The Constitution and "Liberated" Community Property in California -- Some Constitutional Issues and Problems Under the Newly Enacted Dymally Bill

By JACK F. BONANNO*

Introduction

On October 1, 1973, the governor of the state of California signed into law, effective January 1, 1975, a legislative enactment[1] that substantially revises, *inter alia*, numerous provisions of California law (principally the Civil Code), covering certain relationships between spouses with respect to their community property.[2] Frequently

---

* Assistant Professor of Law, University of California, Hastings College of the Law. The author wishes to acknowledge the capable research and editorial assistance of Edith Rae Matthai of the *Quarterly* editorial staff.

1. Cal. Stats. 1973, ch. 987, § 20 of the law provides:

Except as provided in Section 21, the provisions of this act shall be operative January 1, 1975.

Section 21 deals only with amendments to § 5116 of CAL. CIV. CODE (West 1970) under Assembly Bill 312 covering the liability of community property for debts contracted by the wife prior to Jan. 1, 1975, and the garnishment of a spouse's wages to pay for debts incurred by the other spouse after Jan. 1, 1975. Although the prevailing version of CAL. CIV. CODE § 5116 (West 1970) came from Assembly Bill 312, both bills reflect the legislative purpose that all community property will become fully liable only for debts contracted by either spouse after Jan. 1, 1975. Prior to that date, only property managed and controlled by the debtor spouse would generally be liable, although an exception is made in § 5116(b) to permit recovery by the wife's creditor against her earnings or separate property which have been commingled with other community property.

2. Amended by the new law are CAL. CIV. CODE §§ 5102, 5105, 5110, 5113.5, 5116, 5117, 5120, 5121, 5122, 5123, 5125, 5127, 5131, and 5132 (West 1970). The new law repeals former § 5101, providing that the husband was the head of the family with the power to choose any reasonable place or mode of living, and § 5124, allowing the wife to manage and control only community property stemming from earnings or personal injury damages acquired during marriage. The new law also adds CAL. CIV. CODE § 199, which limits the source of support of a child of a prior marriage to the earnings and separate property of the natural parent of said child. Also amended is

called the Dymally Bill after its principal author and supporter, State Senator Mervyn Dymally, an advocate of women's rights, this new law makes a fundamental change in the California community property system by giving to both spouses joint and several management and control[3] of the community property after January 1, 1975.[4] Although some changes are expected to be made by a "trailer bill" that will be introduced in the current session of the legislature,[5] the principle of joint and several management and control of the community property is likely to remain, with perhaps some modifications, and to go into effect on January 1, 1975.[6]

If the new form of management and control were to affect only property rights acquired *after* January 1, 1975, there would need to be concern only about the pragmatic question of whether joint and several management and control of the community property is more workable than the present system. Certainly, the legal, non-constitutional ramifications of such joint management and control are many and farreaching in their application and are worthy of extended dis-

§ 173000 of the CAL. WELF. & INST. CODE (West 1968) dealing with contributions of children, spouses and parents toward support of persons otherwise eligible for welfare aid.

3. As used in this article, "joint and several" management and control means that either spouse alone or both spouses jointly may exercise management and control over all of the community property. "Joint" management and control means that the spouses must act cooperatively or jointly as to the particular transaction involving management and control of the community property. One example of joint management and control of community property is contained in CAL. CIV. CODE § 5127 (West 1970), which required both spouses to join in executing any instrument by which community real property or any interest therein is leased for a period longer than one year, or is sold, conveyed, or encumbered. "Equal" management and control as used in this article means that each spouse would manage his or her half of the community property or would manage and control that community property which he or she was responsible for acquiring. Other articles have referred to equal management and control as a system in which each spouse acting alone can fully bind, dispose of, and control the entire community property. Note, *Equal Rights and Equal Protection: Who Has Management and Control?*, 46 S. CAL. L. REV. 892, 909 (1973).

4. Section 5125(b) under the Dymally Bill provides for the following exception to the rule of joint and several management and control: "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."

5. S.B. 1601 has been introduced in the current session of the California Legislature as a "spot bill" which will be left open for the insertion of the various provisions which will make up the "trailer bill" to amend the new law.

6. The author has been advised by Bion Gregory, Esq., the Chief Counsel for the California Senate Committee on Judiciary, that the "trailer bill" will merely carry technical amendments to the new law rather than provisions covering new subject matter or policies. The most important technical amendment will determine whether the provisions of the new law will apply retroactively.

cussion in other law review articles.[7] However, because the Dymally Bill generally makes no differentiation, for purposes of joint and several management and control, between community property acquired before January 1, 1975, and community property acquired on or after that date, a very serious constitutional question is raised as to the propriety of applying the new law to community property acquired before 1975 and thus previously subject to a different form of management and control. The constitutional question arises since the right of management and control is one of the "bundle of rights" that comprise the totality of what is called "property", or, in this case, "community property."[8]

As a property right, a person's pre-existing right to manage and control vested property interests may not be altered or taken away without due process of law;[9] California cases have applied this constitutional requirement to preserve community property interests acquired prior to a change in the law affecting the nature and extent of the relative rights of the spouses in community property.[10] Were the constitutional issues limited to the question of due process, the fate of the new law when first tested in the courts would seem fairly certain, but because other existing and proposed constitutional provisions could be applicable (as will be discussed), the constitutional issues promise to be considerably more complex.

Apart from the likely difficulties and litigation that will arise

7. For example, under the Dymally Bill effective Jan. 1, 1975, CAL. CIV. CODE § 5125 (West 1970) will provide in part: "Except as provided in subdivisions (b) and (c) and Sections 5113.5 and 5128, either spouse has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse; provided, however, that the spouse cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children that is community, without the written consent of the other spouse."

8. *See* People v. Walker, 33 Cal. App. 2d 18, 20, 90 P.2d 854, 855 (1939).

9. The case of Roberts v. Wehmeyer, 191 Cal. 601, 612, 218 P. 22, 30 (1923), for example, held that to deprive a husband of the sole right of alienation after acquisition "would deprive him of a vested right," citing Spreckles v. Spreckles, 116 Cal. 339, 43 P. 228 (1897), which recognized a husband's power to make a gift of community property without the wife's consent as a property right.

10. Boyd v. Oser, 23 Cal. 2d 613, 623, 145 P.2d 312, 322 (1944); Stewart v. Stewart, 204 Cal. 546, 269 P. 439 (1928); McKay v. Lauriston, 204 Cal. 557, 269 P. 519 (1928); Ferguson v. Rogers, 168 Cal. App. 2d 486, 336 P.2d 234 (1959); Paley v. Bank of America, 159 Cal. App. 2d 500, 324 P.2d 35 (1958); Ottinger v. Ottinger, 141 Cal. App. 2d 220, 296 P.2d 347 (1956); Jacquemart v. Jacquemart, 125 Cal. App. 2d 122, 269 P.2d 951 (1954).

before the complex constitutional issues are resolved, there is the practical question of whether there is much need to be concerned with the constitutional issues. After all, if both spouses are given management and control of community property, and one spouse uses or spends the property in a way in which the other spouse does not approve, the conflict would seem better resolved in the divorce court than in the United States Supreme Court.

However, the right to manage and control the community property means more than just the right to control and direct the hoarding or expenditure of the community wealth according to the predilections of the manager. It means, in addition, that the manager and controller has the power to incur debts and thereby make all community property managed and controlled by that spouse subject to the payment of such debts.[11] The fact that the manager and controller of that community property technically has an ownership interest in only one-half of that property is totally irrelevant.[12] Thus, the function of the manager and controller of the community is very similar to that of a trustee who may incur debts payable from property in which said trustee has no beneficial ownership.

Conversely, the situation of the spouse without management and control is similar to that of the beneficiary of a spendthrift trust. Although that spouse may have an ownership in trust in one-half of the community property managed and controlled by the other spouse, debts incurred by the nonmanaging spouse cannot be collected from the one-half interest owned by the debtor unless the debt was incurred for necessaries,[13] or until such ownership interest is made subject to the debtor's management and control or becomes the debtor's separate property by agreement between the spouses, by death of a spouse, or by court order in a legal separation or a dissolution.[14]

Implicit in the discussion regarding the right to subject com-

11. Grolemund v. Cafferata, 17 Cal. 2d 679, 684-89, 111 P.2d 641, 643-46 (1941); *but see* Bare v. Bare, 256 Cal. App. 2d 684, 64 Cal. Rptr. 335 (1967), wherein the court provided for the apportionment of a husband's support obligations from a prior marriage between his separate property and the community property which he managed and controlled.

12. *See* Grolemund v. Cafferata, 17 Cal. 2d 679, 111 P.2d 641 (1941).

13. *See* CAL. CIV. CODE §§ 5116, 5117 (West 1970) for provisions effective until Jan. 1, 1975.

