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California’s Assembly Bill 205, The Domestic Partner Rights and Responsibilities Act of 2003: Is Domestic Partner Legislation Compromising the Campaign for Marriage Equality? 

Enrique A. Monagas*

I. INTRODUCTION

Are domestic partner registries¹ an adequate alternative to marriage for same-sex couples? Should gays and lesbians strive for the right to marry or should they focus their efforts exclusively on the right to enter into alternative legal partnerships? Or should they continue their current strategy, waging a campaign for both marriage and alternative rights until they acquire full equality with their heterosexual peers? Answering these questions requires a clear understanding of the rights, responsibilities and recognition at stake for same-sex couples. The “gay marriage”² debate has entered American discourse with an intensity reminiscent of the civil rights struggles of the 1960s. As such, both sides of the current debate claim moral legitimacy: Gays and lesbians are fighting for legal recognition of their lasting, committed, and caring human relationships,³ while opponents argue that human history fails to recognize such relationships and religious tenets affirmatively condemn them.⁴

In 2003, gays and lesbians made considerable strides toward equality. In June, the United States Supreme Court decided Lawrence v. Texas, striking down a Texas criminal sodomy law as a violation of Due Process

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1. For purposes of this paper the term “domestic partner” includes all legal frameworks granting marriage-like rights and responsibilities to same-sex couples, including civil unions, reciprocal beneficiaries, and domestic partner registries.

2. Cf. EVAN WOLFSON, WHY MARRIAGE MATTERS 17 (Simon & Schuster 2004) (arguing against using the phrase “gay marriage” as it implies that same-sex couples are asking for special rights apart from those afforded to traditional opposite-sex marriages).


and thereby recognizing that homosexuals "are entitled to respect for their private lives." Five months later, the Massachusetts Supreme Judicial Court decided Goodridge v. Dep't of Pub. Health, declaring a law which restricted marriage to individuals of the opposite sex was a violation of the Equal Protection and Due Process clauses under the Massachusetts Constitution, and staying its order for 180 days to permit the legislature to take "such action as it may deem appropriate in light of this opinion." These two landmark decisions fueled a growing public discourse. The public seemed ready to accept gay and lesbian persons as equal members of American society. The fight for same-sex marriage was quickly on the move and foremost on the political landscape. In early 2004, mayors in cities across the country began issuing marriage licenses to same-sex couples in direct violation of state laws. Following the favorable decision in Massachusetts, same-sex marriage activists filed suits in multiple states challenging the legality of the ban on same-sex marriage.

Progress in gay and lesbian equality came at a considerable cost, however. On November 2, 2004, Americans re-elected President George W. Bush, who declared his mandate against same-sex marriage as the cornerstone of his re-election platform. On this same day, 11 states voted to curtail and/or completely eliminate "gay rights" from their respective states. The election delivered a clear message: marriage equality would not come without a struggle. Exit polls indicated that a majority of voters cited "moral values" as the central basis behind their support for the President’s bid for re-election. As playwright and gay activist Larry Kramer has noted, however, the phrase “moral values” is a misnomer. Its actual meaning is the reverse: by voting moral values, American citizens

11. Alan Johnson, Same-Sex Marriages Banned, COLUMBUS DISPATCH, Nov. 3, 2004, at 1A.
expressed their collective belief that gays and lesbians are immoral. On November 2, 2004, the momentum toward legally recognizing same-sex marriage ended abruptly with a considerable loss of legal rights and public support.

The battle for same-sex marriage is in a precarious position. With the current political climate leaning toward a religious conservatism at odds with gay and lesbian lifestyles, the promise of same-sex marriage now seems far from becoming reality. Accordingly, same-sex marriage advocates have considered alternative strategies. Marriage is not the sole method of granting same-sex couples legal protections and recognition. In order to afford gay and lesbian couples legal rights without recognition of legal civil marriage, a handful of progressive states enacted domestic partner registries or civil union statutes. Under these alternative legal regimes, states are able to recognize and, arguably, to appease same-sex couples without having to grant them the full panoply of rights afforded to their heterosexual residents and without the use of the word "marriage." Interestingly, states that have come out against same-sex marriage have nevertheless enacted domestic partner laws. Of the states that have such arrangements, California's recently enacted Assembly Bill 205: The Domestic Partner Rights and Responsibilities Act of 2003 ("AB 205") is one of the most comprehensive.

