased to believe in the constitutional theory"<sup>93</sup> expounded in *Thornton I*,<sup>94</sup> but

because section 164 accorded less protection in his marital property rights to the husband who accumulated his property elsewhere than . . . under *Spreckels* and its progeny, we accorded to the husband who acquired . . . property here.<sup>95</sup>

In other words, since, under *Spreckels*, property rights of married persons who acquired property while domiciled in California were governed by the law in effect on the date of acquisition and could not be affected by subsequent statutory changes, the court felt it could not

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89. *Id.*

90. *Id.* at 496. It seems clear that there should be "no substantial constitutional objection," on due process grounds, "to effective revision by the legislature of the methods it employs to protect its legitimate interest in the marital relationship, including the property rights incident thereto." Knutson, *supra* note 46, at 267. See Addison v. Addison, 62 Cal. 2d 558, 566, 399 P.2d 897, 902, 43 Cal. Rptr. 97, 102 (1965).

91. 1 Cal. 2d 1, 33 P.2d 1 (1934).

92. Armstrong, *supra* note 24, at 501.

93. *Id.* at 502.

94. See text accompanying note 87, *supra*.

95. Armstrong, *supra* note 24, at 502. It should be noted that, while the *Thornton* facts happened to involve the husband's property, section 164 applied equally to both husbands and wives. The *Spreckels* line of cases all happened to involve legislation which increased the rights of wives while limiting those of husbands; however, the due process dogma would have been applicable equally had the facts been reversed.

uphold legislation which purported to alter property rights of married persons when the property had been acquired while domiciled in another state and the rights of the parties with respect to such property previously had been determined under the laws of the other state.<sup>96</sup>

As authority for this point, Professor Armstrong quotes the following language from the opinion:

*"So long as we are bound by the holding that to limit the rights of one spouse by increasing the right of the other in property acquired, by their united labors, is the disturbance of a vested right, we entertain no doubt of the application of at least two provisions of the Fourteenth Amendment to the Constitution of the United States. If the right of a husband, a citizen of California, as to his separate property, is a vested one and may not be impaired or taken by California law, then to disturb in the same manner the same property right of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him, is clearly to abridge the privileges and immunities of the citizen."*<sup>97</sup>

The italicized language in the quotation apparently represents the basis for Professor Armstrong's assertions that the court in *Thornton II* viewed the DPA as merely a "rule of property,"<sup>98</sup> to which it was bound

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96. This of course ignores proper state-interest analysis as well as the basic question. To assume that marital property rights were "vested" under the laws of the domicile at the time of acquisition and cannot be altered in any way upon establishing domicile in California is just as faulty as the assumption of *Spreckels*, that rights with respect to community property are "vested" and thus cannot be altered by subsequent legislation. "[B]y characterizing the right as 'vested,' the court simply assumed the conclusion: 'a right is vested when it has been so far perfected that it cannot be taken away by statute.'" Knutson, *supra* note 46, at 267, quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 696 (1960).

Moreover, with respect to the *Thornton* controversy, the court, in insisting that the property earned by the husband in Montana had to remain his separate property in California, actually altered property rights and expectations substantially, since the wife would have had dower rights with respect to the property under Montana law, whereas those rights were lost upon the change of domicile to California and the attendant classification of the property as "separate" under California law. Bodenheimer, *supra* note 46, at 579-80; see Knutson, *supra* note 46, at 269 n.223. See also notes 81 & 82 *supra* and accompanying text.

If the court in *Thornton II* truly felt the DPA to be merely a "rule of property," it might have upheld the legislation in question, since the legislature had acted specifically to provide for "retroactivity," and invited the legislature so to provide with regard to changes affecting management and control of community property.

97. 1 Cal. 2d 1, 5, 33 P.2d 1, 3 (1934), as quoted in Armstrong, *supra* note 24, at 502-03.

98. Armstrong, *supra* note 24, at 501.

in the absence of expressed legislative intent to the contrary,<sup>99</sup> and that "privileges and immunities, rather than due process considerations became the major basis for the decision."<sup>100</sup> At no point in the opinion, however, is the court critical of the doctrinal basis of the DPA. Indeed, the court stated the question involved in the case to be

the competency of the state to pass such a statute in view of certain clear, related, and co-ordinate inhibitions of section 1 of the 14th amendment to the Constitution of the United States and the *due process* provision of article 1, section 13, of the state Constitution.<sup>101</sup>

Furthermore, it should be recalled that the court spoke of the applicability of "two provisions of the 14th amendment,"<sup>102</sup> the second of these, mentioned immediately following the language quoted by Professor Armstrong, was the due process clause.<sup>103</sup> It seems, therefore, that while the holding in *Thornton II* may be based on alternative grounds, and certainly is somewhat confusing, it does not represent nearly the implied repudiation of the DPA which Professor Armstrong asserts.<sup>104</sup> This conclusion would seem to be affirmed by the fact that the supreme court applied the DPA ten years after *Thornton II*, in *Boyd v. Oser*.<sup>105</sup>

Justice Langdon, in a strong dissent in *Thornton II*,<sup>106</sup> agreed that "the section under consideration is unconstitutional in so far as it attempts to diminish the husband's property rights during his lifetime . . ." <sup>107</sup> but would have reached a different result on the facts of the case. Since Mr. Thornton was dead, Justice Langdon viewed the case solely as involving rights of intestate succession and testamentary disposition, with the widow's claim involving rights to succession under section 201 of the Probate Code, as broadened by the classificatory language of section 164 of the Civil Code, representing the sole issue.<sup>108</sup>

In Justice Langdon's words:

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99. See *Boyd v. Oser*, 23 Cal. 2d 613, 623, 145 P.2d 312, 318 (1944) (Traynor, J., concurring).

100. Bodenheimer, *supra* note 46, at 580, citing Armstrong, *supra* note 24, at 502-03. Professor Bodenheimer, if she does not agree with this interpretation, at least is uncritical of it. See *id.* at 580-81.

101. 1 Cal. 2d 1, 4, 33 P.2d 1, 2 (1934) (emphasis added).

102. *Id.* at 5, 33 P.2d at 3.

103. *Id.*

104. The supreme court, in *Addison v. Addison*, 62 Cal. 2d 558, 564-65, 399 P.2d 897, 901, 43 Cal. Rptr. 97, 101 (1965), stated that: "The underlying rationale of the majority was the same in *Thornton* as it had been since *Spreckels v. Spreckels* . . ."

105. 23 Cal. 2d 613, 145 P.2d 312 (1944).

106. 1 Cal. 2d 1, 5-7, 33 P.2d 1, 3-4 (1934) (Langdon, J., dissenting).

107. *Id.* at 6, 33 P.2d at 3.

108. *Id.* at 6-7, 33 P.2d at 3.

William Thornton is dead and has no property rights. . . .

. . . The issue is whether the state of California may require that *upon the death* of a decedent, certain property owned by him and brought into this state shall be subject to the same rules of testamentary disposition and succession as community property acquired in this state. . . . [T]he rights of testamentary disposition and of succession are wholly subject to statutory control, and may be enlarged, limited or abolished without infringing upon the constitutional guaranty of due process of law. . . .<sup>109</sup>

In 1935, the legislature, following the theory of Justice Langdon's dissent in *Thornton II*, adopted section 201.5 of the Probate Code.<sup>110</sup> This section covers property within California's jurisdiction, which was acquired by the decedent while domiciled elsewhere, but would have been community property of the decedent and the surviving spouse had they been domiciled in California at the time of the acquisition. It provides that "*upon the death*" of a married person domiciled in California, one half of such property "shall belong to the surviving spouse," the other one half being subject to the testamentary disposition of the decedent, and descending to the surviving spouse in the event of intestacy.<sup>111</sup>

The section is contained in the Probate Code, and is phrased entirely as a succession statute. There is no mention of "reclassification," and the section is not operative until triggered by the occurrence of a crucial event—death of a married person domiciled in California. At that point, the state's interest in regulating succession rights of property within its jurisdiction belonging to its deceased domiciliaries outweighs any interest or expectation the decedent might have had in exercising dead-hand control by way of testamentary disposition. Any property which was separate property under the law of the domicile at the time of acquisition (and which remained such) is distributed in a certain manner (the same manner as community property). While the validity of

109. *Id.* (emphasis added). It is interesting to note that Justice Langdon apparently viewed the majority's holding as based, at least in part, on grounds of denial of due process.

110. Law of July 30, 1935, ch. 831, § 1, [1935] Cal. Stat. 2248 (now CAL. PROB. CODE ANN. § 201.5 (West 1956)).

111. CAL. PROB. CODE ANN. § 201.5 (West 1956) (emphasis added).

The distributory scheme under this section is exactly the same as that for community property under Probate Code section 201 (CAL. PROB. CODE ANN. § 201 (West 1956)), and the property subject to distribution is the same as that which the legislature had attempted to define as "community property" in the legislation declared unconstitutional in *Thornton II*.

section 201.5 as a succession statute has been upheld,<sup>112</sup> the DPA has been applied to limit its applicability to cases where the spouse who acquired the wealth while the parties were domiciled outside California is the decedent.<sup>113</sup> In a case where the non-acquiring spouse was the decedent, and had attempted to leave half of the non-California source property of the other spouse by will to someone else, *Thornton II* was held controlling, and section 201.5 constitutionally could not apply.<sup>114</sup>

C. *The Doctrine of Prospective Application and "Quasi-Community Property" Legislation: Addison v. Addison*

In 1961, the legislature deleted from section 164 of the Civil Code the classificatory language relating to property acquired while domiciled in another state,<sup>115</sup> which remained on the books notwithstanding the decision in *Thornton II*, and added section 140.5 (as amended, section 4803) to the Civil Code.<sup>116</sup> The constitutionality of section 140.5 was tested and upheld in 1965 in *Addison v. Addison*.<sup>117</sup>

Section 140.5 defined as "quasi-community property"<sup>118</sup> that property within California's jurisdiction<sup>119</sup> which would have been community property had the acquiring spouse been domiciled in California at the time of acquisition. Such property remains the separate property of the acquiring spouse even after domicile is established in California, and is not treated as "quasi-community property" until the occurrence of a "crucial event" in California—dissolution of the marriage or legal sepa-

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112. *E.g., In re Miller*, 31 Cal. 2d 191, 187 P.2d 722 (1947).

113. *Paley v. Bank of America*, 159 Cal. App. 2d 500, 324 P.2d 35 (1958).

114. *Id.* The reasoning is very similar to that in *Boyd v. Oser*, 23 Cal. 2d 613, 145 P.2d 312 (1944), and *McKay v. Lauriston*, 204 Cal. 557, 269 P. 519 (1928).

115. Law of June 1, 1961, ch. 636, § 1, [1961] Cal. Stat. 1838 (now CAL. CIV. CODE § 5110 (West Supp. 1975)).

116. Law of June 1, 1961, ch. 636, § 2, [1961] Cal. Stat. 1838 (now CAL. CIV. CODE § 4803 (West Supp. 1975)).

117. 62 Cal. 2d 558, 399 P.2d 897, 43 Cal Rptr. 97 (1965).