14. McClain v. Tufts, 83 Cal. App. 2d 140, 142, 187 P.2d 818, 819 (1947). Even without the transmutation of the community property into separate property of the wife or the transfer of management and control to her, the creditors of the wife may still reach that community property by establishing that she was acting as the agent of the husband. Hulsman v. Ireland, 205 Cal. 345, 270 P. 948 (1928).

munity property to payment of a spouse's debts is the existence of a correlative right on the part of the creditors of a spouse to recover (except when debts for necessaries are involved) only from community property subject to the management and control of such spouse. Obviously, such creditors can only benefit from the widest possible extension to both spouses of management and control of the community property, particularly if involuntary payment of a spouse's debts becomes necessary because of the reluctance of either or both spouses to part voluntarily with community property for the payment of the debts.

Consequently, whether by design or accident (and the latter seems a more plausible explanation), the creditors of the spouses, particularly the creditors of the wife whose powers of management and control over community property are relatively limited under present law, will become donee-beneficiaries of the Dymally Bill when it goes into effect on January 1, 1975. If the movement toward joint and several management and control of the community property represents the current forward thrust in the promotion of women's rights, then it is a strange alliance indeed that brings these conservatively oriented "creditor-donee-beneficiaries" and feminists together in the vanguard of the women's liberation movement.

Consistent with the desire that each spouse have all-pervasive management and control over all community property, regardless of when acquired, there will necessarily be opposition by creditors to any constitutional limitation that would require them, before recovering against any community property, to make careful inquiry not only as to the source of the acquisition of such property, but also as to the time of such acquisition. Creditors would clearly prefer to keep intact the Dymally Bill provisions that accord joint and several management and control to both spouses over all the community property, regardless of the time or source of its acquisition. To the extent that an application of the constitutional mandate, that no state shall deprive a person of property without due process of law, would thwart such provision for joint management and control of all community property, we will encounter the rare situation, such as existed in the case of *Sniadach v. Family Finance Corporation*[15] of the creditors opposed to an extension of the due process clause to protect property rights.

Thus, decisions concerning the application of the Dymally Bill to

15. 395 U.S. 337 (1969).

property acquired prior to 1975 will affect the rights of three distinct persons: the husband, the wife, and the creditor. Whether the creditor has any standing to be heard in any case involving the constitutional issues is a separate question; nevertheless, they will unquestionably be as affected by the decisions in those cases as though they had been party litigants. Consequently, as the discussion of the various constitutional issues proceeds, attention will be paid to the rights of the creditors as well as to the rights of the spouses. Additionally, some consideration will be given to the practical significance of such questions to practicing attorneys in their day to day encounters with what would otherwise seem to be strictly non-constitutional law.

The Dymally Bill and the Deprivation of Property Without Due Process of Law

Application of the New Law to All Community Property

With respect to the applicability of its provisions, the Dymally Bill, for many but not for all purposes, makes no distinction between community property acquired prior to January 1, 1975, and community property acquired on or after that date.

Thus, Civil Code Section 5125 under the new law provides that effective January 1, 1975, each spouse has the same management, control, and power of disposition of *all* community property (except the community property business), and each is subject to equal limitations with respect to making gifts thereof or making any disposition or encumbrance of the community property furniture, furnishings, and fittings of the home and the wearing apparel of the spouse and minor children.[16] Prior to 1975 the wife, under the present Civil Code Section 5124, has exclusive management and control only over her community property earnings and her personal injury damages until commingled with other community property. Otherwise, under the existing Civil Code Section 5125, the husband has the exclusive management and control of the balance of the community personal property, regardless of the source of its acquisition.

Management and control over personal property, as well as the power of disposition for consideration, are indeed valuable property rights and incidents of ownership.[17] To convert such rights acquired prior to January 1, 1975, by legislative fiat from exclusive to non-

16. CAL. CIV. CODE § 5125 (West Supp. 1974).

17. 2 H. MILLER & M. STARR, CURRENT LAW OF CALIFORNIA REAL ESTATE § 287 (1968).

exclusive rights and incidents of ownership, would be no less a taking of valuable property rights than would be an attempted legislative conversion by a state of an exclusive license or a patent or other intellectual product into a non-exclusive license or right.[18] In both cases, the conversion clearly diminishes the value of the exclusive rights and gives the owner thereof something less than he or she had prior to the conversion. To the extent that such diminution of the value of the property rights cannot be related to the proper exercise of state power to promote the health, morals, safety, or welfare of the people,[19] the prospect of conflict with the constitutional prohibition of denial of property without due process of law becomes imminent.[20]

Unfortunately, the constitutional problem cannot be entirely resolved by amending the Dymally Bill to specify that the new provisions of Civil Code Section 5125 would apply only to community property acquired after January 1, 1975, since such property would often be commingled with community property acquired prior to 1975. Most cases covering commingling deal only with the mixing of community property with separate property and hold that the whole mass of commingled property will be rebuttably presumed to be community property.[21] The underlying rationale of the commingling cases is that the manager of the community, as a type of trustee,[22] has acted wrongly in commingling trust property with his own and should bear the loss of no longer being able to separate one from the other.[23] Possibly the solution, when there is commingling of pre-1975 community property with post-1975 community property, would be to apply pre-1975 or post-1975 law to the entire mass in a manner that would impose the greatest loss of managerial rights on the spouse responsible for the commingling.

18. In McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206 (1843), the Supreme Court recognized that despite Congress' plenary power over patents, its repeal of prior patent laws could not impair the right of property held by a patentee under such prior law. *See also* People *ex rel.* Edison Electric Illuminating Co. v. Assessors, 156 N.Y. 417, 51 N.E. 269 (1898).

19. *Cf.* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

20. *Cf.* Addison v. Addison, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97, (1965), the Court allowed certain separate property of the husband to be characterized as quasi-community property and to be divided upon divorce as if community property because of the overriding interest of the state in assuring the wife means of sustenance after the divorce.

21. *See, e.g.*, Falk v. Falk, 48 Cal. App. 2d 762, 120 P.2d 714 (1941); Maskuns v. Maskuns, 93 Cal. App. 27, 268 P. 1093 (1928).

22. *See* White v. White, 26 Cal. App. 2d 524, 529, 79 P.2d 759, 762 (1938).

23. CAL. CIV. CODE § 2236 (West 1970); G.G. BOGERT & G.T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 929 (2d ed. 1962).

While the changes in the powers of management and control over community real property by the spouses under the new law are consent of both spouses to sell, convey, encumber or lease for more than one year any community real property held in both names and further provides that if a husband sells, conveys, encumbers or leases for more than one year any community real property standing in his name alone, then the wife will have one year from the time of the filing of the instrument for record to set aside the transaction. Under existing law the husband is not bound by the one year time limitation for setting aside such sales or the like by the wife of community real property held in her name alone, but he is confronted with the rule of evidence, applicable only to married *women* under existing law, that when a married woman receives a transfer of property by an instrument in writing, there is a rebuttable presumption that she receives it as separate property.[24] Under the new law, no such presumption is accorded to either spouse, but the husband, as well as the wife, will have only one year in which to set aside a sale, conveyance, encumbrance, or lease for more than one year by the other spouse of community real property standing in that other spouse's name alone. Were this the only diminution of the husband's rights in the community real property, one would hardly think the due process issue to be worth raising.

However, the new law also changes Civil Code 5127 to provide that community real property is under the joint and several management and control of both spouses; whereas existing law leaves such management and control in the husband alone. Such a change is quite significant despite the restrictions on voluntary transfers or encumbrances by one spouse without the other's written consent, for, as stated earlier, the power to manage and control is the power to incur debts and to use property so managed and controlled to pay such debts. Thus, even though a husband, under existing law, cannot convey away community real property without the wife's written consent, his creditors may accomplish the involuntary conveyance of that property by asserting claims against it, regardless of the wife's lack of consent.[25] Therefore a husband has always had the power to do indirectly with community real property that which he could not do directly. Under the new law, the wife will have the same power, thereby infringing upon the husband's heretofore exclusive right to deal with the community real property by indirect means.

24. CAL. CIV. CODE § 5110 (West 1970), effective until Jan. 1, 1975.
25. Grolemund v. Cafferata, 17 Cal. 2d 679, 111 P.2d 641 (1941).

Application of the Dymnally Bill to the Debts of the Spouses

The new law purports to make some efforts to distinguish between debts incurred prior to January 1, 1975, and those incurred on or after that date in an apparent effort to eliminate possible taking of property rights without due process. Unfortunately, the attempt made in the new Civil Code Section 5116 is unsuccessful. Under subsections (a) and (b) of the new section 5116, the property of the community, except for the wife's earnings[26] (and probably her community personal injury damages) is not liable for the contracts of the wife made after the marriage and prior to 1975, unless secured by pledge or mortgage thereof executed by the husband, whereas under subsection (c), the property of the community, without distinction as to pre- or post-1975 acquisitions, is liable for the contracts of either spouse which are made after marriage and on or after January 1, 1975. As a result, if a wife contracts a debt for non-necessaries on January 1, 1975, or thereafter, her creditor can recover against community property, acquired prior to 1975, which the husband heretofore thought was beyond the grasp of her creditors. The loss of such assurance is indeed the loss of a valuable property right. It could well be argued, on the basis of existing California case law,[27] that the elimination of the husband's exclusive power of management and control over the pre-1975 community property is a taking of property without due process of law.