AB 205 promises to bestow upon gay and lesbian couples all of the rights afforded to opposite-sex couples under state law (except those rights relating to state income tax). With close to 30,000 registered domestic partners in California, AB 205 is poised to make a significant difference

14. Id.
15. Dennis M. Mahoney, Conservative Christians Backed Bush, COLUMBUS DISPATCH, Nov. 5, 2004, at 7A.
16. See Paula L. Ettelbrick, Avoiding a Collision Course in Lesbian and Gay Family Advocacy, 17 N.Y.L. SCH. J. HUM. RTS. 753 (2000) (arguing for defining a continuum of family structures that could address family and caregiving needs beyond marriage and marriage-like relationships); Greg Johnson, In Praise of Civil Unions, 30 CAP. U. L. REV. 315 (2002) (defending civil unions as an opportunity to acquire central civil rights, while allowing gays and lesbians the freedom to be different).
17. A full discussion of these laws is provided below in Part I of this Article.
18. For example, California voters enacted Proposition 22 in March of 2000, which mandated that California not recognize same-sex marriages from sister states; meanwhile, the State enacted domestic partner legislation in 1999, 2001, and 2003, which granted many of the rights traditionally enjoyed by opposite-sex couples within marriage. A thorough discussion of California's domestic partner legislation and Proposition 22 is found in Part II of this Article.
20. Id.
in the lives of gay and lesbian Californians. Despite its intentions, however, AB 205 has created an air of uncertainty and apprehension among California’s registered domestic partners: Does it apply retroactively? If so, when does community property apply? What are the federal taxation implications of dissolution? What is the legal status of property agreements between partners? Is the domestic partnership recognized outside of California? Unexpectedly, the state experienced a sudden increase in domestic partnership dissolutions as a result of the potential adverse consequences of the newly enacted law.

Plainly, it is essential that AB 205 be properly and easily understood, not only for California residents, but also so that it may serve as a model for states considering granting their residents similar benefits. Part II of this paper places AB 205 in a global context, considering the legal recognition of same-sex couples in other countries in contrast to the United States’ approach. Part III traces the legislative history that brought about the enactment of AB 205. Part IV provides an analysis of AB 205, contrasting its proposed effect with its likely interpretation, while focusing exclusively on the issue of property distribution and protection within the domestic partnership. Part V recommends revisions to AB 205 that will better serve the unique needs of registered domestic partners. Finally, part VI addresses the implications of creating legal relationships outside of a marriage paradigm. While gay and lesbian couples undoubtedly benefit by recognition of the limited rights these alternative legal partnerships provide, I argue that domestic partner legislation serves to undermine the fight for marriage by allowing for a compromise position which fails to deliver on the promise of equality.

II. LEGAL RECOGNITION OF SAME-SEX COUPLES: A GLOBAL CONTEXT

Globally, same-sex couples are granted considerably more rights outside the United States than within it. In 2001, the Netherlands became the first nation to legally recognize same-sex marriage. Belgium followed shortly thereafter, recognizing same-sex marriage in 2003. In June of 2005, Spain became the third nation to legalize same-sex marriage. Although the remainder of Europe does not recognize marriage equality, domestic partnership laws in much of Western Europe grant

23. Id.
same-sex couples many of the rights attendant to traditional marriage.27

Closer to home, appellate courts in the Canadian provinces of Manitoba, Newfoundland & Labrador, Nova Scotia, British Columbia, Ontario, Quebec, and Yukon Territory ruled that denying marriage licenses to same-sex couples contradicted the Charter of Rights and Freedom in the Canadian Constitution and began granting licenses to same-sex couples.28 On December 9, 2004, the Canadian Supreme Court laid the groundwork for legislation permitting same-sex marriage, holding that such legislation would be consistent with the Charter.29 On July 20, 2005, Canada became the fourth nation to legalize same-sex marriage.30

In contrast, same-sex couples in the United States are afforded limited rights, which vary depending on the state in which they reside.31 As of September 2005, only seven states provide same-sex couples legal protections — with Massachusetts, Vermont, California, and Connecticut providing the most comprehensive rights. In May of 2004, Massachusetts became the first, and only, state to recognize same-sex marriage.32 Although the Goodridge decision is a leap for marriage equality there are two significant caveats: first, the State has argued that a law enacted in 1913 to impede interracial marriages limits same-sex marriages to Massachusetts residents;33 and second, the Massachusetts legislature has considered amending its constitution to restrict marriage to traditional opposite-sex couples.34 In Vermont, a state supreme court decision