118. The property defined as "quasi-community property" was, at the time of enactment of section 140.5, exactly the same property dealt with, for purposes of succession, by Probate Code section 201.5. CAL. PROB. CODE ANN. § 201.5 (West 1956). Since numerous other sections of the Civil Code refer to this class of property, it would be cumbersome to include the not-altogether-elegant definitional language in every section of reference, hence the term "quasi-community property." See CAL. CIV. CODE §§ 4452, 4800, 4800.5, 4805, 4807, 4808, 4810, 5132 (West Supp. 1975).

119. The section has since been amended to include within the definition of "quasi-community property" real property situated in other states, which is technically outside California's jurisdiction. CAL. CIV. CODE § 4803 (West Supp. 1975). Special provision is made for distribution of such property on dissolution, CAL. CIV. CODE § 4800.5 (West Supp. 1975).

ration of the parties.<sup>120</sup> At that time, such property is divided in the same manner as community property.<sup>121</sup>

In *Addison*,<sup>122</sup> the parties moved to California in 1949, bringing with them substantial assets accumulated as a result of the husband's business enterprises in Illinois. These assets were the husband's property under Illinois law, and thus were his separate property under California law.<sup>123</sup> In a divorce action filed in 1961, Mrs. Addison urged the applicability of the newly-enacted "quasi-community property" legislation to the Illinois-source property in question. The supreme court, in an opinion by Justice Peters, agreed, upholding the constitutionality of section 140.5. Although *Addison* overrules neither *Spreckels* nor *Thornton*, Professor Knutson has stated that "both cases have lost their precedential value,"<sup>124</sup> while Professor Bodenheimer has said that "there is no question that [the] opinion taken in its entirety represents an almost complete break with the past,"<sup>125</sup> and that "Justice Peters clearly overruled the *Spreckels* case, whether he did so expressly or not."<sup>126</sup>

Justice Peters' opinion in *Addison* mentioned *Spreckels* only once in connection with the due process argument:

The underlying rationale of the majority was the same in *Thornton* as it had been since *Spreckels v. Spreckels*, . . . which established, by a concession of counsel, that changes in the community property system which affected "vested interests" could not constitutionally be applied retroactively but must be limited to prospective application.<sup>127</sup>

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120. Civil Code section 4803 is silent on this point (CAL. CIV. CODE § 4803 (West Supp. 1975)), but that is the necessary implication of Civil Code section 4804 (*id.* § 4804), and was the interpretation accorded the predecessor of section 4103, section 140.5, by the supreme court in *Addison v. Addison*, 62 Cal. 2d 558, 566, 399 P.2d 897, 902, 43 Cal. Rptr. 97, 102 (1965).

121. CAL. CIV. CODE §§ 4800, 4800.5 (West Supp. 1975).

122. 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965).

123. *Id.* at 561-62, 399 P.2d at 898-99, 43 Cal. Rptr. at 98-99; see *In re Estate of O'Connor*, 218 Cal. 518, 23 P.2d 1031 (1933); *Kraemer v. Kraemer*, 52 Cal. 302 (1877); cf. *George v. Ransom*, 15 Cal. 322 (1860).

124. Knutson, *supra* note 46, at 271.

125. Bodenheimer, *supra* note 46, at 582.

126. *Id.* at 585.

127. 62 Cal. 2d 558, 564-65, 399 P.2d 897, 901, 43 Cal. Rptr. 97, 101 (1965). It is clear that, in noting that the *Spreckels* decision was based on a concession of counsel, Justice Peters was questioning the doctrinal validity of the DPA and even the precedential value of *Spreckels*. At only one other point, however, does the *Addison* opinion mention *Spreckels* and the unbroken line of DPA cases which followed it. It was argued in *Addison* that since, under the *Spreckels* doctrine, California held invalid legislation which would alter the vested property rights of its own citizens, it must accord the same treatment to citizens of other states under the privileges and immunities clause of article



Justice Peters also noted that "the constitutional doctrine announced in *Estate of Thornton* . . . has been questioned,"<sup>128</sup> and that its correctness "is open to challenge,"<sup>129</sup> citing with apparent approval<sup>130</sup> Justice Traynor's concurring opinion in *Boyd v. Oser*<sup>131</sup> and the learned commentary of Professor Armstrong and others.<sup>132</sup>

Rather than overrule *Thornton II*, however, the court in *Addison* went on to distinguish it both in terms of the argument relating to denial of due process and of an argument relating to alleged abridgement of the privileges and immunities clause of the fourteenth amendment. The basis of distinction is the same as to both constitutional arguments.<sup>133</sup> While the legislation at issue in *Thornton* was general classificatory legislation,

the concept of quasi-community property is applicable . . . [o]nly if, after acquisition of domicile in this state, certain acts or events occur which give rise to an action for divorce or separate maintenance. These acts or events are not necessarily connected with a change of domicile at all.<sup>134</sup>

Without citation of authority, and without reference to the *Spreckels* rule that marital property rights are fixed permanently by the law in effect on the date of acquisition, *Addison* adopted a peculiar and "unprecedented"<sup>135</sup> definition of retroactivity. It held that the legislation in question was being applied prospectively only, since it "neither creates nor alters rights except upon divorce or separate mainte-

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IV, section 2 of the United States Constitution. This argument was rejected, without further reference to *Spreckels*, with the observation that:

"[T]he privileges and immunities clause is not an absolute. . . ." In the case at bar, [Mrs. Addison], as a former nondomiciliary of California, is a member of a class of people who lost the protection afforded them in Illinois had they sought a divorce there before leaving that state. . . . She has lost that protection, and is thus in need of protection from California. Hence, the discrimination, if there be such, is reasonable, and not of the type article IV of the federal Constitution seeks to enjoin.

62 Cal. 2d at 568-69, 399 P.2d at 903-04, 43 Cal. Rptr. at 103-04.

128. *Id.* at 565, 399 P.2d at 901, 43 Cal. Rptr. at 101. Apparently the "constitutional doctrine" to which Justice Peters refers is the DPA. The *Spreckels* rule was not directly at issue in *Addison*, however, since the facts involved acquisitions of separate property while domiciled in another state, and Mr. Addison was relying on *Thornton II*.

129. *Id.* at 565-66, 399 P.2d at 901, 43 Cal. Rptr. at 101.

130. *Id.* at 565, 399 P.2d at 901, 43 Cal. Rptr. at 101.

131. *Id.* See *Boyd v. Oser*, 23 Cal. 2d 613, 623, 145 P.2d 312, 318 (1944) (Traynor, J., concurring).

132. 62 Cal. 2d at 565-66, 399 P.2d at 901, 43 Cal. Rptr. at 101.

133. *Id.* at 566, 568, 399 P.2d at 902, 903, 43 Cal. Rptr. at 102, 103.

134. *Id.* at 566, 399 P.2d at 902, 43 Cal. Rptr. at 102.

135. Knutson, *supra* note 46, at 270.

nance,"<sup>136</sup> and "[t]he judgment of divorce was granted after the effective date of the legislation."<sup>137</sup>

While the court thus managed to avoid a direct confrontation with *Spreckels*, the fact remains that the property in question was the husband's separate property under Illinois law and that, absent the legislation, it would have remained so under California law notwithstanding a California divorce action, in which none of it would have been awarded to the wife. Thus, there was "retroactive application," and the legislation operated to divest one spouse of property in which the other spouse otherwise would have had no interest. This is recognized implicitly in the court's earlier discussion of the due process problem.

*Addison* rejected the argument that the "quasi-community property" legislation was violative of due process and thus unconstitutional, stating that Mr. Addison "ha[d] not been deprived of a vested right without due process."<sup>138</sup> The court quoted with approval<sup>139</sup> Professor Armstrong's due process analysis<sup>140</sup> to the effect that vested rights may be impaired *with* due process of law, under the police power, the proper test being "not whether a vested right is impaired by a marital property law change, but whether such a change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment."<sup>141</sup>

The *Addison* court noted the "sociological problem"<sup>142</sup> to which the "quasi-community property" legislation was addressed—that of the loss of marital property rights associated with a change of domicile to California.<sup>143</sup> It held that "where the innocent party would otherwise be left unprotected,"<sup>144</sup> the state of the matrimonial domicile at the

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136. 62 Cal. 2d at 569, 399 P.2d at 904, 43 Cal. Rptr. at 104.

137. *Id.* The court in *In re Marriage of Bouquet*, 16 Cal. 3d 583, 593 n.10, 546 P.2d 1371, 1377 n.10, 128 Cal. Rptr. 427, 433 n.10 (1976), refers to the language from *Addison* quoted in the text as a "cryptic passage" by which the court "probably intended to convey the modest message that the court was not applying the 1961 legislation in a way that would disturb judgments handed down prior to its effective date on the basis of the then prevailing law."

138. *Id.* at 566, 399 P.2d at 902, 43 Cal. Rptr. at 102. Mr. Addison obviously *had* been deprived of a "vested right."

139. *Id.*

140. Armstrong, *supra* note 24, at 495-96; *see* notes 88-90 *supra* and accompanying text.

141. Armstrong, *supra* note 24, at 496.

142. 62 Cal. 2d at 562, 399 P.2d at 899, 43 Cal. Rptr. at 99.

143. *Id.* at 569, 399 P.2d at 904, 43 Cal. Rptr. at 104.

144. *Id.* at 567, 399 P.2d at 903, 43 Cal. Rptr. at 103.

dissolution of the marriage has "a very substantial interest"<sup>145</sup> in the matrimonial property of the parties, so that it may "provide for a fair and equitable distribution of the marital property"<sup>146</sup> without violating the due process clauses of either the fourteenth amendment or the California constitution. In support of its analysis of the state's substantial interest, the court quoted a United States Supreme Court decision, *Williams v. North Carolina*:<sup>147</sup>

"Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few commanding problems in the field of domestic relations with which the state must deal."<sup>148</sup>

As a result of the due process analysis of *Addison*, Professor Knutson has stated that "[t]he sweeping generalization that 'vested rights may not be impaired or destroyed by subsequent legislation' is no longer the law of California."<sup>149</sup> It is clear from Justice Peters' opinion that, while *Addison* substituted a "modern" due process test for the dogmatic approach of *Spreckels* and the other DPA cases, Professor Bodenheimer's statement that "Justice Peters clearly overruled the *Spreckels* case . . ." <sup>150</sup> is far too sweeping.

Even though the *Addison* test is available as a measure of due process for statutory enactments which alter management and control of community property, *Addison* is distinguishable from the DPA cases both on its facts and in terms of the statute involved and does not overrule *Spreckels*. Thus, while it holds that alterations in marital property rights "are permissible *on divorce* in order to effectuate the State's interest in providing for 'a fair and equitable division of the marital property,'" <sup>151</sup> it "is not helpful . . . [with regard to other] circumstances under which the spouses' interests in property can be altered by retroactive enactments."<sup>152</sup>

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145. *Id.*

146. *Id.*

147. 317 U.S. 287 (1942).