A comparable due process problem arises with respect to the community property earnings and personal injury damages of the

26. Effective Jan. 1, 1974, until Jan. 1, 1975, Civil Code § 5116(b) was amended to provide in part that property of the community would be liable for the contracts of the wife which are made on or after Jan. 1, 1974, to the extent that her earnings or separate property have been commingled with the property of the community. This provision seems to be consistent with the existing law stated in Tinsley v. Bauer, 125 Cal. App. 2d 724, 727, 271 P.2d 116 (1954) as follows: "Although it has been held with respect to exemption of earnings of the wife for debts of the husband (Civ. Code, § 168) that it is waived where such earnings are so commingled with other community property as to lose their identity . . . the same will not apply to the liability under Section 167, Civil Code; the wife can waive her exemption but not the liability to her creditors." This author is aware of the concern by some working on the "trailer bill" that *Tinsley v. Bauer* may not eliminate the due process issue as to this provision because the funds in the *Tinsley* case were not so totally commingled as to cause all loss of identity or ability to figure relative contributions to the entire mass. However, the quoted language seems to remove all doubts as to the principles that were applied and their applicability to a situation where there is true commingling and a loss of identity. The danger of a violation of the due process clause by the new CAL. CIV. CODE § 5116(b) seems remote.

27. See generally Note, *Retroactive Application of California Community Property Statutes*, 18 STAN. L. REV. 514 (1966).

wife. Prior to 1975, such community property under Civil Code Section 5117 was not liable for the husband's debts for non-necessaries.[28] On and after January 1, 1975, under the new Civil Code Section 5116(c), all community property, including the community property earnings and personal injury damages of the wife acquired prior to January 1, 1975, will be liable for the entire debts of either spouse contracted on or after January 1, 1975. Thus, this elimination of the wife's exclusive management and control over some of the community property again raises the due process question.

There is an additional provision under the new Dymally Bill, which, although less likely to be a frequent source of litigation, is nevertheless the basis for another conflict with the due process clause. Under the new Civil Code Section 199, the obligation of divorced parents to support their natural children extends to and may be satisfied only from the earnings and separate property of each. The implication is that if one of the parents remarries, the community property earnings of the new spouse of that parent cannot be reached by the children of the prior marriage for payment of child support, even though that parent has a one-half ownership right in that property as well as joint and several management and control over the entire amount of such earnings. In a sense, the new code section represents a departure from the general rule that the debts of a spouse are payable from any property which he or she manages and controls. Further, it conflicts with and apparently implicitly repeals, by inconsistency,[29] the present Civil Code Section 5127.5, which gives the wife limited power of management and control over part of her one-half of the community property (including her husband's earnings) otherwise managed and controlled by her husband so that she can support her children, even if not of their marriage.[30]

28. CAL. CIV. CODE § 5117 (West 1970), effective until Jan. 1, 1975, provides in part: "The earnings and community property personal injury damages of the wife are not liable for the debts of the husband; but, except as otherwise provided by law, such earnings and damages shall be liable for the payment of debts, heretofore or hereafter contracted by the husband or wife for the necessities of life furnished to them or either of them while living together."

29. *But cf.* Penziner v. West. American Finance Co., 10 Cal. 2d 160, 74 P.2d 252 (1937).

30. CAL. CIV. CODE § 5127.5 (West Supp. 1974) reads in part: "Notwithstanding the provisions of Section 5125 or 5127 granting the husband the management and control of the community property, to the extent necessary to fulfill a duty of a wife to support her children, the wife is entitled to the management and control of her share of the community property.

The wife's interest in the community property, including the earnings of her husband, is liable for the support of her children to whom the duty of support is owed,

Such a partial repeal of the wife's power to compel the use of some of her husband's earnings to support her children takes from her a valuable right with respect to community property; and since so many children are being supported by Aid to Dependent Children and other welfare payments, one could hardly justify this diminution of the wife's rights in the community property as a taking of property in the exercise of the state's police power to promote the health, morals, safety, and welfare of the people. Certainly, the wife would have standing to sue in order to contest the constitutional validity of new Cicil Code Section 199 if it is applied retroactively to take vested rights in property acquired prior to January 1, 1975. Further, by reason of retroactively diminishing the rights of the children, as creditors, to recover against such community property acquired prior to January 1, 1975, the new statute appears to afford a basis for such child to join in the wife's cause of action to assert the constitutional issue of denial of their property rights as creditors without due process of law.[31]

Apart from the rights of such children, as creditors, to have standing to sue, it does not appear that other creditors of either spouse will directly have standing to initiate proceedings to test the Dymally Bill. The remaining provisions of that bill, actually expand the rights of creditors in general to reach even greater amounts of the community property formerly managed and controlled by one spouse to pay the debts of the other spouse. However, once a spouse does bring suit to contest the retroactive application of the various provisions of the bill, then creditors may properly become involved in the proceeding, either directly seeking to recover against all the community property, or as *amici curae* seeking to protect their interests in similar subsequent suits.

The Dymally Bill makes a commendable change to Civil Code Section 5121 by providing that all the separate property of *either* spouse may be liable for the payment of debts contracted by either spouse for necessaries while they are living together and have no community or quasi-community property to pay for such necessaries. Under the existing law, which will be effectively repealed on January 1, 1975, all the separate property of the husband could be reached by creditors to pay for such necessaries, but only a limited

provided that for the purposes of this section, prior support liability of her husband plus three hundred dollars ($300) gross monthly income shall first be excluded in determining the wife's interest in community property earnings of her husband."

31. See CAL. CODE CIV. PRO. § 378 (West 1970).

amount of the separate property of the wife would be subject to the claims of creditors for debts incurred by a husband for necessaries while they were living together, even if there were neither community property nor separate property of the husband to pay therefor.[32] The absurdity of the distinction is only highlighted by the proviso that is contained in the present Civil Code Section 5121 to define what segments of the wife's separate property are subject to the claims of the husband's creditors for such necessities.[33]

Regrettably, the new Section 5121 of the Dymally Bill will conflict with existing California case law[34] if, as appears from its wording, it applies to all separate property of the wife acquired prior to 1975 and to all the husband's debts for necessaries, whether incurred before or on and after January 1, 1975 because the removal of some of the exemptions of property from the claims of creditors is a taking of a right or benefit in that property. One can imagine the chaos arising in a litigated case applying the due process clause to the wife's pre-1975 separate property commingled with her post-1974 separate property, particularly because the lack of any trust or fiduciary duties as to her separate property will preclude application of normal commingling rules against her interests.[35]

The new law does not completely ignore the due process issue, as shown by the new Civil Code Section 5116(a), which frees the property of the community from liability for debts of the wife contracted during marriage prior to January 1, 1975. Such observance of the limitation on retroactivity seems misplaced, however. While it is true that the restriction, to be consistent with existing decisions

32. CAL. CIV. CODE § 5130 (West 1970) presently reads as follows: "If the husband neglects to make adequate provision for the support of his wife, except in the case mentioned in Section 5131, any other person may in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband."

33. The present CAL. CIV. CODE § 5121 (West 1970) reads as follows:

"The separate property of the wife is liable for her own debts contracted before or after her marriage, but is not liable for her husband's debts; provided, that the separate property of the wife is liable for the payment of debts contracted by the husband or wife for the necessaries of life furnished to them or either of them while they are living together; provided, that the provisions of the foregoing proviso shall not apply to the separate property of the wife held by her at the time of her marriage or acquired by her by devise, succession, or gift, other than by gift from the husband, after marriage."

34. *See, e.g.*, Estate of Thornton, 1 Cal. 2d 1, 33 P.2d 1 (1934); Credit Bureau of Santa Monica Bay District Inc. v. Terranova, 15 Cal. App. 3d 854, 93 Cal. Rptr. 538 (1971); Ackley v. Maggi, 86 Cal. App. 631, 261 P. 311 (1927).

35. See text accompanying notes 21-23 *supra*, and cases cited therein.

on the due process issue,[36] should be applied to community property acquired prior to January 1, 1975, there seems to be no constitutional prohibition under existing case law against allowing such pre-1975 creditors of the wife to recover against community property acquired on or after January 1, 1975.[37]

Applicability of the Dymally Bill to Presumptions of Separate Property

Also possibly misplaced is the concern shown in the bill that certain existing rebuttable presumptions relating to community property, which will be eliminated for property acquired on or after January 1, 1975, will nevertheless continue to be applicable to property acquired prior to 1975. As previously stated the new Civil Code Section 5110 of the Dymally Bill retains the provision that any property acquired during marriage and prior to January 1, 1975, by a married woman by an instrument in writing will be rebuttably presumed to be her separate property. In accordance with the purposes and policy of the bill to promote equality between the spouses, no such rebuttable presumption is applied to property so acquired on or after January 1, 1975. However, if the rebuttable presumption were to be repealed even as to property so acquired by the wife prior to January 1, 1975, there would seem to be no violation of the mandate of existing California case law holding retroactive operation of community property legislation on vested property rights to be a denial of property without due process of law. Such rebuttable presumptions are merely rules of evidence to aid the court in determining the status of the property in question.[38] Such presumptions neither increase nor decrease any vested rights in the property in question, for it may be possible to present sufficient evidence to establish the status of such property as separate property without resort to the rebuttable presumption. Early cases in California,[39] relying on the due process clause, denied retroactive application of the enactment creating a rebuttable presumption of separate status for property received by a married woman by a instrument in writing. However, the rulings were prompted by the fear of disturbance of "titles already vested"[40]

36. An excellent chart on the case law up to 1965 is found in Note, *Retroactive Application of California's Community Property Statutes*, 18 STAN. L. REV. 514, 524-29 (1966).