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34. A Step Back, BOSTON GLOBE, Mar. 30, 2004, at A10 (reporting on the initial passage of an amendment to Massachusetts’s constitution restricting marriage to heterosexuals but setting up civil unions for gays.); but see, Pam Belluck, Massachusetts Rejects Bill to Eliminate Gay Marriage, N.Y. TIMES, Sept. 15, 2005, at A14 (reporting on the Massachusetts legislature’s rejection of the proposed constitutional amendment. Although a victory for marriage equality advocates, opponents vow to introduce an
compelled the legislature to enact a parallel system of rights for same-sex couples.\textsuperscript{35} Although not marriage, Vermont’s civil union statute allows same-sex couples to enter into a state-sanctioned civil union, a status providing all the rights, privileges and obligations of marriage under state law.\textsuperscript{36} California’s AB 205 and Connecticut’s newly enacted civil union bill promise to afford the same rights as given under Vermont’s civil union statute, but neither extends state tax law benefits.\textsuperscript{37} The remaining three states, Hawaii, Maine, and New Jersey, all have some form of a domestic partner registry, providing a limited bundle of rights.\textsuperscript{38} On the other side of the debate, 40 states have laws or state constitutional amendments that purport to ban same-sex marriage, including four of the six states that afford same-sex couples some rights.\textsuperscript{39}

III. THE CALIFORNIA CONTEXT OF AB 205

AB 205’s most remarkable characteristic does not concern the rights it confers, but rather how those rights were created: The enactment of California’s legislation protecting gay and lesbian families is unique because it did not require a court order but instead originated purely in the legislature.\textsuperscript{40} Unlike Massachusetts and Vermont, in which same-sex rights were compelled by decisions delivered by the states’ respective Supreme Courts, the California legislature enacted AB 205 \textit{sua sponte}. The progress achieved through AB 205, however, did not arrive in a vacuum. Instead, rights for California’s same-sex couples have been enacted in a gradual and modest process.

In 1985, the cities of West Hollywood and Berkeley established the first domestic partner registries in California, with other cities following suit.\textsuperscript{41} Some 14 years later, the state legislature enacted AB 26, establishing the first statewide registry.\textsuperscript{42} AB 26 granted limited rights, 

\textsuperscript{36} VT. STAT. ANN. Tit. 15, § 1202 (2004).
\textsuperscript{38} HAW. REV. STAT. § 572C-4-572C-5 (2004); ME. REV. STAT. ANN. tit. 22, § 2710 (West 2004); N.J. STAT. ANN. § 26:8A (West 2005).
\textsuperscript{42} Id.
including hospital visitation, and provided for domestic partner health benefits of state employees. In 2001, AB 25 added an additional 12 benefits and responsibilities to the rights established under AB 26, including the right to sue for wrongful death, the right to use employee sick leave to care for a partner, the right to use stepparent adoption procedures, and the right to make medical decisions for an incapacitated partner. Although the limited legislation concerning same-sex couples gave registered domestic partners key rights, there were still well over 1,000 rights afforded under marriage not available to registered domestic partners.

Enter AB 205. AB 205 was authored and introduced to the California legislature by state Assemblywoman Jackie Goldberg during the 2003 legislative session. It passed the legislature and was signed into law by Governor Gray Davis on September 19, 2003. As discussed above, AB 205 is part of a series of legislation granting same-sex couples legal recognition. Given its breadth, however, it stands apart: AB 26 provided a handful of rights, AB 25 included a mere 12 more, but AB 205 affords same-sex couples virtually all of the state rights a married couple is granted. This fact was not lost on the opponents of same-sex marriage.

In fact, many Californians believed they had already decided the “gay marriage” debate in the negative. In 2000, California voters approved Proposition 22 (the “Knight Initiative”), which prohibited out-of-state same-sex marriages from being recognized in the state. Proposition 22 was codified as California Family Code section 308.5, providing “Only marriage between a man and a woman is valid or recognized in California.” Arguing that AB 205 created marriage rights for same-sex couples in violation of Proposition 22, opponents of same-sex marriage filed suit in state court seeking injunctive relief. Maintaining a broad reading of section 308.5, the plaintiffs argued that Proposition 22 was enacted to restrict all marriage-like relationships in the state to opposite-sex couples. Essentially, they argued that AB 205 created a new marriage paradigm, replacing the word “marriage” with domestic partner.