148. *Id.* at 298, quoted in 62 Cal. 2d at 567, 399 P.2d at 902, 43 Cal. Rptr. at 102.

149. Knutson, *supra* note 46, at 271, quoting *McKay v. Lauriston*, 204 Cal. 557, 269 P. 519 (1928).

150. Bodenheimer, *supra* note 46, at 585.

151. Knutson, *supra* note 46, at 271, quoting *Addison v. Addison*, 62 Cal. 2d at 567, 399 P.2d at 902, 43 Cal. Rptr. at 102.

152. Knutson, *supra* note 46, at 271.

The state's interest in terms of the "quasi-community property" legislation lies in extending the protection of California law to an otherwise unprotected spouse. This legislation applies to those cases in which the property in question, had the parties been domiciled in California at the time of acquisition, would have been viewed as having been acquired through the co-equal contributions of the members of the marital partnership. Since the property thus would have been classified as community property, rather than as the separate property of the spouse who happened to be "in the marketplace," it is to be divided equally upon dissolution. Even though Probate Code section 201.5 was upheld on another theory—as a succession statute<sup>153</sup>—the same interest-analysis is applicable. At least one half of the defined property goes to the surviving spouse, as if it were community property. This disposition is provided in order to prevent the decedent from making a testamentary disposition of all of the otherwise separate property in favor of some third party, which might leave the survivor penniless even though he or she contributed to the acquisition as a member of the marital partnership.

This same state interest—that of protecting the otherwise unprotected—is not present with respect to the recent management and control amendments.<sup>154</sup> Indeed, with one possible exception,<sup>155</sup> these changes do not appear to extend *any* additional "protection" to either spouse.<sup>156</sup>

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153. *In re Miller*, 31 Cal. 2d 191, 187 P.2d 722 (1947).

154. Compare CAL. CIV. CODE §§ 5125, 5127 (West Supp. 1975) with Former §§ 5125, 5127, *supra* note 12. See also Former § 5124, *supra* note 13.

155. See CAL. CIV. CODE § 5125(e) (West Supp. 1975), which, for the first time, codifies the duty of each spouse to act in "good faith" in the management and control of the community property.

This sub-section is peculiar, in that, while it refers to "the" community property, it is contained in the section relating to management and control of community personal property; no similar provision appears in section 5127, the section relating to management and control of community real property. *Id.* § 5127. It has been suggested that section 5125(e) relates to the "business management" exception of section 5125(d). Kahn & Frimmer, *supra* note 10, at 517-18; Reppy, *supra* note 10, at 1014-17; see CAL. CIV. CODE § 5125(d) (West Supp. 1975); note 17 *supra*; notes 33 & 34 *supra* and accompanying text.

Moreover, the spouse exercising management and control of community property has been held by the courts to be under a duty to act in "good faith." See *Williams v. Williams*, 14 Cal. App. 3d 560, 92 Cal. Rptr. 385 (1971), and authorities cited therein. Since the legislature could have used language in section 5125(e) similar to that in section 5103, which specifically imposes the fiduciary duties of a trustee upon each spouse with respect to inter-spousal agreements regarding property (CAL. CIV. CODE § 5103 (West 1970)), but did not do so, it is unclear to what extent section 5125(e) adds anything to existing law. See Kahn & Frimmer, *supra* note 10, at 519.

156. Knutson, *supra* note 46, at 272, makes the point that the requisite state interest

Thus, the availability of the *Addison* due process analysis does not automatically pave the way for avoidance of the *Spreckels* result, even though it softens or eliminates the dogmatic, deterministic approach of *Spreckels*.

#### IV. DISCARDING THE DOCTRINE: THE 1975 MANAGEMENT AND CONTROL AMENDMENTS

##### A. *The Doctrine of Prospective Application as a "Rule of Property": The Police Power Argument*

Justice Traynor argued that the DPA should be viewed as a "rule of property" rather than a doctrine of constitutional necessity.<sup>157</sup> Acceptance of this proposition is implicit in Justice Peters' opinion in *Addison*.<sup>158</sup> Nonetheless, so long as one accepts the basic proposition which led to the *Spreckels* result—that the right to management and control of community property is itself a vested property right—the due process argument remains.<sup>159</sup>

Thus, in order to uphold the application of the 1975 management and control amendments to all community property, whenever acquired,

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would be present in an instance where a management and control amendment extended additional protection to the non-managing spouse during the existence of the marriage.

Under pre-1975 law, as to community personal property, the non-managing spouse was afforded protection by provisions prohibiting gifts of such property, under the management and control of the other spouse, without his or her consent. Former § 5125, *supra* note 12; Former § 5124, *supra* note 13. Under the new law, with community personal property generally under the management and control of "either spouse," although section 5125 is rearranged and there are some changes in wording, that basic protection seems to be continued unchanged. Compare Former § 5125, *supra* note 12, and Former § 5124, *supra* note 13, with CAL. CIV. CODE § 5125(b),(c) (West Supp. 1975).

As to community real property, the pre-1975 law afforded the wife protection by requiring that she join in executing instruments by which such property was conveyed (with or without consideration), leased for longer than one year, or encumbered. Former § 5127, *supra* note 12. The same protection is afforded each spouse under the new law by its provision that, although "either spouse has the management and control of the community real property," "both spouses" must join in executing any such instruments. CAL. CIV. CODE § 5127 (West Supp. 1975).

157. *Boyd v. Oser*, 23 Cal. 2d 613, 623, 145 P.2d 312, 318 (1944) (Traynor, J., concurring).

158. 62 Cal. 2d at 565-66, 399 P.2d at 901, 43 Cal. Rptr. at 101.

159. Professor Bonanno, writing in 1974, accepts the basic proposition of *Spreckels*, and seems to view the due process argument as formidable. Bonanno, *supra* note 10, at 102.

Professor Armstrong, while she did not view the due process argument as formidable even in 1945, acknowledged its presence even as she urged adoption of Justice Traynor's position. See Armstrong, *supra* note 24, at 495-96, 505.

it would be necessary to find that "retroactive application" of the amendments was justified as a valid exercise of the "police power" for the general welfare. In such case, rather than an impairment of property rights without due process, there would be an impairment "with due process"—*i.e.*, no unconstitutional impairment.<sup>160</sup> Under the *Addison* formulation, this would necessitate a finding that "retroactive application" of the amendments "reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment,"<sup>161</sup> and "an inquiry . . . into whether, as applied, [the amendments are] 'capricious,' 'invidious,' or 'without rational and substantial relation to the object of the legislation.'"<sup>162</sup>

The legislation extending application of the "equal rights" management and control amendments to all community property, whenever acquired,<sup>163</sup> offers what can best be described as a "grab bag" of justifications for the extension.<sup>164</sup> Among these are the findings that the extension "entails important social and economic considerations,"<sup>165</sup> "is necessary to achieve social and economic equality and facilitate commercial transactions,"<sup>166</sup> and that "the right to manage and control community property is not a fundamental right which may not be divested by the Legislature. . . ."<sup>167</sup>

All of this may boil down to an assertion by the legislature that, even though the right of a married person to management and control of previously acquired community property itself constitutes a property right, the state's interest in promoting social and economic equality of the spouses and facilitating commercial transactions<sup>168</sup> is important

160. See *Armstrong*, *supra* note 24, at 495-96, 505.

161. 62 Cal. 2d at 566, 399 P.2d at 902, 43 Cal. Rptr. at 102, quoting *Armstrong*, *supra* note 24, at 496.

162. *Knutson*, *supra* note 46, at 271.

163. CAL. CIV. CODE §§ 5125, 5127 (West Supp. 1975).

164. Law of Sept. 23, 1974, ch. 1206, § 1, [1974] Cal. Stats. 2609. These justifications are further discussed at text accompanying notes 282-92 *infra*. The present discussion relates only to the due process argument.

165. *Id.*

166. *Id.*

167. *Id.* The present discussion will assume that this peculiar language constitutes recognition that the right to management and control is a vested property right of some sort, since otherwise there would be no due process issue. Further analysis of the quoted language follows at notes 282-328 *infra* and accompanying text.

168. "Facilitating commercial transactions" apparently refers to the proposition that it will be easier for married women to get credit after January 1, 1975, since "the liability of community property for the debts of the spouses has been coextensive with the right to manage and control community property . . ." *Id.* See *Reppy*, *supra* note 10, at 1007-08.

enough to justify impairment of such previously vested rights as a valid exercise of the police power.

The state's interest in promoting social and economic equality of married persons with respect to their<sup>169</sup> community property should be sufficient to justify impairment of the expectations of either spouse with respect to exclusive management and control of community property acquired prior to January 1, 1975.<sup>170</sup> This may follow particularly since, "[s]tatutory law notwithstanding,"<sup>171</sup> "a form of a joint and several management system . . . ,"<sup>172</sup> in which the parties "consult closely concerning major purchases,"<sup>173</sup> "is, in fact, the system by which most married couples today handle family finances."<sup>174</sup>

### B. *The Doctrine of Prospective Application as a "Rule of Construction"*

Since none of the earlier management and control amendments stated a legislative intent that they be applied retroactively—that is, to commu-

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Indeed, Civil Code section 5116 was amended to provide that: "The property of the community is liable for the contracts of either spouse which are made after marriage and prior to or on or after January 1, 1975." CAL. CIV. CODE § 5116 (West Supp. 1975). Law of Sept. 23, 1974, ch. 1206, § 1 [1974] Cal. Stats. 2609 declares that this extension of liability of community property for debts of the spouses "does not impair the rights of creditors or the interests of the spouses . . . ."

Professor Bonanno, writing prior to the enactment of the 1974 amendments, but after enactment of the original "equal rights" management and control amendments in 1973, discusses the constitutional issues inherent in such extension of liability. *See generally* Bonanno, *supra* note 10. He points out that "creditors can only benefit from the widest possible extension to both spouses of management and control of the community property," and characterizes creditors as "donee beneficiaries" of the management and control amendments. *Id.* at 101.

In Community Property classes, this author, not entirely facetiously, has characterized the amendments as the "Creditors' Rights Act of 1975." Professor Bonanno speaks of the "strange alliance . . . that brings these conservatively oriented 'creditor-donee-beneficiaries' and feminists together in the vanguard of the women's liberation movement." *Id.*

169. Keeping in mind that, at least since 1927, the respective interests of the spouses as to community property have been "present, existing and equal." CAL. CIV. CODE § 5105 (West Supp. 1975).

170. *Mismanagement Litigation*, *supra* note 9, at 737.

171. Bingaman: *Equal Rights*, *supra* note 2, at 44.

172. *Id.*

173. *Id.* at 45.

174. *Id.* at 44. Professor Armstrong argued that:

[C]ompelling public policy considerations would support the legislature in making any change in marital property rules which could reasonably be expected to work an adjustment of the husband and wife's property interest which *most spouses would approve* as more satisfactory and more equitable than the previous rule.