37. *Cf.* Ferguson v. Rogers, 168 Cal. App. 2d 486, 336 P.2d 234 (1959).

38. Stafford v. Martinoni, 192 Cal. 724, 738, 221 P. 919, 925 (1923).

39. Booker v. Castillo, 154 Cal. 672, 98 P. 1067 (1908); Nilson v. Sarment, 153 Cal. 524, 96 P. 315 (1908); Jordan v. Fay, 98 Cal. 264, 33 P. 95 (1893).

40. In Jordan v. Fay, 98 Cal. 264, 33 P. 95 (1893), the court indicated that the

or by the desire to avoid the retroactive application of a presumption that had become conclusive because a conveyance by the wife to a bona fide purchaser for value had been made.[41]

Consistent with those cases, the new Civil Code Section 5110 under the Dymally Bill, recognizing the due process issue, properly preserves as to pre-1975 property the rule that when the wife deals with a bona fide purchaser of property which was acquired by the wife in her name by an instrument in writing, such property is conclusively presumed to have been her separate property. The consistency of such a provision with the present rule on retroactivity of amendments affecting community property is borne out by the rule that a conclusive presumption is a rule of substantive law,[42] and, as with any other substantive law covering property rights, change of the conclusive presumption creating a separate property right would affect vested property rights.

As to property acquired during marriage by an instrument in writing on or after January 1, 1975, by either spouse in his or her name alone, the Dymally Bill eliminates in Civil Code Section 5110 all separate property presumptions. Such a change is consistent with the purpose of the bill's author to achieve greater equality in the rights of the husband and the wife.

Another Way to Look at the Due Process Issue

In spite of the present acceptance by the California courts of the due process rationale of *Spreckles v. Spreckles*[43] to prevent

rebuttable presumption in CAL. CIV. CODE § 164 (now § 5110 (West 1970)) was a vested right: "we do not think the legislature intended or had the power to change it so that it would be retroactive in effect and disturb titles already vested. To hold otherwise would probably upset many titles in this state. . . ." *Id.* at 267-68, 33 P. at 96. Obviously the court was concerned about titles on the records and the presumptions made by the title searchers as to titles acquired in the wife's name prior to the legislative change in 1891, that such properties were her separate property rather than community property. To make the law retroactive would require title searchers to change all presumptions as to any acquisition in the chain of title in the wife's name that was later conveyed to a grantee relying on that presumption. Practically speaking, then, the case of *Jordan v. Fay* was concerned with protecting subsequent bona fide purchasers for value.

41. In the later cases of Booker v. Castillo, 154 Cal. 672, 98 P. 1067, (1908), and Nilson v. Sarment, 153 Cal. 524, 96 P. 315 (1908), the rights of a bona fide purchaser from the wife were involved; under the law after 1891 the presumption that such property was her separate property was conclusive when she was dealing with a bona fide purchaser for value.

42. "Conclusive presumptions are not evidentiary rules so much as they are rules of substantive law." CAL. EVID. CODE § 620 (Law Revision Comm'n Comment) (West 1968).

43. 116 Cal. 339, 48 P. 228 (1897).

the retroactive application of legislation affecting any of the bundle of rights in community property, it appears that without resort to the police power argument of *Addison v. Addison,*[44] a basis could be found to limit the application of the *Spreckles* case to property acquired prior to 1927. It has been pointed out that *Spreckles,* decided prior to 1927, dealt with California community property in which the wife had a mere expectancy.[45] It was only in 1927, when Section 161a was added to the California Civil Code, that the wife was given a vested property right in community property in the form of a "present, equal and existing right."[46] If the *Spreckles* case were found to be applicable only to property in which the wife had a mere expectancy, the decision could be harmonized with the United States Supreme Court decision of *Warburton v. White.*[47] That case held that a Washington statute, allowing one-half of the community property to be subject to testamentary disposition by the wife or to descend to her issue, could be applied to property acquired prior to the date of its enactment in 1879. The rationale of the court was that under the Washington statute at the time of acquisition, the husband and wife had equal proprietary interests in the community property and that such interests were characterized as a form of partnership property.[48] As to the effect of the statute on the theretofore greater dispositive powers of the husband, the court pointed out that giving management and disposition of community property to the husband did not make him the holder of larger proprietary rights than the wife since someone had to manage and dispose of the community property during the marriage, and conferring such power on the husband merely conferred on him a bare power in trust for the community. It was perfectly competent for the state legislature to withdraw such a power from him and confer it upon both spouses without taking away any vested property rights since each still owned the same proprietary one-half interest in the property, regardless of who had management and control.[49] The

44. 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965).

45. Comment, *Community and Separate Property: Constitutionality of Legislation Decreasing Husband's Power of Control over Property Already Acquired,* 27 CALIF. L. REV. 49, 55 (1938).

46. Cal. Stats. 1927, ch. 265, § 1 (1927) (codified at CAL. CIV. CODE § 5105 (West 1970)).

47. 176 U.S. 484 (1900).

48. *Id.* at 491. In Arnett v. Reade, 220 U.S. 311 (1911), Justice Holmes ruled that New Mexico legislation requiring the written consent of the wife to a conveyance of community real property could be applied retroactively because the wife, under New Mexico law, had more than just a mere expectancy or possibility in the community property. Holmes did not discuss the *Spreckles* case. However, Justice McKenna, in a two sentence dissent, cited it without comment.

49. *Id.* at 490.

United States Supreme Court acknowledged the *Spreckles* decision, but found it inapplicable to the case at hand because it pertained only to management and control powers during the marriage, rather than the power of disposition upon death.[50] Had the Court been obliged to review the *Spreckles* case in light of what it said earlier in its opinion, the *Spreckles* decision would probably have been overruled. That the Court did not do so does not preclude raising the issue now that the Dymally Bill could be applied retroactively to powers of management and control over community property acquired after the 1927 enactment of Civil Code Section 161a (now Civil Code Section 5105), since the bill, under the *Warburton* rationale, merely affects a "bare power in trust" for the benefit of the community.

Notwithstanding that the courts today may not apply the trust power theory of the *Warburton* case in order to overrule the existing body of California case law applying the due process clause to prevent the retroactive operation of statutory amendments affecting separate and community property of the spouses, there are other approaches available to support the constitutionality of retroactive application of the Dymally Bill.

The Equal Protection Clause and the Dymally Bill—Conflict With the Due Process Clause?

The Husband's Predominant Management and Control of the Community Property as a Possible Violation of the Equal Protection Clause

The argument has been made frequently in recent years that existing inequalities, sanctioned by long-standing laws, in the management and control of community property have never been valid because they are a denial of equal protection of the laws under the Fourteenth Amendment to the United States Constitution.[51] The laws of several community property states came under severe criticism because they continued to accord predominant or complete management and

50. *Id.* at 497. The California Supreme Court, in McKay v. Lauriston, 203 Cal. 557, 269 P. 519 (1928), and Estate of Phillips, 203 Cal. 106, 263 P. 1017 (1928), held that a statute giving the wife the power to testamentary disposition over one-half of the community property could not be applied retroactively, but neither case made any mention of the *Warburton* case. However, since both cases dealt with community property acquired prior to 1927, when the wife had a mere expectancy under California law, no reference to that case was really necessary.

51. U.S. CONST. amend. XIV, § 1, provides:

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws,

control of the community property to the husband,[52] and some states have recently changed their laws as a response to such criticism.[53]

However, it has clearly been established by numerous decisions of the United States Supreme Court that despite the equal protection clause, state laws under appropriate circumstances may differentiate between different classes of persons and treat such classes in different ways.[54] A number of tests have arisen to aid the courts in determining whether a discriminatory classification is constitutional.

Under the "reasonableness" or traditional test, a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[55] If such a test is used, the party challenging the discriminatory classification has the burden of proving the lack of reasonableness or the lack of a substantial relationship between the classification and the legitimate interests of the government and community.[56] Under the new and more activist-oriented "suspect classification and fundamental interest" test, certain "suspect classifications" are subject to a more careful scrutiny by the courts to determine their justification, even though they may have some ostensibly rational basis. The most prominent cases involving such active review have been those involving

52. Note, *Equal Rights and Equal Protection: Who Has Management and Control*, 46 S. CAL. L. REV. 892, 893-96 (1973) [hereinafter cited as Note, *Equal Rights*]; Bilbe, *Constitutionality of Sex-based Differentiations in the Louisiana Community Property System*, 19 LOYOLA L. REV. (NEW ORLEANS) 373, 390-92 (1973); Note, *Community Property: Male Management and Women's Rights*, 1972 LAW AND THE SPECIAL ORDER 163, 166-71, 173-75 (Arizona).