43. Id.
44. Id.
45. Id.
51. Id. at 3.
52. Id.
Accordingly, given that section 308.5 was enacted through the California proposition process, any law conferring the benefits and detriments exclusively reserved for “marriage” upon a same-sex couple must be approved by the voters of California, not the legislature.\textsuperscript{53} The trial court disagreed.\textsuperscript{54}

Sacramento Superior Court Judge Loren E. McMaster\textsuperscript{55} ruled that AB 205 did not create “marriage,” and thus Proposition 22 had no bearing on the implementation of the law.\textsuperscript{56} The court determined that marriage could not be defined solely by the rights attendant to the institution because these rights were in continuous flux and no fixed set could adequately define marriage; instead, the court relied on the historical element of marriage’s opposite-sex unions to determine that “marriage,” within the meaning of section 308.5, was essentially rights plus a heterosexual union.\textsuperscript{57} Furthermore, the court reasoned that the plaintiffs’ interpretation of section 308.5 was untenable because based on an unconstitutional reading: Denying same-sex couples benefits on the basis of their sexual orientation would violate California’s equal protection clause.\textsuperscript{58} On appeal, the Third Appellate District affirmed.\textsuperscript{59}

If appealed to the California Supreme Court, the trial and appellate court decisions should be upheld for the following reasons. First, section 308.5 relates specifically to “marriage” and not to domestic partnerships. If the drafters of Proposition 22 desired to affect domestic partnerships, they could have easily amended their language to reflect this intent. The superior court agreed with this legislative intent argument in its decision, noting that at the time of Proposition 22’s enactment the state already had a domestic partner registry conferring rights to same-sex couples, of which the drafters were well aware.\textsuperscript{60} Instead, “Yes on 22” spokesman Robert Glazier went on the record in 2000 with Fox News reporter Paula Zahn saying, “Proposition 22 was so narrowly defined with just fourteen words, not just for simplicity’s sake, but for the legal impact. It will not affect domestic partnership rights.”\textsuperscript{61}

Second, section 308.5, in spite of what opponents to same-sex marriage argue, only relates to the recognition of marriages from out-of-state. Read in a vacuum, section 308.5 might lead one to the conclusion that California

\textsuperscript{53} Id.
\textsuperscript{54} Id. at 14-22.
\textsuperscript{55} As a result of the \textit{Knight} ruling, anti-gay activists have organized to have Judge McMaster recalled; see Bob Egelko, \textit{Judge Targeted for Same-Sex Ruling}, S.F. CHRON., Sept. 13, 2004, at B2.
\textsuperscript{56} Knight, No. 03AS05284 at 14.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 18-20.
\textsuperscript{60} Knight, No. 03AS05284 at 15-16.
\textsuperscript{61} The Edge with Paula Zahn, Transcript No. 030603cb.260 (Fox television broadcast Mar. 6, 2000).
limits marriage to opposite-sex couples, but section 308.5 is found within section 308, which relates exclusively to the "validity of foreign marriages." Accordingly, Proposition 22's proscription of same-sex marriage is limited to marriages performed outside of California. Thus, the argument that AB 205 was enacted in violation of Proposition 22 is patently wrong.

IV. A ROADMAP TO AB 205

AB 205 is ambitious in scope. It provides registered domestic partners and their families with a number of significant new rights, benefits, and obligations. Yet, unlike its predecessors AB 26 and AB 25, which exclusively granted rights to same-sex couples, AB 205 provides an additional benefit: responsibilities. Given that same-sex couples have never before been held to marriage-like responsibilities by the state, the application of these new rights remains unclear. In September 2004, the San Francisco Chronicle reported that hundreds of domestic partners were dissolving their unions as a result of the uncertainty posed by AB 205. Specifically, given community property obligations, same-sex couples are concerned about winding up in a "financial quagmire." Not surprisingly, despite its benefits and recognition, marriage is an institution gays and lesbians enter with considerable trepidation. Having lived their entire lives financially independent, many gays and lesbians are reticent about entering into a state-enforced legal contract that will tie their earnings, property, and debts with their life partner's. This anxiety is heightened when the institution they are entering is an unknown territory, created by a law that has yet to be tested.