Armstrong, *supra* note 24, at 496.

nity property (or the fruits thereof) acquired prior to their effective dates—it was always possible for the courts to construe them as applying only prospectively. Professor Armstrong argued that the DPA was merely a “rule of construction”<sup>175</sup> which, “in deference to long usage has become a rule of property.”<sup>176</sup>

[T]he decisions which settled the meaning of each of the successive changes while offering constitutional necessity as the *supporting* reason for the extreme “prospective” operation construction which it applied, could rest securely upon the basis of mere construction of legislative intent. The legislature in no case presented wording which was inescapably retrospective, and after a “prospective operation” construction by the courts, the legislature in no case altered the language of the measure to make it read retrospectively and so force a facing of the constitutional issue . . . .<sup>177</sup>

As to the 1975 management and control amendments, the legislature has clearly indicated, both in the statutes themselves<sup>178</sup> and in a preamble,<sup>179</sup> its intent that they apply retroactively. So long as rights to management and control of community property are viewed as “vested property rights”;<sup>180</sup> however, such a declaration of legislative intent does not solve the problem, but merely “force[s] a facing of the constitutional issue.”<sup>181</sup>

### C. *The Impact of In re Marriage of Bouquet*

In 1971, the legislature amended section 5118 of the Civil Code.<sup>182</sup> The amendment provided that earnings and accumulations of either spouse, while living separate and apart from the other spouse, would be separate property. Prior to March 4, 1972, the effective date of the amendment, earnings and accumulations of the wife living separate and

175. Armstrong, *supra* note 24, at 503-04.

176. *Id.* at 505.

177. *Id.* at 504.

178. CAL. CIV. CODE §§ 5125, 5127 (West Supp. 1975). *See also* CAL. CIV. CODE § 5116 (West Supp. 1975) (liability of community property for claims of creditors).

179. Law of Sept. 23, 1974, ch. 1206, § 1, [1974] Cal. Stat. 2609.

180. *See* Bonanno, *supra* note 10, at 102-03.

181. Armstrong, *supra* note 24, at 504.

182. Law of Dec. 10, 1971, ch. 1699, § 1, [1971] Cal. Stat. 3640, *as amended* CAL. CIV. CODE § 5118 (West Supp. 1975). Former section 5118 (CAL. CIV. CODE § 5118 (West 1970)) was enacted as part of the Family Law Act (Law of Sept. 6, 1969, ch. 1608, § 8, [1969] Cal. Stat. 3342), and was based on long-standing prior law. *See* CAL. CIV. CODE § 169 (1872). Section 5118 represents an exception to the general rule that acquisitions during marriage are community property. *See* CAL. CIV. CODE § 5110 (West Supp. 1975).



apart were her separate property, but those of the husband were community property, to which the "present, existing and equal" interest of the wife attached at the time of acquisition. Although the amendment did not, on its face, provide for retroactive application, the California Supreme Court, in *In re Marriage of Bouquet*,<sup>183</sup> accepted Mr. Bouquet's claim for retroactive application and held that his earnings, acquired from the date of separation in 1969 to the date of dissolution in 1972, were his separate property.

This contention had been rejected by the trial court, which found that the law in effect on the date of acquisition controlled as to classification of the property in question.<sup>184</sup> The court of appeal affirmed,<sup>185</sup> finding retroactive application of amended section 5118 unjustified even though the amendment functioned to accord to the husband's earnings the same treatment as that previously accorded those of the wife.<sup>186</sup> It based its decision on two grounds. First, noting that the statute was silent on its face as to retroactivity, the court invoked the "fundamental rule" of statutory construction that "a statute will not be construed to operate retroactively unless the legislative intent cannot otherwise be satisfied,"<sup>187</sup> or, stated another way, "that a statute will not be deemed retroactive unless such intent *clearly appears from the statute itself*."<sup>188</sup> Second, the court held that in the absence of a showing of a proper exercise of the police power, purported retroactive application of marital property legislation so as to impair vested rights of the spouses would fall within the *Spreckels*<sup>189</sup> rule as a deprivation of property without due process.<sup>190</sup> As to this latter point, the court stated:

[E]ven if we accept the proposition that the traditional police power of the state does include the right to interfere with vested property rights and that this right extends to a possible impairment of the vested rights of the spouses by a marital property law change . . ., it is manifestly clear that even under *Addison* such divestiture or impairment of vested rights may be justified only whenever it is necessary to protect health, safety, morals or general well-being of the people. [A]ppellant fall[s] fatally short of indicating that the suggested retroactive application of

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183. 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976).

184. *Id.* at 586, 546 P.2d at 1372, 128 Cal. Rptr. at 428.

185. *In re Marriage of Bouquet*, 119 Cal. Rptr. 67 (Ct. App. 1975).

186. *Id.* at 68-69.

187. *Id.* at 68, *citing, e.g.*, *Balen v. Peralta Junior College Dist.*, 11 Cal. 3d 821, 828, 523 P.2d 629, 633, 114 Cal. Rptr. 589, 593 (1974).

188. *Id.* at 69.

189. *Spreckels v. Spreckles*, 116 Cal. 339, 48 P. 228 (1897).

190. 119 Cal. Rptr. at 70.

amended section 5118 would promote the above described aims to any extent. It goes without saying that in the absence of such showing the purported retroactive application would be altogether ineffective even if such intent had been clearly expressed by the Legislature.<sup>191</sup>

Since "[t]he status of property as community or separate is normally determined at the time of its acquisition,"<sup>192</sup> retroactive application of amended section 5118 in *Bouquet* clearly affected ownership rights. As the husband had earned money from the date of separation to the effective date of the amendment, it had been classified as community property, to which "vested property rights"<sup>193</sup> of the wife attached. Professor Reppy, writing after the court of appeal decision in *Bouquet*, noted that "the clearest property-taking would result"<sup>194</sup> from retroactive application of the amendment, and expressed surprise that the supreme court granted a hearing.<sup>195</sup> Nonetheless, it was obvious when the hearing was granted that the supreme court opinion could be of immense import in terms of the 1975 management and control amendments.

A decision by the supreme court that amended section 5118 could not operate retroactively may have been based on either of two grounds. Neither ground necessarily would have meant that the management and control amendments could not so apply. The supreme court might have held that amended section 5118 could not apply retroactively simply because legislative intent in that regard was lacking, leaving open the question as to what the decision would have been had there been expressed legislative intent. Since the legislature expressed retroactive intent in the management and control amendments,<sup>196</sup> such a narrow holding in *Bouquet* would have been inapplicable to future litigation concerning the retroactivity of sections 5125 and 5127.<sup>197</sup> Alternatively, the court might have held that amended section 5118 could not have applied retroactively even if the legislature had so intended. But this broader holding need not have meant that amended sections 5125 and 5127 could not so apply, since retroactive application of amended section 5118 clearly affects ownership, while retroactive application of

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191. *Id.* (citations omitted).

192. *In re Marriage of Bouquet*, 16 Cal. 3d 583, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976).

193. *Id.*; CAL. CIV. CODE § 5105 (West Supp. 1975).

194. Reppy, *supra* note 10, at 1080-81, n.335.

195. *Id.*

196. Law of Sept. 23, 1974, ch. 1206, § 1, [1974] Cal. Stat. 2609; CAL. CIV. CODE §§ 5125, 5127 (West Supp. 1975).

197. CAL. CIV. CODE §§ 5125, 5127 (West Supp. 1975).

the management and control amendments arguably does not.<sup>198</sup> However, the supreme court held first, that the legislature intended the amendment to operate retroactively, and second, that such retroactive application would not constitute a deprivation of property without due process, "[n]otwithstanding the fact that it denudes the wife of certain vested property rights . . . ."<sup>199</sup>

The supreme court had to find that the legislature intended amended section 5118 to apply retroactively before reaching the due process issue. Since legislative intent in that regard is express in the management and control amendments, the first part of the *Bouquet* opinion is not technically relevant to the present discussion. It is worthy of brief note, however, since it reveals the court's determination to reach the due process issue.<sup>200</sup>

The supreme court noted the general presumption against retroactive application of statutes,<sup>201</sup> but stated that it must be "subordinated . . . to the transcendent canon of statutory construction that the design of the Legislature be given effect."<sup>202</sup> Relying on *In re Estrada*,<sup>203</sup> the court stated that "[w]here the Legislature has not set forth in so many words what it intended,"<sup>204</sup> the presumption against retroactive application of an amendment "is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent."<sup>205</sup> Conceding the issue to be "a close one,"<sup>206</sup> the court

198. As to this point, see the discussion beginning at text accompanying notes 289-316 *infra*.

199. 16 Cal. 3d at 591-92, 546 P.2d at 1376, 128 Cal. Rptr. at 432.

200. Reppy states that in analyzing the California cases dealing with the general presumption against retroactivity, "one can find support for a strong or weak presumption to enable the court to reach the desired result." Reppy, *supra* note 10, at 1009 n.114.

201. 16 Cal. 3d at 587, 546 P.2d at 1372, 128 Cal. Rptr. at 428.

202. *Id.* at 587, 546 P.2d at 1373, 128 Cal. Rptr. at 429.

203. 63 Cal. 2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965).

204. 16 Cal. 3d at 587, 546 P.2d at 1373, 128 Cal. Rptr. 429, quoting *In re Estrada*, 63 Cal. 2d 740, 746, 408 P.2d 948, 952, 48 Cal. Rptr. 172, 176 (1965).

205. *Id.* (emphasis deleted). This interpretation of the presumption finds support in other cases. See, e.g., Reppy, *supra* note 10, at 1009 n.114, and cases cited therein. The court's reliance on *Estrada* and treatment of the presumption as "weak" was predicted by Professor Reppy as to certain provisions of the 1975 reform legislation where legislative intent was unclear. See *id.* at 1029. I suspect, however, that he would not have predicted the same treatment in *Bouquet*, since the legislation at issue clearly involved a "taking." See *id.* at 1080-81 n.335. The court also ignored the language of such cases as, for example, *Balen v. Peralta Junior College Dist.*, 11 Cal. 3d 821, 828, 523 P.2d 629, 622, 114 Cal. Rptr. 589, 593 (1974), and *Di Genova v. State Bd. of Educ.*, 57 Cal. 2d 167, 367 P.2d 865, 18 Cal. Rptr. 369 (1962).