53. Joint and several management and control of the community was enacted in 1972 in Washington, Arizona, and New Mexico. Wash. Laws, 1st Ex. Sess. 1972, ch. 108, § 3, *codified in* REV. CODE WASH. ANN. § 26.16.030 (Supp. 1973); ARIZ. REV. STATS. ANN. §§ 25-214 (Supp. 1973); New Mexico Laws 1973, ch. 320, § 10 *codified in* N.M. STATS. ANN. § 57-4A-8 (Supp. 1973).

54. Reed v. Reed, 404 U.S. 71 (1971); McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969); Railway Express Agency v. New York, 336 U.S. 106 (1949); Barbier v. Connolly, 113 U.S. 27 (1885).

55. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

56. Because the test accords considerable deference to alleged reasonable purposes of the state legislatures, the test is said to embody a deferential or restrained review by the court of such purposes, particularly in economic regulation cases. The scope of the court's review in such cases may range from trying to discover the most probable purpose of the legislation to attempting to discover and attribute to the legislature any reasonably conceivable purpose that would support the constitutionality of the classification. Often the latter approach will be preferred because of the presumption of the constitutionality of legislation. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969) [hereinafter cited as *Developments in the Law—Equal Protection*].

classifications based upon race.[57] In some cases, the motives of the legislature have been called into question,[58] but for the most part the courts have followed the mandate of Chief Justice Marshall[59] that courts will not examine the motives of legislators.[60] Other suspect classifications have included classifications based on national ancestry, alienage, and wealth.[61] Notwithstanding lack of suspicion of a classification, there has also been recognition that careful review will be given to legislation that results in unequal treatment with respect to "fundamental interests."[62] According to the recent case of *San Antonio Independent School District v. Rodriguez*,[63] such interests include only those rights which are explicitly or implicitly guaranteed by the Constitution.[64] The exact content of such interests or rights is unclear, but they apparently include rights related to voting, criminal procedure, and interstate travel, among others.[65]

57. *Id.* at 1087-1123.

58. *See, e.g.*, Griffin v. County School Board, 377 U.S. 218, 231 (1964), in which the Supreme Court found that the public schools in Prince Edward County, Virginia, were closed to ensure that "white and colored children in Prince Edward County would not, under any circumstances, go to the same school."

59. "The case, as made out in the pleadings, is simply this. One individual who holds lands in the state of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favour of the law, which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

"This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent, in the extreme, upon a private contract, between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 131 (1810).

60. In upholding a Michigan statute severely restricting a woman's right to acquire a bartender's license, the United States Supreme Court, per Justice Frankfurter, said: "We cannot cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives. Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind the legislation was an unchivalrous desire of male bartenders to try to monopolize the calling." Goesaert v. Cleary, 335 U.S. 464, 466-67 (1948). *But cf. Developments in the Law—Equal Protection*, note 56, *supra*.

61. Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533, 1534 (1973).

62. *Developments in the Law—Equal Protection, supra* note 56, at 1127-31.

63. 411 U.S. 1 (1973).

64. *Id.* at 33-34.

65. *Developments in the Law—Equal Protection, supra* note 56, at 1127.

Classifications based on sex discrimination have generally been subjected to the traditional "reasonableness test" with its deferential treatment of the intent of the legislature when some legitimate purpose for the classification can be found. The use of such a test is not without justification. Because many of the laws which discriminate on the basis of sex have been in existence for many years, they reflect a solicitude for the welfare and protection of the average woman in a period of time when she was not as well equipped, either by education or training, as today's average woman, to exercise rights and assume responsibilities to the same extent as a man.[66] Having therefore no reason to suspect invidious motives behind such long-standing sexually discriminatory legislation, the courts have usually been content to uphold such legislation if there was some reasonable basis for it, without regard to its operative or secondary effects. Thus, in earlier cases legislation discriminating between the sexes in regard to employment opportunities, hours, or conditions has been upheld by the United States Supreme Court.[67] The validity of such legislation cov-

66. In Muller v. Oregon, 208 U.S. 412, 421-22 (1908), the court said: "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to [have] injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Yet again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations on personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has any advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained."

67. Goesaert v. Cleary, 335 U.S. 464 (1948) (Michigan statute denying a bartender's license to a woman unless she was the wife or daughter of the male owner of a licensed liquor establishment). Justice Frankfurter's tongue-in-cheek opinion indi-

ering employment may now be more readily questioned as a result of the enactment of the Civil Rights Act of 1964.[68] Indeed, some courts have, to a greater or lesser degree, begun to consider classifications based on sex as suspect classifications requiring close scrutiny and a compelling state interest to be upheld as constitutional.[69]

However, the United States Supreme Court, in *Reed v. Reed*,[70] applied the less stringent reasonableness test in striking down as unconstitutional, under the equal protection clause, an Idaho statute providing that of several persons claiming and equally entitled to administer a decedent's estate, males were to be preferred over females. The court found the alleged legislative purpose of reducing litigation and intrafamily controversy over who should be the administrator was an insufficient justification to overcome the mandate of the equal protection clause. In a sense, the use of the suspect classification test in *Sail'er Inn v. Kirby*[71] can be harmonized with the use of the reasonableness test in *Reed*.[72] The former concerned sex discrimination in employment, an activity regulated by a federal statute expressly prohibiting sex discrimination in that activity; whereas the *Reed* case focused upon an

---

cated that since bartending by women could, in the allowable legislative judgment, give rise to moral and social problems, the legislature could devise suitable preventive measures. Muller v. Oregon, 208 U.S. 412 (1908) (statute imposing maximum number of work hours per week permitted for women).

68. 42 U.S.C. § 2000e-2(a) (1972), provides: (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. *See also* CAL. CONST. art. XX, § 18, which provides: "A person may not be disqualified because of sex, from entering or pursuing a lawful business, vocation, or profession." Despite such a provision in the state constitution, CAL. LABOR CODE § 1298 (West 1970) makes the following interesting distinction: "No boy under 10 years of age and no girl under 18 years of age, shall be employed or permitted to work at any time in or in connection with the street occupation of peddling, bootblacking, the sale or distribution of newspapers, magazines, periodicals, or circulars or in any other occupation pursued in any street or public place. Nothing in this section shall apply to cities whose population is less than 23,000 according to the preceding Federal census."

69. United States v. York, 281 F. Supp. 8 (D. Conn. 1968); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968).

70. 404 U.S. 71 (1971).

71. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

72. 404 U.S. 71 (1971).

economic activity not covered by the Civil Rights Act, but regulated only under state law.

By comparable reasoning, the constitutionality of statutory provisions for management and control by the husband of community property should be determined by applying the reasonableness test. Management and control of community property is an economic activity not covered by provisions of the federal Civil Rights Act, which specifies the particular kinds of activities in which there is a fundamental interest in prohibiting discrimination based on sex. However, as more and more legislation at state and federal levels is enacted as a reflection of the increasing concern in our society with the issue of equality between the sexes, the time may come when any legislative classification based on sex, as with those based on race, will automatically become a suspect classification because a fundamental interest is involved. The recent case of *Frontiero v. Richardson*,[73] with the close division of the justices over the use of the suspect classification or the reasonableness test reflects such a shifting of sentiment.[74]

Pending such a transition, arguments will be made that it is reasonable to give principal management and control of the community property to the husband for one or more of the following reasons: (1) most husbands are better qualified than most wives to manage property and financial affairs; therefore, the classification is not a completely arbitrary one, but has some reasonable basis as an attempt to protect the wife from her own limitations; (2) placing management and control primarily in the husband prevents disruption of family harmony that could arise if a wife could countermand or nullify any decisions the husband made concerning the community property; (3) confusion among third persons dealing with disagreeing spouses will be avoided because they would know that the husband had the final word, thereby facilitating certainty in commercial transactions.[75] It has been stated that the above arguments do not provide sufficient justification to meet even the reasonableness test of the equal protection clause. The classification favoring the husband is either over-inclusive, since some wives are better qualified to manage financial affairs than their husbands, or is arbitrary, because it selects only the husband to have the

73. 411 U.S. 677 (1973).

74. W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 276-77 (2d ed. 1971).

75. *But cf.* Comment, *The Equal Rights Amendment & Inequality Between Spouses Under the California Community Property System*, 6 LOYOLA L. REV. (LOS ANGELES) 66, 93 (1973) [hereinafter cited as Comment, *Inequality Between Spouses*].

last word in a transaction with community property when either spouse could reasonably be given such final authority to assure certainty in dealings with third parties.[76]

The trend of California and other community property states to change their statutes to provide a joint and several (or at least more equal) form of management and control over the community property[77] may appear to be rendering moot the question of the validity of statutes giving the husband the principal management and control of the community property. However, in California, the retrospective application of any statute striking down the husband's principal management and control of the community property presents an interesting conflict of constitutional provisions.

Retrospective Application of the Dymally Bill: Equal Protection Clause v. the Due Process Clause

The line of California decisions[78] recognizing the husband's principal management and control over the community property as a vested property right seems to conflict with any retroactive application of the Dymally Bill to change the management and control of community property acquired prior to January 1, 1975. However, if a decision of the California or United States Supreme Court finds that the existing provision giving the husband principal management and control violates the equal protection clause, the due process rationale of the earlier cases may or may not prevail as to community property acquired prior to such decision.