Given the breadth of relevant issues presented by AB 205, and in light of the financial apprehension expressed by many same-sex couples, this paper limits its discussion to AB 205's effect on property within the domestic partnership: its effect before registry into the partnership, during the existence of the partnership, and upon dissolution of the partnership. Specifically, this paper will explore the viability of preregistration agreements entered into before and after January 1, 2005, and whether

63. See id. § 297.5(a).
64. Marech, supra note 22, at A1.
65. Id.
66. See also, Gay Shame Opposes Marriage in Any Form, at http://www.gayshamesf.org/archives.htm (Gay Shame is a "queer" group opposing marriage equality that argues: "Whatever happened to the time when being queer was an automatic challenge to the disgusting, oppressive, patriarchal institution of holy matrimony? Now, it seems that queers are so desperate to get their taste of straight privilege that they'll camp out in the rain with the hopes that the state will finally sanction their carnal coupling.").
67. For purposes of this paper the term "preregistration agreement" refers to premarital agreements made between domestic partners prior to registration; see Cal. Fam. Code §§ 297.5(a), 1610(a) (Deering 1994 & Supp. 2005).
community property character may constitutionally attach to registered domestic partners’ property retroactively.

A. PROCEDURAL FRAMEWORK OF DOMESTIC PARTNER REGISTRATION AND DISSOLUTION UNDER AB 205

As a preliminary matter, in order to qualify for legal domestic partner recognition same-sex couples must meet certain requirements: Both persons must have a common residence; neither person may be married to someone else or in a domestic partnership with someone else; the two persons may not be related by blood in a way that would prevent them from being married to each other in California; both persons must be at least 18 years of age; and both persons must be capable of consenting to the domestic partnership.68

For couples registered as domestic partners with California under earlier domestic partner legislation, AB 205 does not require action on their part.69 Instead of requiring domestic partners registered under AB 26 to reapply for benefits under AB 205, the new legislation follows the same course AB 25 had set out in 2001: registered domestic partners are granted the rights and responsibilities of the new legislation without re-registration.70 Consequently, those individuals who decided they did not want the new benefits and responsibilities of AB 205 needed to dissolve their partnership before the date the law became effective, January 1, 2005. Notices informing registered partners of the rights and responsibilities they would be accepting if they chose to remain within the partnership were mailed in March of 2003 by Secretary of State Kevin Shelly.71 Accordingly, those couples who received notice of the changes to domestic partnerships and chose not to act implicitly agreed to the modification in benefits.

For new couples, entering into a domestic partnership has not changed as a result of AB 205.72 It remains a relatively simple and rather straightforward procedure whereby a same-sex couple files a declaration of domestic partnership with the Secretary of State.73 The above mentioned requirements apply, but the services of a lawyer or even an official

69. Id. § 299.3.
70. Id.
71. Id. (The letter provided in part “Effective January 1, 2005, California’s law related to the rights and responsibilities of registered domestic partners will change... Domestic partners who do not wish to be subject to these new rights and responsibilities MUST terminate their domestic partnership before January 1, 2005... If you do not terminate your domestic partnership before January 1, 2005... you will be subject to these new rights and responsibilities and, under certain circumstances, you will only be able to terminate your domestic partnership, other than as a result of domestic partner’s death, by the filing of a court action.”).
72. Id. §§ 298, 298.5.
73. Id.
ceremony are not necessary. Instead, would-be partners simply download a
declaration of domestic partnership from the Secretary of State’s webpage
or pick up the form at a local county registrar’s office or at any office of the
California Secretary of State. After completing the form, which requires
that they provide a mailing address, attest that they meet the requirements
of domestic partnership, and submit to the jurisdiction of California courts,
they notarize the form and mail it to the Secretary of State with a check for
10 U.S. dollars. Of note, unlike marriage in Massachusetts, it is not
necessary that either partner be a resident of California in order to qualify
for AB 205’s protection. Furthermore, AB 205 recognizes and protects
legal domestic partnership-like relationships from other states, without
mandating partners register within California. Dissolving the partnership,
however, is not as simple.