206. 16 Cal. 3d at 588, 546 P.2d at 1373, 128 Cal. Rptr. at 429.

examined the "pertinent factors" and found two indicators of legislative intent that the statute apply retroactively. In the absence of conflicting indicia, the court concluded that "the Legislature intended amended section 5118 to operate retroactively."<sup>207</sup>

One of these indicia of legislative intent, upon which Mr. Bouquet primarily relied, was a letter from Assemblyman Hayes, author of the bill which amended section 5118, to Senator Mills, President Pro Tempore of the Senate.<sup>208</sup> The letter was printed in the Senate Journal pursuant to a resolution passed on the motion of Senator Grunsky.<sup>209</sup> Even though the letter was "irrelevant" insofar as the personal views of Assemblyman Hayes were concerned,<sup>210</sup> it was indicative of legislative intent in two ways. First, it cast "some light on the shrouded legislative history of the amendment."<sup>211</sup> Since Assemblyman Hayes stated in the letter that it was his intention that the amendment apply retroactively, and that "was the argument [he] used in obtaining passage of the measure . . .,"<sup>212</sup> the letter supported retroactive application of the amendment by shedding light upon the legislative debates; in turn, "[d]ebates surrounding the enactment of a bill may illuminate its interpretation."<sup>213</sup> Second, Senator Grunsky's motion, while technically a motion to print, clearly indicated that the letter was to be printed as a "letter of legislative intent."<sup>214</sup>

Mr. Bouquet also suggested that a "pertinent factor" supporting retroactivity of amended section 5118 was the "patent unconstitutionality" of its predecessor.<sup>215</sup> Although the constitutionality of the prior statute was not at issue, the supreme court observed that

it would be subject to strong constitutional challenge. Prior to the amendment, section 5118 blatantly discriminated against the husband during periods of separation: the earnings of the wife were her separate property while those of the husband belonged to the community. It seems doubtful that the state could conjure a rational relation between this unequal treatment and any legitimate state interest. It is even less

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207. *Id.* at 591, 546 P.2d at 1375-76, 128 Cal. Rptr. at 431-32.

208. The letter is reprinted in a footnote to the court's opinion. *Id.* at 589 n.5, 546 P.2d at 1374 n.5, 128 Cal. Rptr. 430 n.5.

209. *Id.*

210. *Id.* at 589, 546 P.2d at 1374, 128 Cal. Rptr. at 430.

211. *Id.* at 590, 546 P.2d at 1374-75, 128 Cal. Rptr. at 430-31.

212. *Id.* at 589 n.5, 546 P.2d at 1374 n.5, 128 Cal. Rptr. at 430 n.5.

213. *Id.* at 590, 546 P.2d at 1373, 128 Cal. Rptr. at 431.

214. *Id.*

215. *Id.* at 588, 546 P.2d at 1373, 128 Cal. Rptr. at 429.

likely that the state could sustain the greater showing required by our recognition that sex based classifications are inherently suspect.<sup>216</sup>

Since the legislature is presumed to be aware of judicial decisions, the court assumed that it was aware of "the dubious constitutional stature of the sexually discriminating old law."<sup>217</sup> It was therefore reasonably inferable that "the Legislature wished to replace the possibly infirm law with its constitutionally unobjectionable successor as soon as possible."<sup>218</sup> This inference as to legislative intent may be somewhat less reasonable in light of the fact that other features of the community property system as it existed at the time of the amendment to section 5118—particularly those dealing with management and control and creditors' rights—also were of dubious constitutionality.<sup>219</sup> Yet, as to those features, the legislature conducted extensive hearings<sup>220</sup> prior to enactment of the original "equal rights" management and control/creditors' rights bill in 1973,<sup>221</sup> the effectiveness of which was delayed until 1975. Then, in 1974, the legislature acted specifically to provide for retroactivity of those reforms.<sup>222</sup>

One might wish for more than weak or speculative circumstantial evidence of legislative intent that a statute be applied retroactively—particularly when, as a result of a finding of such intent, the supreme court is forced to face the issue of whether retroactive application effects a "taking" in the constitutional sense. Indeed, it would seem that a court normally would avoid the constitutional issue whenever possible by applying a rather strict presumption against retroactivity in cases where the legislature's intent is neither expressed nor strongly indicated.<sup>223</sup> Even though the constitutionality of former section 5118 was not at issue in *Bouquet*, the court clearly indicated its feeling that, prior to the

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216. *Id.*

217. *Id.* The only case cited by the court in discussing the "dubious constitutional stature" of the old law is *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). The amendment to section 5118 was enacted on December 10, 1971 (Law of Dec. 10, 1971, ch. 1699, § 1, [1971] Cal. Stat. 3640). AB 1549, introduced by Assemblyman Hayes on April 2, 1971, predated the decision in *Sail'er Inn*, which was rendered on May 27, 1971. *Bouquet* fails to note these facts.

218. 16 Cal. 3d at 588, 546 P.2d at 1374, 128 Cal. Rptr. at 430. While the inference was "hardly conclusive," it was "of some value in ascertaining the Legislature's intent." *Id.* The court had earlier labeled Mr. Bouquet's argument on this point "somewhat speculative," (*id.*) so that we wind up with a "somewhat speculative reasonable inference."

219. *See, e.g., Management and Control, supra* note 1, at 899-906; *see generally* notes 4-7 *supra* and accompanying text.

220. *Mismanagement Litigation, supra* note 9, at 723-24 & n.4.

221. Law of Oct. 1, 1973, ch. 987, [1973] Cal. Stat. 1897.

222. Law of Sept. 23, 1974, ch. 1206, [1974] Cal. Stat. 2609.

223. *See* Reppy, *supra* note 10, at 1009.

amendment, the section was violative of equal protection.<sup>224</sup> This feeling may explain why the court was willing to find retroactive intent on the basis of weak indicia and go on to dispose of the due process issue.

The court noted that "[t]he vesting of property rights . . . does not render them immutable . . . ,"<sup>225</sup> and that in many instances the police power justifies the impairment of property rights " "with due process of law." ' ' "<sup>226</sup> Examples of factors to be considered in determining whether a retroactive law is violative of due process are

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, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.<sup>227</sup>

None of the enumerated factors dealing with reliance are mentioned again except in a footnote, where the supreme court stated that "the unfairness of the former law also casts doubt upon the legitimacy of reliance upon it."<sup>228</sup> Apparently no reliance was alleged. No facts except for names and dates are mentioned in the opinion, and the wife *agreed* that the amended section could be applied retroactively if such application was "necessary to subserve a sufficiently important state interest,"<sup>229</sup> although she obviously contended that no such interest was involved.<sup>230</sup>

In discussing the state's interest in retroactive application of amended section 5118, the court noted the "peculiar congruence"<sup>231</sup> between *Bouquet* and *Addison*,<sup>232</sup> and stated that *Addison* "conclusively establishes the constitutionality of applying amended section 5118 retroac-

224. See quotation in text accompanying note 217 *supra*. See also 16 Cal. 3d at 594 n.11, 546 P.2d at 1377 n.11, 128 Cal. Rptr. at 433 n.11, where the court speaks of the "patent unfairness of former section 5118."

225. 16 Cal. 3d at 592, 546 P.2d at 1376, 128 Cal. Rptr. at 432.

226. *Id.*, quoting *Addison v. Addison*, 62 Cal. 2d 558, 566, 399 P.2d 897, 901, 43 Cal. Rptr. 97, 101 (1965), quoting *Armstrong*, *supra* note 24, at 495.

227. 16 Cal. 3d at 592, 546 P.2d at 1376, 128 Cal. Rptr. at 432.

228. *Id.* at 594 n.11, 546 P.2d at 1377 n.11, 128 Cal. Rptr. at 433 n.11.

229. *Id.* at 593, 546 P.2d at 1376, 128 Cal. Rptr. at 432.

230. *Id.* at 593, 546 P.2d at 1377, 128 Cal. Rptr. at 433. See text accompanying notes 251-52 *infra*.

231. *Id.* at 594, 546 P.2d at 1378, 128 Cal. Rptr. at 434.

232. *Addison v. Addison*, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965). For an extended discussion of *Addison* and the legislation at issue therein see notes 115-56 *supra* and accompanying text.

tively.”<sup>233</sup> Since “*Addison* involved a factual pattern almost identical to that of the present case,”<sup>234</sup> retroactive application could be sustained “without protracted discussion.”<sup>235</sup> In *Addison*, “[t]he state’s paramount interest in the equitable distribution of marital property upon dissolution of the marriage . . . justified the impairment of the husband’s vested property rights.”<sup>236</sup> The court held that the same state interest justified infringement of the wife’s vested property rights in *Bouquet*.

[H]ere, as in *Addison*, the Legislature reallocated property rights in the course of its abiding supervision of marital property and dissolutions. Moreover, the legislation sprang in both cases from an appreciation of the rank injustice of the former law. The calculus of the costs and benefits of the retroactive application of amended section 5118, therefore, does not differ significantly from that implicit in *Addison*. . . . The divestiture of the wife’s property rights in the instant case is no more a taking of property without due process of law than was the divestiture of the husband’s property rights in *Addison*. The state’s interest in the equitable dissolution of the marital relationship supports this use of the police power to abrogate rights in marital property that derived from the patently unfair former law.<sup>237</sup>

The court’s emphasis on the “unfairness” of former section 5118 must be considered in light of its earlier observations as to the probable constitutional infirmity of the section.<sup>238</sup> Read in that light, the opinion means that the state’s power to regulate the marital relationship extends to the divestiture of one spouse’s property rights, in the interest of equality, when those rights had vested under a statute which was so patently “unfair” that it probably was unconstitutional. The opinion could be more broadly construed as suggesting that the legislature has plenary power to divest property rights when the law under which those rights vested is found, by the legislature or the court, to have been “unfair.”<sup>239</sup> There is danger in such an interpretation,<sup>240</sup> seemingly

233. 16 Cal. 3d at 593, 546 P.2d at 1377, 128 Cal. Rptr. at 433.

234. *Id.*

235. *Id.* at 594, 546 P.2d at 1378, 128 Cal. Rptr. at 434.

236. *Id.* at 593, 546 P.2d at 1377, 128 Cal. Rptr. at 433.

237. *Id.* at 594, 546 P.2d at 1377-78, 128 Cal. Rptr. at 433-34 (footnote omitted).

238. See text accompanying notes 217 & 224 *supra*.

239. This interpretation is possible since it was the *Bouquet* court, not the legislature, that made the finding of “unfairness.” The legislature made no findings at all. Moreover, the court never looked to the history of former section 5118 to determine whether there was a legitimate reason for the classificatory distinctions between the earnings and accumulations of husbands and wives during periods of separation. The reason probably had to do with the husband’s general duty to support the wife under California Civil

invited by the court's broadly worded opinion, which "overapplies" *Addison*. The narrower interpretation suggested above more properly places *Bouquet* in line with *Addison*.

Of all the cases discussed in this article, beginning with *Spreckels*,<sup>241</sup> *Bouquet* cites only *Addison* and the concurring opinion of Justice Traynor in *Boyd v. Oser*.<sup>242</sup> While citing Professor Reppy as one authority for the list of factors to be considered in determining whether retroactive application of a statute violates due process,<sup>243</sup> the court ignored his discussion of the *Bouquet* case itself.<sup>244</sup> The court also ignored *Jacquemart v. Jacquemart*<sup>245</sup> and *Ottinger v. Ottinger*,<sup>246</sup> two appellate court cases which held that legislation very similar to that at issue in *Bouquet* could not apply retroactively.<sup>247</sup> *Bouquet* thus seems

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Code section 5130, which was not repealed until January 1, 1975. Law of Sept. 23, 1974, ch. 1206, § 6, [1974] Cal. Stat. 2609. It may also have had to do with historical, economic reality (i.e., more husbands than wives had earnings) and sexist assumptions. See generally DEFUNIAK & VAUGHN, *supra* note 2, at 328-30. For criticism of statutes such as former section 5118 see generally *id.* at 108-12.