It may be that such a decision based on the equal protection clause would look to the changed condition of wives in California today from their condition at the time the legislation giving the husband the principal management and control was first enacted.[79] If the decision rested on such changed circumstances there would be no basis for retroactive application that would destroy rights vested in the hus-

76. *See* Bingaman, *The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management, & Control*, 3 N.M.L. REV. 11, 49 (1973) (*e.g.*, sale of stock) [hereinafter cited as Bingaman]; Note, *Equal Rights, supra* note 52.

77. At present, only Louisiana, Nevada, & Idaho (California until Jan. 1, 1975) preserve principal management & control of the community property in the husband. IDAHO CODE §§ 32-912 to 32-913 (1973); LA. STAT. ANN. CIVIL CODE, art. 2404 (1974); NEV. REV. STAT. § 123.230 (1973). *But see* Riley, *Revision of the Property Law of Marriage—Why Now?*, 21 LA. B.J. 29 (1973).

78. Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22 (1923); Spreckles v. Spreckles, 116 Cal. 339, 48 P. 228 (1897).

79. Duncan v. Duncan, 6 Cal. App. 404, 92 P. 310 (1907).

band prior to the date of the transaction overturned by the decision of the Court, since those prior rights would have had a rational basis when given.[80]

In addition, the Court may very well decide that the violation of the equal protection clause by giving the husband predominant management and control did indeed extend to the distant past and even to a period of time prior to the *Spreckles* decision. However, it would be argued, and not without merit, that because so many have relied on the long line of decisions in California to establish their rights of management and control over property acquired prior to the effective date of the Dymally Bill it would produce undue confusion and hardship to compel them to deal differently with property which they heretofore thought was protected from creditors, or from the real or imagined profligacy of the wife. Such reasoning opposing retroactive application of decisions affecting rights under the Constitution has been adopted in cases dealing with other rights;[81] but it is hard to predict whether it would be applied in the case of an equal protection decision striking down the husband's predominant management and control.

An approach that might be taken, if such a decision is rendered, is one representing a compromise: since the wife has had the management and control of some of the community property since 1951, that is, her earnings until commingled, her personal injury damages, and property traceable to the earnings and damages, legislation giving the husband comparable control over his earnings or personal injury damages since 1951 will be found not violative of the equal protection clause. Only control given to the husband in excess thereof would be a violation and invalid despite assertions of protection under the due process clause.[82] Thus, any community property acquired prior to 1951, and any community property other than the husband's earnings or personal injury damages acquired after 1951, if previously subject to the husband's management and control, would now be subject to the joint and several management of both spouses, since rational classification based on responsibility for the acquisition of the property

80. H. VERRALL & A. SAMMIS, CALIFORNIA COMMUNITY PROPERTY—CASES & MATERIALS 227 (2d ed. 1971).

81. Williams v. United States, 401 U.S. 646 (1971); Johnson v. New Jersey, 384 U.S. 719 (1966). *See, e.g.*, Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969).

82. *See, e.g.*, TEX. CODE ANN., FAMILY CODE, tit. 1, § 5.22 (Pam. 1973).

would be impossible.[83] To assure further equality, if any of the community property controlled by a spouse were commingled by that spouse, then joint and several management and control should apply.[84]

However, the complications do not end merely with a resolution of the conflict between the equal protection and the due process clauses. A whole new body of conflicts within constitutional provisions may arise if a proposed amendment to the United States Constitution is ratified by the requisite number of states.

The Equal Rights Amendment and Its Impact On Management and Control of Community Property and Vested Rights Therein

The Proposed Equal Rights Amendment

There is currently pending before a number of state legislatures the following proposed amendment to the United States Constitution: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[85] The amendment has been ratified as of April 1974, by thirty-three states.[86] Al-

83. Even this approach is opposed by some on the ground that it is merely ostensibly neutral and would actually give the wife fewer rights in the marital property than are given to the husband since men still have greater average earnings than women. Note, *Equal Rights, supra* note 52 at 910-11; Bingaman, *supra* note 76 at 40-43.

84. CAL. CIV. CODE § 5124 (West 1970), *repealed effective Jan. 1, 1975*, Cal. Stat. 1973, ch. 987, provides:

Notwithstanding the provisions of Sections 5105 and 5125, the wife has the management and control of the community personal property earned by her, and the community personal property received by her in satisfaction of a judgment for damages for personal injuries suffered by her or pursuant to an agreement for the settlement or compromise of a claim for such damages, until it is commingled with community property subject to the management and control of the husband, except that the husband may use such community property received as damages or in settlement or compromise of a claim for such damages to pay for expenses incurred by reason of the wife's personal injuries and to reimburse his separate property or the community property subject to his management and control for expenses paid by reason of the wife's personal injuries.

The wife may not make a gift of the community property under her management and control, or dispose of the same without a valuable consideration, without the written consent of the husband. The wife may not make a testamentary disposition of such community property except as otherwise permitted by law.

85. H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972) [hereinafter cited as H.R.J. Res. 208]. The other sections of the proposed amendment read as follows:

Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Sec. 3. This amendment shall take effect two years after the date of ratification.

It should also be noted that the joint resolution prescribed that the amendment had to be ratified by the legislatures of three-fourths of the states within seven years from the date of the submission of the amendment by Congress.

86. Cal., Colo., Conn., Del., Hawaii, Idaho, Iowa, Kan., Ky., Me., Md., Mass.,

though it appeared that the amendment would fall short of receiving ratification by the requisite thirty-eight states, the strong endorsment of the Equal Rights Amendment by the AFL-CIO at its convention in October, 1973,[87] presages a possible resurgence of efforts to secure the balance of state ratifications necessary to make the proposed amendment a part of the Constitution. The possibility of its ratification by the requisite number of state legislatures necessitates some assessment of the amendment's impact on existing laws concerning management and control of community property, as well as its possible conflict with the due process clause.

The broad language of the proposed amendment would appear to require that men and women be treated identically under the law in all respects. Such an interpretation is justified by legislative history which reflects rejection by Congress of committee and subcommittee amendments which would have expressly made the Equal Rights Amendment inapplicable to laws exempting women from compulsory military service, reasonably promoting the health and safety of the people, or making distinctions on the basis of physiological or functional differences between men and women.[88] The omission of such qualifying or limiting clauses, however, does not mean that no differentiations whatsoever would be permitted between the sexes. The amendment's proponents have asserted that "equality" does not mean "sameness", and that there would be no violation of the amendment by a reasonable classification based on physical characteristics unique to one sex.[89] Rather, the basic principle underlying the Equal Rights

Mich., Mo., Mont., Neb., N.D., N.H., N.J., N.M., N.Y., Ohio, Ore., Pa., R.I., S.C., S.D. Tenn., Tex., Va., W. Va., Wis., & Wyo. Neb. has attempted to rescind their ratification. Only two of the seven community property states have ratified.

87. 84 LAB. REL. REP. 180 (Oct. 29, 1973). The resolution adopted by the convention committed state labor federations to urge their legislatures to ratify the amendment.

88. A summary of the legislative history of the Equal Rights Amendment with a description of the numerous proposed changes to narrow its broad wording is contained in 118 CONG. REC. S4582-83 (daily ed. Mar. 22, 1972).

89. The separate views were filed by the proponents of the broad wording with H.R.J. REP. No. 359, 92d Cong., 2d Sess. (1972) that accompanied H.R.J. Res. 208, *supra* note 85. They stated in part: "For example, a law providing for payment of the medical costs for child bearing could only apply to women. . . .

"Just as the principle of equality does not mean that the sexes must be regarded as identical, so too it does not prohibit the states from requiring a reasonable separation of persons of different sexes under some circumstances." The report then referred to such circumstances as regulation of cohabitation and sexual activity by unmarried persons and the preservation of the right of privacy by separation of the sexes in such places as public toilets and sleeping quarters. 117 CONG. REC. 35791, 35792 (1971) (remarks of Congressman Edwards).

Amendment is that legal rights must be determined by the actual attributes of an individual, not by a stereotype or overclassification based on sex.[90]

Although the major emphasis of the proponents is on the elimination of discrimination against women with respect to such economic matters as occupational opportunities, compensation for labor, and educational opportunities, the Equal Rights Amendment is also expected to affect state laws governing domestic relations[91] and community property rights.[92]

Application of the Proposed Equal Rights Amendment to the Management and Control of Community Property

A congressional proponent of the proposed Equal Rights Amendment has made it clear that the amendment would strike down com-

90. Preceding a statement of that principle, Congressman Ryan expressed the belief that although many laws discriminating on the basis of sex had originally been enacted with the valid intent of protecting the health and safety of women, they often resulted in unfair discrimination against women. 117 CONG. REC. 35791 (1971) (remarks of Congressman Ryan). Rather than risk the continuation of possible unfair discrimination rationalized by an ostensible motive of protecting the woman, the proponents instead seek by the amendment to be assured that an individual would be denied a job or some other right or benefit only because he or she individually lacked the requisite physical or mental qualifications to meet the particular requirements for that job, right or benefit. Thus, if, as recently occurred, a number of female applicants were denied jobs as police officers because they were unable to carry a 140 pound weight a certain distance within a certain number of seconds (simulating a police officer removing a wounded comrade quickly from a field of gunfire), the Equal Rights Amendment would not be violated even though only male applicants were accepted as a result.