Under the prior system established by AB 26, dissolving a partnership
merely required filling out a form with the Secretary of State. In contrast,
AB 205 requires a more thorough procedure. Most couples will now need
to petition the superior court in order to dissolve their partnership. Essentially, with respect to dissolution, opposite-sex couples and same-sex
couples are treated similarly in the state. The key distinction is while
opposite-sex couples may have their marriage dissolved in a state other
than California if one partner is domiciled there, same-sex couples must
litigate their dissolution before a California court. There is a narrow
exception to the mandatory court dissolution proceeding, however, for the
rare couple who meets certain enumerated requirements. If a couple can
prove, among other things, that they have been registered with the state less
than five years, have no children, have minimal community property, and
neither contests the dissolution, the couple can simply file a form with the
Secretary of State and circumvent the judicial route.

B. RIGHTS AND RESPONSIBILITIES BEFORE REGISTRY INTO THE
PARTNERSHIP: VALIDITY OF PRE-REGISTRATION AGREEMENTS

As of January 1, 2005, community property principles apply to
registered domestic partners within California. While this is likely
welcomed by many same-sex couples, others who desire to protect their

74. Id. § 298.
75. Id. §§ 298, 298.5.
76. Id. § 297.
77. Id. § 299.2.
78. Id. § 299.
79. Id. § 299, 1999 Cal. Legis. Serv. 3375 (West) (repealed 2003).
80. Id. § 299(d).
82. CAL. FAM. CODE § 299(a) (Deering Supp. 2005).
83. Id.
84. Id. § 297.5.
separate wealth and limit their exposure to a partner's debts greet this change in California law with well-deserved trepidation. Accordingly, like opposite-sex couples before them, these same-sex couples rely on pre-registration agreements as a means to protect their interests. For new couples contemplating a domestic partnership, preregistration agreements require that partners clearly define how their assets will be divided. The essential element of a preregistration agreement is that the agreement be drafted and agreed upon before a couple registers as a domestic partnership.\textsuperscript{85} For domestic partners who registered prior to the enactment of AB 205, however, preregistration agreements may present the possibility of serious financial exposure. After all, how can these couples draft a preregistration agreement reflecting AB 205's grant of community property rights given that they are already registered with the state?

Nonetheless, many same-sex couples did create contractual agreements similar to preregistration agreements prior to their domestic partnership registrations. Unfortunately, a retroactive application of AB 205 likely renders those agreements invalid. Before California's Family Code granted same-sex couples legal protections, same-sex couples relied on case law and contract rights to safeguard their separate and combined assets during the existence and dissolution of relationships.\textsuperscript{86} Under the precedent established in \textit{Marvin v. Marvin}, express agreements between unmarried persons to pool earnings and to share in the joint accumulations of property during the term of the unmarried relationship are enforceable in California.\textsuperscript{87} Thus, partners, perhaps with the aid of a single lawyer, would draft preregistration-like agreements defining how to divide their assets. Although these agreements were clearly made before couples' eventual domestic partner registration, application of AB 205 renders many of these contracts void from the moment the respective couples registered as domestic partners.

California Family Code section 1615 mandates certain requirements be met in order for preregistration agreements to be valid.\textsuperscript{88} Most notably, partners must each be independently represented by counsel and in the event that a partner chooses to waive independent legal counsel, she must do so expressly in a separate writing.\textsuperscript{89} Given that pre-AB 205 couples could not foresee that their relationships would be regulated under the California Family Code, they likely failed to meet section 1615 requirements. Accordingly, if AB 205 is given a retroactive application these contracts would be void as preregistration agreements upon the couple's initial registration with the state.

\textsuperscript{85} \textit{CAL. FAM. CODE} § 1613 (Deering 1994).
\textsuperscript{86} Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{CAL. FAM. CODE} § 1615 (Deering 1994).
\textsuperscript{89} \textit{Id.}
The California legislature recognized the problem facing partners registered prior to AB 205’s enactment. Accordingly, it drafted AB 205 to allow registered partners to draw up preregistration agreements until June 30, 2005, despite their registered status. After such date, registered couples who have not entered into a preregistration agreement will have to draft a postregistration agreement, which has stricter requirements. However, by simply allowing registered partners an extended period in which to draft agreements, the legislature has not necessarily made them legally sound. Instead, it is possible that many of those registered partners who choose to exercise the extended date to file a preregistration agreement will find their agreement invalid given the duties imposed on them as a result of the couple’s special fiduciary relationship — their “confidential relationship.”