240. As an extreme example, suppose the legislature, in a frenzy of individualism, decided that it disapproved the basic theory of community property, since it was "unfair" that the contributions of a spouse who either was not "in the marketplace" or was earning less than the other spouse should be considered co-equal as a matter of law to the contributions of the latter. The legislature therefore decided to abolish the community property system, the abolition to apply retroactively. Since the prior law was "unfair," would the state's "abiding supervision of marital property," justify retroactive divestiture of all community property rights not finally adjudicated "without protracted discussion" by the court? Would the answer depend on the court's opinion as to what was and was not "fair"?

241. *Spreckels v. Spreckels*, 116 Cal. 339, 48 P. 228 (1897).

242. 23 Cal. 2d 613, 623, 145 P.2d 312, 318 (1944).

243. 16 Cal. 3d at 592, 546 P.2d at 1376, 128 Cal. Rptr. at 432, *citing, e.g.*, Reppy, *supra* note 10, at 1048-49.

244. Reppy, *supra* note 10, at 1080-81 n.335; see text accompanying notes 194-95 *supra*.

245. 125 Cal. App. 2d 122, 269 P.2d 951 (1954).

246. 141 Cal. App. 2d 220, 296 P.2d 347 (1956).

247. *Jacquemart* involved former section 169.1 of the Civil Code (enacted by Law of July 23, 1951, ch. 1700, § 12, [1951] Cal. Stat. 3913) which provided that a husband's earnings after a decree of separation, which had been classified as community property under prior law, were to be classified as separate property. *Ottinger* involved former section 175 of the Civil Code (enacted by Law of May 13, 1955, ch. 525, § 1, [1955] Cal. Stat. 999). Prior to that enactment, the husband's earnings were classified as community property in all instances where the parties were living separate and apart; section 175 provided that his earnings were to be classified as separate property in cases where he had been unjustifiably abandoned by his wife, and prior to an offer by her to return. In each case, the wife's earnings in the same situation had always been classified as separate property. Thus, each case would be decided differently even under the narrow interpretation of *Bouquet* suggested in the text.



to consign three quarters of a century of California jurisprudence to the scrap-heap of legal history with neither precise analysis nor even a nostalgic (if not fond) farewell wave. While there is respected opinion<sup>248</sup> to the effect that *Addison* overruled, for example, *Spreckels* and *Thornton II*,<sup>249</sup> it must be recalled that *Addison* distinguished *Thornton II* and never expressly overruled any prior cases.<sup>250</sup>

In *Spreckels*, counsel for the wife conceded that "if the husband is the owner of the property, then a statute which makes the right to dispose of it subject to the will of another is unconstitutional."<sup>251</sup> In *Bouquet*, counsel for the wife agreed "that amended section 5118 can be applied retroactively if such a retroactive application is necessary to subserve a sufficiently important state interest."<sup>252</sup> Thus, just as the concession of counsel in *Spreckels* obviated the need for discussion of the due process issue, counsel in *Bouquet* seems to have conceded on every aspect of the due process issue except for that of the importance of the state's interest.

Having noted that "*Addison* involved a factual pattern almost identical to that of the present case,"<sup>253</sup> and the "State's paramount interest in the equitable distribution of marital property upon dissolution of the marriage,"<sup>254</sup> the court went on to state, in a footnote:

We observed in *Addison* that "where the innocent party would otherwise be left unprotected the state has a very substantial interest and one sufficient to provide for a fair and equitable distribution of the marital property without running afoul of the due process clause of the Fourteenth Amendment." The patent unfairness of former section 5118 surely makes this an appropriate case for the use of the police power to redress retroactively inequitable property rules.<sup>255</sup>

The enactment of the "quasi-community property" legislation, considered in *Addison*,<sup>256</sup> was necessary for the protection of the non-acquiring spouse. Upon death of the acquiring spouse or dissolution of the marriage, the non-acquiring spouse had lost whatever protection he or she would have had under the law of the former marital domicile due to removal of the marital domicile to California. This was so because the

248. Bodenheimer, *supra* note 46, at 585; see Knutson, *supra* note 46, at 271.

249. *In re Estate of Thornton*, 1 Cal. 2d 1, 33 P.2d 1 (1934).

250. See notes 124-26, 133-34 *supra* and accompanying text.

251. 116 Cal. at 349, 48 P. at 231.

252. 16 Cal. 3d at 593, 546 P.2d at 1376, 128 Cal. Rptr. at 432. See text accompanying notes 229-30 *supra*.

253. *Id.* at 593, 546 P.2d at 1377, 128 Cal. Rptr. at 433.

254. *Id.*

255. *Id.* at 594 n.11, 546 P.2d at 1377 n.11, 128 Cal. Rptr. at 433 n.11.

256. CAL. CIV. CODE § 4803 (West 1970); CAL. PROB. CODE ANN. § 201.5 (West 1956).

California courts, applying the "tracing" or "source" doctrine of conflict of laws,<sup>257</sup> classified the property according to the law of the domicile at the time of acquisition.<sup>258</sup> However, California law (the law of the forum and current domicile) was deemed controlling as to distribution of property upon death<sup>259</sup> or divorce.<sup>260</sup> Thus, looking to the law of State X, the domicile at the date of acquisition, the California courts would note that State X was not a community property state, and classify the property, even though earned during marriage, as the separate property of the acquiring spouse. The courts then applied California law as to distribution of the property. However, as to California separate property, the non-acquiring spouse has no protection on the testate death of the acquiring spouse or upon dissolution of the marriage, since the community property system substitutes for the common-law or other statutory schemes of marital property rights. As to the same property, had the parties remained domiciled in State X, the non-acquiring spouse would have been protected by the laws of State X in the event of death of the acquiring spouse,<sup>261</sup> and may well have been protected in the event of dissolution.<sup>262</sup> Thus, the non-acquiring spouse lost the protection afforded by the law of State X and was unprotected under California law because of the California courts' characterization of the property according to the law of State X and distribution according to California law.<sup>263</sup> The "quasi-community property" legislation

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257. RESTATEMENT OF CONFLICT OF LAWS §§ 290-91 (1934).

258. *E.g.*, *In re Estate of Thornton*, 1 Cal. 2d 1, 33 P.2d 1 (1934); *In re Estate of O'Connor*, 218 Cal. 518, 23 P.2d 1031 (1933); *In re Estate of Niccolls*, 164 Cal. 368, 129 P. 278 (1912); *Latterner v. Latterner*, 121 Cal. App. 298, 8 P.2d 870 (1932).

259. *E.g.*, *In re Estate of O'Connor*, 218 Cal. 518, 23 P.2d 1031 (1933); *In re Estate of Niccolls*, 164 Cal. 368, 129 P. 278 (1912).

260. *Latterner v. Latterner*, 121 Cal. App. 298, 8 P.2d 870 (1932).

261. *E.g.*, *In re Estate of Thomson*, 1 Cal. 2d 1, 33 P.2d 1 (1934) ("dower" rights in Montana); *In re Estate of O'Connor*, 218 Cal. 518, 23 P.2d 1031 (1933) (widow's one third forced share in Indiana).

262. "[M]any common law jurisdictions have provided for the division of the separate property of the respective spouses in a manner which is 'just and reasonable' . . . ." *Addison v. Addison*, 62 Cal. 2d 558, 567, 399 P.2d 897, 902, 43 Cal. Rptr. 97, 102 (1965).

263. A recent Arizona dissolution case, *Rau v. Rau*, 432 P.2d 910 (Ariz. Ct. App. 1967), solved this problem by distributing the State X source property according to the law of State X. The California courts never reached this eminently sensible result—perhaps because the legislature recognized the problem so early that subsequent litigation centered on the constitutionality of the corrective legislation. Arizona subsequently enacted "quasi-community property" legislation applicable to dissolution cases—perhaps in the interest of uniformity of distribution; perhaps because, in *Rau*, part of the property distributed "equitably" under Illinois law would have been the wife's separate property even under Arizona law. *See* ARIZ. REV. STAT. ANN. § 25-318 (Supp. 1973).

was designed as a partial remedy<sup>264</sup> for this situation.

In *Addison*, the legislation afforded the wife an interest in property which was the husband's property under Illinois law, but which would have been community property had the parties been domiciled in California at the time of acquisition. Had the parties remained in Illinois, she would have been protected upon dissolution.<sup>265</sup> Clearly there could have been no constitutional objection had a California court, under choice-of-law principles, decided to apply Illinois law and effect an "equitable division" of the property.<sup>266</sup> The only issue presented in *Addison* was the constitutionality of remedial legislation, designed to effect uniformly "equitable divisions" without constant reference to the laws of other jurisdictions, and designed to extend protection to the otherwise unprotected.<sup>267</sup>

As far as can be determined from the few facts available in *Bouquet*, the facts of *Bouquet* and *Addison* are not "almost identical." *Addison* substituted "modern" due process analysis for the dogma of *Spreckels* and its progeny. Beyond that, the analysis set forth above reveals that *Addison* is of no help in deciding *Bouquet*. It is not enough simply to state that "the legislation sprang in both cases from an appreciation of the rank injustice of the former law."<sup>268</sup> Amended section 5118 may or may not have sprung from such an appreciation. The court had no way of knowing. The legislative history of the amendment is "shrouded,"<sup>269</sup> and Assemblyman Hayes's letter is silent on that point.<sup>270</sup> The only possible connection between the "unfair" former law and the legislature's motives in enacting the new law was the court's assumption, based

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264. Probate Code section 201.5 would not have remedied the situation in *In re Estate of O'Connor*, 218 Cal. 518, 23 P.2d 1031 (1933), since in that case the property was owned by the husband prior to marriage (and thus would have been his separate property even under California law), and the wife's one third forced share under Indiana law was characterized by the California court as not "vested." See CAL. PROB. CODE ANN. § 201.5 (West 1956). But see *Rau v. Rau*, 432 P.2d 910, 914 (Ariz. Ct. App. 1967):

If the mere act of removal of property from Illinois to Arizona could destroy an interest of the wife in that property, whether we call that interest "vested" or not, we conceive that any cry of lack of due process would have a clearer ring if voiced by the wife.

265. See authorities cited in the *Addison* opinion, 62 Cal. 2d at 567 n.11, 399 P.2d at 902 n.11, 43 Cal. Rptr. at 102 n.11; see also *Yoselle v. Yoselle*, 204 N.E.2d 129 (Ill. Ct. App. 1964).