91. "The Equal Rights Amendment may also have an effect on those State laws affecting domestic relations in this area, as elsewhere, the amendment will prohibit discrimination based on sex. This will mean that State domestic relations laws will have to be based on individual circumstances and needs, and not on sexual stereotypes." SENATE COMM. ON THE JUDICIARY, MAJORITY REPORT ON THE EQUAL RIGHTS AMENDMENT, reprinted in 118 CONG. REC. S4586 (daily ed. Mar. 22, 1972).

92. Speaking at the consideration H.R.J. Res. 208, *supra* note 85. Congressman Edwards, a proponent of the broad version of the Equal Rights Amendment, stated: "Some community property states do not vest in the wife the property rights that her husband enjoys . . . .

"Under the circumstances, an amendment to our Constitution is not merely appropriate, but it is imperative. For it is only by enacting such an amendment that we can declare a national commitment to the concept of equal justice under the law for men and women alike." 117 CONG. REC. 35306 (1971) (remarks of Congressman Edwards).

It was also recognized by Senator Ervin, an opponent of the broad language version of the Equal Rights Amendment that the community property and common law systems "contain sex discriminatory aspects which would be changed under the Equal Rights Amendment," SENATE COMM. ON THE JUDICIARY, MINORITY REPORT, EQUAL RIGHTS FOR MEN & WOMEN, S. REP. No. 689, 92d Cong., 2d Sess. 41-42 (1972).

munity property laws giving predominant management and control of the community property to the husband[93] rather than equal, or joint and several management and control to both spouses.

Anticipating that the Equal Rights Amendment would have such an effect, most of the community property states have already effectively changed their laws to provide either for joint and several management and control by both spouses[94] or a form of management and control that could be described as "separate but equal"; that is, each spouse has the sole management, control, and disposition of the community property that he or she would have owned if single. Once commingled with other community property, the entire mass would be subject to the joint management, control, and disposition of the spouses.[95] If there were concern only about the effects of the prospective application of the Equal Rights Amendment requiring changes in the rules on management and control of community property, the recent legislative developments in most community property states would render the issue moot. Even in California, where the joint and several management and control provisions do not go into effect until January 1, 1975,[96] the issue would be moot since the Equal Rights Amendment, by its own provisions, does not become effective until two years after its ratification.[97] Furthermore, even if the Equal Rights Amendment should not be ratified by the requisite number of states, the case of *Frontiero v. Richardson*[98] foreshadows a possible expanded application of the equal protection clause to cover such management and control.[99]

However, any retroactive application of the Equal Rights Amendment to management and control of community property acquired

93. While debating a proposed limitation on the broad wording of the amendment, Congresswoman Grasso stated as a reason for her preference for the broad wording: "And in seven of the eight states where all things acquired during marriage are considered community property, the husband has the sole right to control and manage the estate." 117 CONG. REC. 35799 (1971) (remarks of Congresswoman Grasso). Comment, *Inequality Between Spouses, supra* note 75, at 96; Bingaman, *supra* note 76, at 18.

94. These states include Arizona, California (effective Jan. 1, 1975), New Mexico, and Washington.

95. TEX. CODE ANN., FAMILY CODE, tit. 1, § 5.22 (1973 Pam.).

96. Cal. Stat. 1973, ch. 987, §§ 20-21.

97. H.R.J. Res. 208, *supra* note 85.

98. 411 U.S. 677 (1973).

99. Chief Justice Berger and Justices Powell and Blackmun indicated that it was inappropriate *at that time* to decide whether sex was a suspect classification because of Reed v. Reed, 404 U.S. 71 (1971), and because the Equal Rights Amendment has been submitted for ratification. *Id.* at 691-92.

prior to the effective date of that amendment poses another problem. Whether or not the amendment is preceded in a particular community property state by a statute establishing equal management and control of the community property, California cases, relying on the due process clause, have established that the husband's management and control of particular community property may not be taken by retroactively applying legislation enacted subsequent to the acquisition of the property.[100] None of those cases, however, provides guidance as to whether a subsequent amendment to the United States Constitution may operate retroactively to take away vested property rights, a question certain to arise if the Equal Rights Amendment is ratified.

The Equal Rights Amendment v. The Due Process Clause

The proponents of the Equal Rights Amendment did not appear to give a great deal of consideration to constitutional conflicts that could arise from the retroactive operation of that amendment. There have been some statements made by proponents that the Equal Rights Amendment would have to be harmonized with the overall structure of the Constitution;[101] however, the context of such statements has indicated a concern only for the protection of certain pre-existing constitutional rights such as an individual's right to privacy.[102] No particular solicitude appears to have been shown for the preservation of pre-existing property rights.

Indeed, there is ample precedent for constitutional amendments taking without compensation property rights vested under the Constitution. The most obvious example is the Thirteenth Amendment, which abolished slavery without compensating the slave owners.[103] However, the distinction could be made that the Thirteenth Amendment retroactively abolished vested property rights in something that was not properly or morally the subject matter of property in anyone (that is, property in human beings); whereas the vested right of management and control of the material things comprising community property can be the subject matter of property in one or more per-

100. See cases cited note 78 *supra.*

101. Note, *The Equal Rights Amendment & the Military*, 82 YALE L.J. 1533, 1536 (1973); Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 912-20 (1971).

102. *Hearings on H.R.J. Res. 208 Before Subcomm. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 402 (1971).

103. Bailey v. Alabama, 219 U.S. 219 (1911); Peonage Cases, 123 F. 671 (M.D. Ala. 1903).

sons without violating such fundamental standards of morality that retroactive application of the amendment is required.

Similarly, other constitutional amendments have been held to be effective to take without compensation property rights previously vested under the Fourteenth Amendment.[104] Likewise, federal regulation of transactions arising from property rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the legislation, the fact that its provisions limit or interfere with previously acquired property rights does not invalidate the legislation.[105]

To the extent that the Equal Rights Amendment, if ratified, purports to destroy previously vested exclusive rights to manage and control community property, it modifies the requirement of the Fifth Amendment which states, "nor shall private property be taken for public use, without just compensation." Whether a court, interpreting the Equal Rights Amendment, should recognize its effectiveness to take, without compensation, vested property rights previously protected by the Fifth Amendment is a question that may be more jurisprudential than practical. More likely, advocates of retroactive application of the Equal Rights Amendment will prefer to establish a justification for retroactivity within the framework of the due process clause of the Fourteenth Amendment.

Such a justification may be found in the argument that a retroactive application of the Equal Rights Amendment is an exercise of the police power of the government. Maintenance of the statutory inequalities of the past for previously acquired property would be considered so inconsistent with the policy of promoting the general welfare through equal treatment of the sexes that property rights could be taken away, if necessary, to assure the desired equal treatment.[106] Advocates of retroactive application of the amendment to cover management and control of the community property have argued that the existing equal protection clause is not an adequate basis on which to overrule past legislation because the reasonableness test, rather than the suspect classification test, still appears to be applied with respect

104. Corneli v. Moore, 267 F. 456 (E.D. Mo.), *aff'd*, 257 U.S. 491 (1921).

105. Fleming v. Rhodes, 331 U.S. 100, 107 (1947); Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 551 (1870); U.S. CONST., Library of Congress ed. 976 (1963).

106. Lieberman v. Van De Carr, 199 U.S. 552 (1905); Jacobson v. Massachusetts, 197 U.S. 11 (1905).

to discriminatory classifications based on sex under state law.[107]

On the other hand, opponents of the retroactive application of the Equal Rights Amendment would argue that such application would cause serious economic and social disruptions. They would urge that the amendment in itself will cause severe strains on family relations and marriage,[108] and that the retroactive application of the amendment would further aggravate the situation.

A more practical argument against retroactivity could be made because of its economic consequences. If, prior to January 1, 1975, the effective date of the Dymally Bill, the husband had management and control of the community property investments, retroactive operation of the bill and the Equal Rights Amendment would permit the wife to intervene at will in future transactions with the investments. Brokers and other intermediaries who had dealt in the past with the husband alone would now be uncertain as to the final authority of either spouse alone to mandate further transactions. Their best solution would be to demand the more cumbersome procedure of joint consent to any future transactions with the investments.