The existence of a confidential relationship imposes a duty of the highest good faith and fair dealing on each partner. This legal relationship gives rise to the presumption that a preregistration agreement between parties had been obtained by undue influence, with the burden of proof that the agreement had been obtained voluntarily shifting to the partner seeking to enforce it. Once a confidential relationship has attached, parties to the relationship must take affirmative steps to protect the interests of either party, thus ensuring undue influence is not exerted. Upon marriage or registration under AB 205 a confidential relationship expressly attaches, rendering the couple subject to the rules governing the actions of persons having confidential relations with one another. Thus, registered domestic partners cannot create a registration agreement in the same manner as they were able to before the legal relationship attached. Instead, the confidential relationship requires that registered domestic partners follow special rules in their contractual transactions, which are more demanding than those required by preregistration agreements. These further regulated agreements, made after a confidential relationship has attached, are known as postregistration agreements. Failure to heed the requirements of a postregistration agreement results in the invalidation of the agreement.

In contrast, a confidential relationship does not expressly exist between

90. Id. § 299.3.
91. Id.
92. Id.
93. See CAL. CIV. CODE § 1575 (Deering 2005); CAL. FAM. CODE § 1615 (Deering 2005).
94. BENDER, supra note 81, at 1-2 § 2.17.
96. See CAL. FAM. CODE § 721 (Deering 1994).
97. Id.
98. Id.
99. Id. § 1101(g).
unregistered couples contemplating a pre-registration agreement. Thus, the individual parties do not automatically owe a fiduciary duty to each other as such. Domestic partner registration under AB 205 and traditional marriage, however, are not the only means by which to establish a confidential relationship. Accordingly, registered domestic partners might have established confidential relationships between one another prior to AB 205's enactment that prevent them from filing legally sound pre-registration agreements.

The California Supreme Court has recognized that even between unmarried cohabitants, a confidential relationship may develop. Determining whether such a relationship exists requires a factual investigation whereby the trier of fact determines if a confidence is reposed by one person in the integrity of another. In conducting her analysis the trier of fact considers: (1) the length of the relationship; (2) whether funds and property were commingled or shared; and (3) the relative age, sophistication, and business experience of the parties. As a general rule, the mere existence of an intimate friendship does not create a legally recognizable confidential relationship giving rise to an inference of undue influence. However, when a friendship is coupled with another factor, such as old age, sickness, financial inexperience or some other incapacity, the presumption of undue influence does arise. Accordingly, registered domestic partners did not establish a confidential relationship merely as a result of their intimate association or cohabitation, unless some additional factor is present. Thus, for domestic partners who have been living together, sharing their finances and confidences for an extended period of time, and who maintain grossly unequal bargaining positions; it is possible a legally recognizable confidential relationship has developed, which will prevent them from filing a valid preregistration agreement.

Then again, the extent to which pre-AB 205 registered partners will be affected by their confidential relationship will be rather limited if subject to the factual inquiry described above. A compelling argument can be made, however, that the very act of registering as pre-AB 205 domestic partners by itself establishes a confidential relationship between partners, consequently rendering all preregistration agreements drafted pursuant to AB 205's June 30, 2005, extension invalid.

100. Bonds, 5 P.3d at 831.
102. Bender, supra note 81, at 1-2 § 2.17.
103. See In re Estate of Nelson, 36 Cal. Rptr. 352 (Cal. Ct. App. 1964) (finding a premarital agreement invalid given that husband was greatly advantaged, wife knew little about legal affairs, and the couple managed their property as if no agreement existed).
California law clearly delineates the point in time when a confidential relationship will attach to a married couple: the date of their union. In delineating this date, however, the California Family Code did not create a separate legal paradigm, but instead legally notes that on the date of marriage a confidence is reposed by one person in the integrity of another. The act of marriage destroys the legally recognizable illusion that this intimate couple can create an agreement at arm's length. Instead, marriage is an affirmation by both parties that their interests are entwined and that a party to the marriage will not take advantage of the other.