266. See *Rau v. Rau*, 432 P.2d 910 (Ariz. Ct. App. 1967); notes 263-64 *supra*.

267. *Addison v. Addison*, 62 Cal. 2d 558, 566-67, 399 P.2d 897, 901-02, 43 Cal. Rptr. 97, 101-02 (1965).

268. 16 Cal. 3d at 594, 546 P.2d at 1377, 128 Cal. Rptr. at 433.

269. *Id.* at 591, 546 P.2d at 1374, 128 Cal. Rptr. at 430.

270. *Id.* at 589 n.5, 546 P.2d at 1374 n.5, 128 Cal. Rptr. at 430 n.5.

on the husband's equal protection argument, that there was a connection.

Nor is it enough simply to state that "[t]he divestiture of the wife's property rights in the instant case is no more a taking of property without due process of law than was the divestiture of the husband's property rights in *Addison*."<sup>271</sup> That is simply a statement of the issue in terms of a conclusion.<sup>272</sup> *Addison* involved an extension of the protection of the community property system to a class of persons otherwise unprotected. *Bouquet* involved a withdrawal of protection. The property in question was defined under the old law as community property, as to which the wife had a one-half interest; under the new law, it was defined as the husband's separate property, as to which she had no interest. Seen in that light, the issue was whether the protection of the marital property system may be withdrawn from a person whose rights have vested under the law previously in force. *Addison* obviously is not helpful in answering that question; nor should the mere fact that the law previously in force was "unfair" dictate an affirmative answer—surely not all property rights may be divested simply because they vested under a law subsequently deemed "unfair."

Since *Addison* clearly can not be said to be controlling on the facts, the only possible explanation for the *Bouquet* decision seems to be the court's opinion that former section 5118 was violative of equal protection,<sup>273</sup> and that such unconstitutionality was so obvious that California wives could not legitimately have relied upon "vested rights" acquired under it.<sup>274</sup> Unfortunately for the cause of clarity in jurisprudential development, the court clearly states that *Addison* is controlling,<sup>275</sup> yet

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271. *Id.* at 594, 546 P.2d at 1378, 128 Cal. Rptr. at 434.

272. The issue is whether property rights, even though "vested," may be divested in the particular case. It is not helpful to say that "since property rights may be divested [in *Addison*] they may be divested [in *Bouquet*]."

273. 16 Cal. 3d at 588, 546 P.2d at 1373, 128 Cal. Rptr. at 429. See text accompanying notes 217, 224, 238 *supra*.

274. 16 Cal. 3d at 594 n.11, 546 P.2d at 1377 n.11, 128 Cal. Rptr. at 433 n.11. Former section 5118 and its predecessor, section 169, had been continuously in force as the law of California since 1872. *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). The federal equal protection cases cited in note 5 *supra*, which have been most often used to support arguments that certain features of the California community property system were unconstitutional, were all decided since 1971. The Equal Rights Amendment was passed by Congress in 1972. H.R.J. Res. 208, 92d Cong., 2d Sess. (1972). It is difficult to see how reliance on former section 5118 would have been unjustified.

275. 16 Cal. 3d at 593, 594, 546 P.2d at 1377, 1378, 128 Cal. Rptr. at 433, 434.

its opinion as to the unconstitutionality of former section 5118 is rendered in connection with the husband's legislative intent argument.<sup>276</sup> This part of the opinion is bootstrapped into the due process discussion in a footnote,<sup>277</sup> where the court's opinion as to the legitimacy of reliance on the former section is also tucked away.<sup>278</sup>

If, after *Addison*, there was any doubt as to whether retroactive application of the 1975 management and control amendments would be upheld, it has been dispelled by *Bouquet*. Given the expressed retroactive intent of the legislature in the 1975 management and control amendments,<sup>279</sup> and their goal of achieving social and economic equality and facilitating credit transactions,<sup>280</sup> a *Bouquet/Addison* due process approach certainly means that the court will uphold retroactive application. In fact, since legislative intent would not be at issue, the *Bouquet* approach to such a case could lead to a per curiam opinion saying little more than "*Bouquet* is obviously controlling. (See also *Addison*.)" Further, even if the right to management and control of community property is viewed as a property right, the legislature's expressed intent, and the supporting reasons therefore<sup>281</sup> will certainly lead the court, applying *Bouquet*, to a decision allowing retroactive application. It is submitted, however, that the husband never should have been considered the "sole owner" of the community property, and that the right to management and control is not a "property right." When the issue arises, it is hoped that the court will not simply sweep *Spreckels* under the rug, but will, instead, write a searching opinion disposing of erroneous doctrine once and for all. The next section proposes alternative grounds for decision.

#### *D. An Alternate Ground for Decision: The Right to Management and Control of Community Property is Not a "Vested Property Right" in California*

If the right to management and control of community property is not a "vested property right," then any legislation adjusting management and control rights, clearly intended to operate "retroactively," should so operate. So long as the legislation did not purport to affect transactions

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276. *Id.* at 588, 546 P.2d at 1373, 128 Cal. Rptr. at 429.

277. *Id.* at 594 n.11, 546 P.2d at 1377 n.11, 128 Cal. Rptr. at 433 n.11.

278. *Id.*

279. CAL. CIV. CODE §§ 5125, 5127 (West Supp. 1975).

280. Law of Sept. 23, 1974, ch. 1206, § 1, [1974] Cal. Stat. 2609.

281. See notes 22-24, 163-74 *supra* and accompanying text.

entered into prior to its effective date,<sup>282</sup> no constitutional question would arise.

In its "grab bag" of justifications for "retroactive" application of the 1975 amendments, the legislature used somewhat confusing language which may leave doubt as to whether it considers a property right to be involved.<sup>283</sup> According to the preamble to the "retroactivity bill" enacted in 1974,

the right to manage and control community property is not a fundamental right which may not be divested by the Legislature and is not accorded the same status as the rights of the spouses in community property during marriage which are, and remain, present, existing, and equal . . . .<sup>284</sup>

To say that the right is not one "which may not be divested" is clearly to imply that it is "vested" to begin with. To the extent that "vested" simply means "has" (*i.e.*, a fixed, noncontingent right exercisable by an identifiable person), it goes without saying that management and control rights are "vested." Prior to January 1, 1975, each spouse *had* exclusive rights to management and control of certain items of community property;<sup>285</sup> after that date, neither spouse has such exclusive rights. Each spouse *has*, however, non-exclusive rights to management and control of all community property, subject to the co-equal rights of the other spouse, or exercisable together with the other spouse.<sup>286</sup> "Vested" is, however, one of the most loosely-used and least-understood terms in the legal lexicon.<sup>287</sup> As most often used, a "vested right" connotes a "protectible property right," the interference with which raises constitutional issues.<sup>288</sup>

The legislature also stated that the right to management and control is

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282. Law of Sept. 23, 1974, ch. 1206, § 7, [1974] Cal. Stat. 2609 provides: "This act shall not apply to or affect any act or transaction which occurred prior to January 1, 1975."

283. See Law of Sept. 23, 1974, ch. 1206, § 1, [1974] Cal. Stat. 2609.

284. *Id.* See CAL. CIV. CODE § 5105 (West Supp. 1975).

285. See Former § 5124, *supra* note 13; Former §§ 5125, 5127, *supra* note 12.

286. CAL. CIV. CODE §§ 5125, 5127 (West Supp. 1975).

287. See, *e.g.*, *In re Marriage of Loehr*, 114 Cal. Rptr. 536, 539 (Cal. App. 1974), *vacated*, 13 Cal. 3d 465, 531 P.2d 425, 119 Cal. Rptr. 113 (1975).

288. Our inherent distaste for retroactive application of legislative enactments would, perhaps, be obviated if, at least in the area under discussion, the courts would refrain from relying upon the 'vested rights' verbalization. In the case of the husband's management and control, for example, is it not more accurate to state that the husband does not have a 'vested right' to dispose of the community property as he sees fit, but rather [that] he has the responsibility, the duty, if you will, to manage it for the common good?

Knutson, *supra* note 46, at 272.

"not a fundamental right."<sup>289</sup> Since "property rights" are considered "fundamental rights" under our system, this language implies that management and control rights are not "property rights." The implication is reinforced when, in the same sentence, it is stated that the right to manage and control community property "is not accorded the same status as the rights of the spouses in community property . . . which are, and remain, present, existing, and equal. . . ."<sup>290</sup>

The "present, existing, and equal" formulation is taken from section 5105 of the Civil Code.<sup>291</sup> That section, first enacted in 1927<sup>292</sup> as section 161a, also provides that it "shall be construed as defining the respective interests and rights of husband and wife in the community property."<sup>293</sup> Since section 5105 accords to each spouse a "vested property right" in the community property<sup>294</sup> (at least as to such property acquired after 1927),<sup>295</sup> and the legislature has stated that management and control rights are "not accorded the same status"<sup>296</sup> as the rights of the spouses under section 5105, the best reading of the preamble to the 1974 "retroactivity legislation" would seem to be that the legislature does not consider management and control rights to be "property rights."<sup>297</sup> An examination of the development of California law on this subject will demonstrate that the legislature is correct in its assessment.

In *Spreckels*, the California Supreme Court stated that ". . . the husband is the absolute owner of the community property."<sup>298</sup> In reaching this conclusion, the court relied on *Panaud v. Jones*<sup>299</sup> and a Louisiana case, *Guice v. Lawrence*.<sup>300</sup> Both *Panaud* and *Guice* are said

289. Law of Sept. 23, 1974, ch. 1206, § 1, [1974] Cal. Stat. 2609.

290. *Id.*

291. CAL. CIV. CODE § 5105 (West Supp. 1975).

292. Law of April 28, 1927, ch. 265, § 1, [1927] Cal. Stat. 484.

293. CAL. CIV. CODE § 5105 (West Supp. 1975).

294. *In re Marriage of Bouquet*, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427; *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003 (1932); *Horton v. Horton*, 115 Cal. App. 2d 360, 252 P.2d 397 (1953); Bonanno, *supra* note 10, at 111; DEFUNIAK & VAUGHN, *supra* note 2, at 266-67; *see* Armstrong, *supra* note 24, at 482.

295. DEFUNIAK & VAUGHN, *supra* note 2, at 266-67; *see* Bonanno, *supra* note 10, at 112; Armstrong, *supra* note 24, at 482.

296. Law of Sept. 23, 1974, ch. 1206, § 1, [1974] Cal. Stat. 2609.

297. Professor Bonanno seems to argue that the right to management and control is a "property right." *See* Bonanno, *supra* note 10, at 99, 100, 102-03; *cf. id.* at 104; Armstrong, *supra* note 24, at 482-83. *But see* Bonanno, *supra* note 10, at 111-12.

298. *Spreckels v. Spreckels*, 116 Cal. 339, 343, 48 P. 228, 229 (1897).

299. 1 Cal. 488 (1851).