Retroactive application of the Equal Rights Amendment to the husband's predominant management and control of the community property would not be likely to jeopardize community property transactions completed by him prior to the effective date of the amendment. If the other party to the transaction had relied on existing law to conclude that the husband's action would be final and binding on the community, that other party should be treated as a bona fide purchaser against whom the wife would have no greater rights than the husband would have had. To that extent, completed or recorded transactions in community real or personal property should be free from rescission or nullification, despite retroactive application of the Equal Rights Amendment. On the other hand, the management and control of community property involving inchoate rights or uncompleted transactions may well become complicated by the Equal Rights Amendment. In particular, there could be severe complications in the process of selecting settlement, options or beneficiaries for life insurance policies or death benefits provided in employee pension plans. It would be difficult enough to accord to the non-employed spouse the retroactive right to change beneficiaries and settlement options when

107. Comment, *Inequality Between Spouses, supra* note 75, at 94; *cf.* Frontiero v. Richardson, 411 U.S. 677 (1973).

108. *See* remarks of Congressman Celler, 117 CONG. REC. 35305-06 (1971).

the life insurance policies and pension plans, though acquired prior to the effective date of the Equal Rights Amendment, were entirely community property. The problem would be compounded if inception of the title to such policies and pension plans had occurred prior to the marriage, thereby creating a mixture of separate and community property in each such policy or plan. Requiring the actuaries of insurers or pension trusts to compute (based on proportionate ownership rights and proportionate allocation of interest earned by funds held under the plan) the portions of benefits that each or both spouses could control, would create enormous problems of administration.[109]

Absent express provision in the Equal Rights Amendment as to its retroactive application, the matter will have to be resolved by the courts. There is ample precedent from prior cases deciding whether and the extent to which constitutional amendments,[110] legislation,[111] or decisions of the courts,[112] should be given retroactive effect, and the courts will probably again be called upon to establish guidelines or restrictions on retroactive application.

The Equal Rights Amendment and the Rights of Creditors

Since the Equal Rights Amendment, if ratified, would affect present and pre-existing rights of management and control over community property, there is the need to assess its impact on the rights of another group—the creditors of the spouses. As has been pointed out,[113] the power to manage and control community property includes the power to incur debts and to use all community property so managed and controlled to pay such debts. Should the Equal Rights Amendment apply retroactively to abolish the husband's exclusive management and control and substitute joint and several or equal management and control of community property, regardless of when acquired, the creditors of either spouse could invoke the amendment to reach any and all of that community property. In this context, the

109. The complexity of calculating the interests of the community and separate property is indicated in Gettman v. City of Los Angeles Dept. of Water & Power, 87 Cal. App. 2d 862, 197 P.2d 817 (1948). Normally, however, selection of the mode of payment of the pension benefits is governed by the terms of the contract with the employer covering both the method of selection and the person who may select. *See* Ball v. McDonnell-Douglas Corp., 30 Cal. App. 3d 624, 106 Cal. Rptr. 662 (1973); *cf.* Phillipson v. Board of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970).

110. See cases cited notes 103-05 *supra.*

111. See cases cited note 10 *supra.*

112. See cases cited note 81 *supra.*

113. See cases cited note 11 *supra.*

Equal Rights Amendment accords even greater advantages to the creditors of the spouses than does the California law going into effect on January 1, 1975. The new California law at least recognizes due process restrictions by providing, *inter alia*, that non-necessity debts incurred during marriage by the wife prior to January 1, 1975, would be payable only from her community property earnings,[114] and that the earnings and community property personal injury damages of the wife would not be liable for the non-necessity debts of the husband incurred during marriage prior to January 1, 1975.[115] The Equal Rights Amendment, if applied to all of the community property, gives each spouse the power to mandate the use of any or all of the community property, regardless of who earned it or of when it was acquired to pay the debts of that spouse.

The more difficult issue under the Equal Rights Amendment, however, will be whether the rights of the creditors would be correlative with the expanded and retroactively applied powers of either spouse to use any community property to pay his or her debts incurred during marriage.

An example will serve to illustrate the problem. Suppose that prior to the effective dates of the Dymally Bill and the Equal Rights Amendment the wife had incurred debts during the marriage in the amount of $5,000. If $5,000 worth of community property traceable to the husband's community earnings acquired prior to the effective dates of the Dymally Bill and the Equal Rights Amendment can be found, may the creditors reach that property without joining the wife as a co-plaintiff in a separate action to wrest that property from the grasp of a husband holding onto the last vestiges of male dominance

114. Cal. Stat. 1973, ch. 999, §§ 2, 3, at 1826, *effective Jan. 1, 1975 and amending*, CAL. CIV. CODE § 5116 (West 1970) provides:

(a) The property of the community is not liable for the contracts of the wife, made after marriage and prior to January 1, 1975, unless secured by pledge or mortgage thereof executed by the husband.

(b) Except as otherwise provided by law, the earning of the wife are liable for her contracts heretofore or hereafter made before or after marriage and prior to January 1, 1975.

115. Cal. Stats. 1973, ch. 987 at 1861, amend. CAL. CIV. CODE § 5117, effective January 1, 1975, to read:

The earnings and community property personal injury damages of the wife are not liable for the debts of the husband incurred prior to January 1, 1975; but except as otherwise provided by law, such earnings and damages shall be liable for the payment of debts, heretofore or hereafter contracted by the husband or wife prior to January 1, 1975, for the necessities of life furnished to them or either of them while they are living together. As used in this section, "community property personal injury damages" has the meaning given that term by subdivision (b) of Setcion 4800.

in the marriage? Suppose the wife now has second thoughts about that debt and decides that she would prefer the continuing benevolent despotism of her husband as to the $5,000 worth of community property over the newly enlightened self-interest of a cerditor invoking the highest ideals of the Equal Rights Amendment to put a decisive end to the husband's exclusive management and control of that property. Then what would be the rights of the creditors? May the wife sacrifice her hard-won rights to manage and control the $5,000 previously in her husband's exclusive province by now disclaiming her right to share management and control thereof? Does she have a right to disclaim management and control of community property earned by the husband after the effective date of the Equal Rights Amendment for the purpose of thwarting the creditor's designs of obtaining payment of the debt?

It would seem that the management and control of anything the husband earned as community property after the effective date of the Equal Rights Amendment could not properly be disclaimed by the wife to defeat the claims of creditors. The resemblances to a transaction in fraud of creditors would be undeniable.[116] However, were the wife only to reject the management and control bestowed upon her by the Equal Rights Amendment over community property acquired prior to the effective date of the amendment, her action would not be unlike the act of a beneficiary disclaiming a testamentary gift for the equally lofty purposes of defeating a claim of the beneficiary's creditor or of reducing the amount of taxes that would otherwise be paid. The analogy of disclaimer seems appropriate since the efficacy of the disclaimer to defeat the rights of a beneficiary's creditor, or the government's pursuit of revenue, depends principally on whether the interest in the property had vested in the beneficiary at the time of the disclaimer.[117] Thus, it could reasonably be argued that the wife's creditor could not recover against community property acquired prior to the effective date of the Equal Rights Amendment if she disclaimed her right to the management and control thereof within a reasonable

116. *Cf.* Estate of Kalt, 16 Cal. 2d 807, 108 P.2d 401 (1940) (disclaimer by beneficiary of interest under will of decedent to defeat claims of beneficiary's creditors held not effective). *But cf.* CAL. PROB. CODE §§ 190-190.10 (West Supp. 1974).

117. For Federal Gift Tax purposes, for example, a disclaimer of an interest under a will by a beneficiary is deemed to not be a gift by such beneficiary if under state law, such interest is deemed not yet vested in the beneficiary at the moment of decedent's death, or if the beneficiary may completely and unqualifiedly refuse to accept the property from the estate. In such case, the disclaimer would not be deemed a gift subject to tax, Treas. Reg. § 25.2511-1(c) (as amended by T.D. 7296, 12-11-73).

time after such date. In effect she would have a form of election not unlike the widow's election.

Conclusion

The constitutional law problems involving the present law covering the management and control of community property in California are already many and complex. The addition of the changes under the Dymally Bill on January 1, 1975, will serve only to add further constitutional law issues to be resolved by the courts; and, if the due process strictures of existing California case law are applied to preclude retroactive operation of the Dymally Bill provisions, the date of January 1, 1975, will be added to all the other dates that must be learned to ascertain what rights each spouse (and/or his or her creditors) has as to each item comprising the mass of community property possessed by spouses after a marriage of long duration.

Even the Equal Rights Amendment, if ratified by the requisite number of states, will not serve to resolve all of the constitutional law questions on the management and control of all past, present, and future community property. Litigation would still be necessary to determine what, if any, retroactive application the amendment would have on the management and control of community property acquired prior to its effective date. Even more difficult, since not considered in the legislative history, is the assessment of the impact of the amendment on the rights of the spouses' creditors, particularly if a wife would be loath to have the newly won liberation of the community property redound to the ultimate benefit of her creditor as the sole and final controller of the community property. The simplest solution to the constitutional law problems on management and control of the community property may lie in the resurrection of the fiduciary theory expounded in the old and apparently still valid *Warburton*[118] case decided by the United States Supreme Court. If that theory is accepted to reduce the right of management and control to a mere fiduciary power of a trustee rather than the beneficial right of a *cestui que* trust, then retroactivity and consequent taking of property without due process cease to be problems. A new trustee or co-trustee may deal as fully and completely with trust property (regardless of when acquired) for the benefit of all beneficiaries, as could a former trustee or a present co-trustee. Since the fiduciary theory is based on the United States Supreme Court decision, it would take precedence over

118. Warburton v. White, 176 U.S. 484 (1900).

any California cases denying retroactive application on the grounds that such application would take away vested rights established by prior erroneous interpretation of management and control as a beneficial interest rather than as a fiduciary power. Retroactivity would be denied only to avoid hardship to those who have relied on previous California case law or in order to effect a smoother transition between operation under the old law and operation under the new law and/or the Equal Rights Amendment establishing joint and several management and control of community property in California.