300. 2 La. Ann. 226 (1847).

to have been based on a "mistranslation and misinterpretation"<sup>301</sup> of Spanish law. According to DeFuniak and Vaughn, Spanish law recognized the husband and wife as equal and present owners of the community property,<sup>302</sup> even though the husband was charged with its administration during the marriage.<sup>303</sup>

By 1926, the Supreme Court of Louisiana, in *Phillips v. Phillips*,<sup>304</sup> had recognized the "error"<sup>305</sup> of *Guice*, and stated that it had been, in effect, overruled.<sup>306</sup> Furthermore the court stated that language to the effect that the wife's interest was only an expectancy constituted "loose expressions."<sup>307</sup> According to the Louisiana court, "[t]he wife's half interest in the community property is not a mere expectancy during the marriage . . . . The title for half of the community property is vested in the wife the moment it is acquired . . . ."<sup>308</sup>

California Civil Code section 682, enacted in 1872, provides that:

The ownership of property by several persons is either:

1. Of joint interests;
2. Of partnership interests;
3. Of interests in common;
4. Of community interest of husband and wife.<sup>309</sup>

301. DEFUNIAK & VAUGHN, *supra* note 2, at 264. See *id.* at 263-67. See also Reppy, *supra* note 10, at 1055-59. Although *Panaud* did not cite *Guice*, it apparently relied on the same "erroneous translation." See DEFUNIAK & VAUGHN, *supra* note 2, at 264-65, where it is also stated that *Panaud* relied upon *Guice*. The fact remains that *Spreckels* relied upon both *Panaud* and *Guice*, and that a leading early California case, *Van Maren v. Johnsen*, 15 Cal. 308, 311 (1860), also relied upon *Guice*. To the effect that *Van Maren* was incorrect in its characterization of the wife's interest as an "expectancy," see G. MCKAY, COMMUNITY PROPERTY 785-86 (2d ed. 1925).

302. DEFUNIAK & VAUGHN, *supra* note 2, at 241-45.

303. *Id.* at 250-56.

304. 107 So. 584 (La. 1926).

305. *Id.* at 588.

306. *Id.* at 589.

307. *Id.* at 588.

308. *Id.* In *Creech v. Capital Mack, Inc.*, 287 So. 2d 497 (La. 1973), the Louisiana Supreme Court discussed at length the question of the interests of husband and wife with respect to community property. *Creech* involved the availability of community property to satisfy antenuptial debts of the husband. Holding that community property is liable for such debts, but that "the husband must account for the enrichment of his separate estate by the discharge of antenuptial debts upon dissolution of the community" (*id.* at 510), the court stated that *Phillips* "is overruled or modified to the extent it conflicts with this opinion." *Id.* However, insofar as *Phillips* held that the wife had an "ownership interest" in the community property during the marriage, that holding is reaffirmed (although refined) by *Creech*. *Id.* at 508-10.

309. CAL. CIV. CODE § 682 (West 1970).



Section 5104, originally enacted as section 161 in 1872, provides that: "A husband and wife may hold property as joint tenants, tenants in common, or as community property."<sup>310</sup> These sections seem clearly to recognize that the California wife had a true "ownership interest" in the community property. This view is bolstered by the fact that in 1871 legislation was proposed which, in cases of "fraudulent transfers, gross mismanagement or profligate waste" of community property by the husband, would have given the wife an action to: (1) obtain sole management and control of the community property; or (2) have a trustee appointed to manage it; or (3) obtain a partition of the community property, with the part awarded to each spouse becoming his or her separate property.<sup>311</sup> Even though this section was not included in the Civil Code of 1872, the fact that it was even considered, together with the presence in that code of sections 682 and 161, indicates that the legislature, at least, did not consider the wife's interest a "mere expectancy."

The insistence of the California courts that the husband was the "owner" of the community property doubtless resulted, at least in part, from their failure to comprehend community property law as a civilian institution.<sup>312</sup> Applying common-law property concepts, the courts failed to distinguish between "ownership" and "control"<sup>313</sup> —even though it seems odd that minds trained in the law of trusts (itself an institution of the common law) could fail to perceive that one person could have a presently protectible interest in specific property while another person was charged with its administration.

The reasoning which led to adoption of the Doctrine of Prospective Application, as applied to management and control amendments, appears circular: The husband is the sole owner of the community property because he has sole powers of management and control; since he is the sole owner, his powers of management and control cannot be lessened to any degree, because those powers are among the most important attributes of ownership. This "confusion between the practical effect of the husband's power and its legal ground"<sup>314</sup> in effect led to the conclusion that "because of a provision which simply pointed out

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310. CAL. CIV. CODE § 5104 (West 1970).

311. CAL. CIV. CODE § 178 (Gelwicks 1871), *quoted in Grant, supra* note 1, at 253-54.

312. DEFUNIAK & VAUGHN, *supra* note 2, at 258-59, 266.

313. *Id.*

314. *Arnett v. Reade*, 220 U.S. 311, 320 (1911).

how common property should be administered, . . . there was no common property to be administered,"<sup>315</sup> or, in the words of Mr. Justice Holmes, that "community is a partnership which begins only at its end."<sup>316</sup>

Consideration of the "retroactivity" feature of the 1975 management and control amendments will offer the present California Supreme Court the opportunity to overrule *Spreckels*<sup>317</sup> and other cases<sup>318</sup> insofar as they held the husband to have been the "owner" of the community property.<sup>319</sup> In addition the court will have the opportunity to declare that management and control rights are not "vested property rights," and may be diminished or altered by subsequent legislation.

The supreme court, however, need not go quite so far in order effectively to hold the 1975 management and control amendments applicable to all community property whenever acquired. Since 1927, at least as to post-1927 acquisitions, each spouse has had an equal, "vested property interest" in the community property.<sup>320</sup> The court could simply hold that, as to post-1927 community property, the spouse designated as "manager" has held a "bare power in trust for the community,"<sup>321</sup> but no greater property rights than the other spouse.<sup>322</sup> Thus the legislature would be perfectly competent to withdraw sole management and control

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315. *Warburton v. White*, 176 U.S. 484, 497 (1900).

316. *Arnett v. Reade*, 220 U.S. 311, 319 (1911).

317. *Spreckels v. Spreckels*, 116 Cal. 339, 48 P. 228 (1897).

318. *E.g.*, *Van Maren v. Johnson*, 15 Cal. 308 (1860); *Panaud v. Jones*, 1 Cal. 488 (1851).

319. Such a decision should have no unsettling effect on land titles, or on transactions completed in the distant past. Whether or not the husband was the sole "owner," he had certain statutory rights to control and disposition of community property at certain times. For example, prior to 1917 (and even after 1917, under the ruling in *Roberts v. Wehmeyer*, 191 Cal. 601, 218 P. 22 (1923), as to property acquired prior thereto) he could convey or encumber community realty without the wife's joinder, whereas after 1917 her joinder was required. No doubt need be cast on transactions completed under those rules. However, possibly complex tracing issues would be eliminated *in futuro*; for example, the present law would apply to all future conveyances of community realty, regardless of whether its source was traceable to pre-1917 assets.

320. CAL. CIV. CODE § 5105 (West Supp. 1975); *see* authorities cited in note 294 *supra*.

321. *Bonanno*, *supra* note 10, at 111.

322. To the author's knowledge, no one has ever seriously argued that the enactment of section 171c (later section 5124) in 1951, giving the wife management and control over, for example, her earnings, made her the "sole owner" of her earnings, or conferred upon her any greater "property rights" in them than those of her husband. In fact, that section specifically provided that it was *not* to be construed as "changing the respective interests of the husband and wife in such community property, as defined in Section 5105." Former § 5124, *supra* note 13.

power from one spouse and confer it upon both, since the respective property interests of the spouses would be the same regardless of who had management and control.<sup>323</sup> As was stated in *Holyoke v. Jackson*:<sup>324</sup>

Management and disposition may be vested in either one or both of the spouses. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community.<sup>325</sup>

The result of such a holding would leave intact the *Spreckels* rule that, as to pre-1927 community property, the wife had a "mere expectancy" and the husband's powers of management and control, as defined by the law in effect at the time of the acquisition, could not be affected by subsequent legislation. The practical effect of the holding, however, would be to make the 1975 management and control legislation applicable to all community property, since the *Spreckels* rule could apply only to Californians who were married prior to 1927.<sup>326</sup> In the few cases to which the *Spreckels* rule could apply, the proponent of the application of that rule (presumably the husband) would bear the burden of tracing the acquisition of the property in question or the corpus from which it derived to the pre-1927 period.<sup>327</sup> That burden should prove practically impossible in most cases.<sup>328</sup>

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323. Bonanno, *supra* note 10, at 111; see *Arnett v. Reade*, 220 U.S. 311 (1911); *Warburton v. White*, 176 U.S. 484 (1900).

324. 3 P. 841 (Wash. 1882).

325. *Id.* at 842.

326. Indeed, the last major pre-1927 management and control change to which the DPA was applied occurred in 1923 (involving amendments to what is now section 201 of the Probate Code). See notes 46-50 *supra* and accompanying text. See also note 54 *supra*. Other major changes took place in 1917 and 1891.

327. *Armstrong*, *supra* note 24, at 477; see notes 37-39 *supra* and accompanying text. A rebuttable presumption, by analogy to the "commingling cases," should apply, so that the 1975 law would be presumed applicable to all community property. The husband would then bear the burden of tracing to identify the pre-1927 property to which the *Spreckels* rule would apply. To the extent that there had been significant commingling of pre-1927 and post-1927 community property, so that precise tracing was impossible, the 1975 law would apply to the entire mass. See *Bonanno*, *supra* note 10, at 103; *Reppy*, *supra* note 10, at 1103-07; *In re Marriage of Mix*, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975); *See v. See*, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966).

328. See note 327 *supra* and authorities cited therein. Moreover, a presumption should apply that the source of any post-1927 acquisition was post-1927 community property. See *Bone v. Dwyer*, 74 Cal. App. 363, 240 P. 796 (1925); *Reppy*, *supra* note 10, at 1105-06.

## V. CONCLUSION

Since 1891, the California legislature has acted on several occasions to increase the rights and protections afforded the wife with respect to community property. Since 1927, the interests of the spouses in community property have been "equal," although, for most of that time, most community property has been under the management and control of the husband. At every step, the California courts have blocked full and immediate implementation of these legislative enactments through the unnecessary application of questionable constitutional doctrine. The legislature has "cooperated" in each case through its failure clearly to indicate its intent that the changes operate "retroactively." With the 1975 "equal rights" amendments, the legislature, in announcing its intent that they apply to all community property, whenever acquired, has offered the supreme court a clear chance to repudiate the tattered Doctrine of Prospective Application as it has applied to management and control amendments. That the court will do so seems clear from its decision in *In re Marriage of Bouquet*.<sup>329</sup> Rather than mechanistically apply *Bouquet*, which "over-interpreted" *Addison v. Addison*,<sup>330</sup> the court should seize the opportunity to reexamine the *Spreckels* doctrine and forever lay to rest old ghosts.

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329. 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976).

330. 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965).