The act of registering as domestic partners prior to AB 205’s enactment arguably creates the same commitment between parties and, consequently, invokes the same attachment of a confidential relationship. The key difference, however, between marriage and pre-AB 205 domestic partnerships is the absence of financial rights and responsibilities attendant to pre-AB 205 domestic partnerships. Given that the existence of a confidential relationship is relevant in determining whether undue influence was exerted in a financial agreement, an argument can be made that the lack of financial rights and responsibilities serves to distinguish marriage from domestic partnership registration for the purpose of determining the existence of a confidential relationship.

On the other hand, the mere absence of financial obligations does not prevent a confidential relationship from attaching. Given that pre-AB 205 partners have the right to make crucial life decisions, such as medical decisions or administration of a partner’s estate, a trier of fact may likely deduce that by registering as domestic partners the couple reposed confidence between one another for all transactions. Accordingly, regardless of the legislature’s extension of the preregistration agreement deadline, these couples may likely be held to a more exacting level of agreements on account of their relationship. Thus, registered partners who choose to file the preregistration agreement, as opposed to a postregistration agreement, might find that their agreement is invalid and that property will be divided in accordance with state law. Consequently, a strong argument is made that registered partners should not rely on the June 30, 2005, extension, but should instead create property agreements following the fiduciary standards of a postregistration agreement in order to ensure their wishes are carried out.

107. See id. ("a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other").
108. See Traditional Wedding Vows, http://www.tmclark.com/JP/traditional.html (last visited July 27, 2005) ("[Groom] will you take [Bride] to be your lawful wife, will you love her, honor and keep her in sickness and in health and forsaking all others keep only unto her so long as you both shall live.") (emphasis added).
C. RIGHTS AND RESPONSIBILITIES DURING THE EXISTENCE AND DISSOLUTION OF THE PARTNERSHIP: RETROACTIVE ATTACHMENT OF COMMUNITY PROPERTY

The right to community property is arguably the single most significant right granted to domestic partners by AB 205. No longer will the financially dependent partner have to rely on Marvin contracts to obtain his share of the community; Instead he will be provided for through the compulsory sharing of assets and debts attendant to a community property regime. Consequently, the burden of renegotiating property distribution via pre- or postregistration agreements is now placed squarely on the financially independent partner. This, however, is not the only significant change the new community property rights afford registered domestic partners. As with opposite-sex marriages, community property attaches to domestic partners’ property on the date of registration with the state.\(^\text{109}\) This presents a dramatic change in circumstances for couples who registered before AB 205’s enactment, believing that their registration would provide them a handful of benefits and would have no effect on the property they would “separately” accumulate during their partnership. In essence, by recharacterizing property, AB 205 is depriving one partner of property for the benefit of the community. Given California’s well established family law doctrine holding that family law rules affecting property rights cannot be applied retroactively,\(^\text{110}\) is the retroactive application of community property rights a violation of the due process clause?

1. California’s Legal Landscape

*In re Marriage of Bouquet* is the seminal case on the issue of retroactive application of community property legislation.\(^\text{111}\) *Bouquet* involved the application of a statute that determined the character of property accumulated during a couple’s separation.\(^\text{112}\) The amended statute provided that “the earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse.”\(^\text{113}\) In contrast, the original statute allowed the wife to accumulate separate property during separation, but required that the husband’s accumulated property during this time become part of the community.\(^\text{114}\) Given the disparate treatment afforded by the two versions of the law, the husband

\(^{109}\) CAL. FAM. CODE § 760 (Deering 1994).


\(^{111}\) *In re Marriage of Bouquet*, 546 P.2d 1371 (Cal. 1976).

\(^{112}\) *Id.* at 1372.

\(^{113}\) *Id.* at 1372 n.1.

\(^{114}\) *Id.* at 1372.
argued for a retroactive application of the newly amended statute.\(^\text{115}\) The California Supreme Court undertook a three-part analysis to determine whether a retroactive application of the statute would be appropriate.\(^\text{116}\) First, the court determined whether the legislature intended the statute to apply retroactively.\(^\text{117}\) Second, after determining a retroactive application was the legislature’s intent, the court considered whether a retroactive application of the amended statute would constitute an impairment of the wife’s property rights.\(^\text{118}\) After it determined that the wife had a vested interest in her share of the community property at the time of acquisition, the court held that a retroactive application would, in fact, deprive the wife of her vested rights in the property at issue.\(^\text{119}\) Nevertheless, the court recognized that in certain situations a statute could still be applied retroactively.\(^\text{120}\) The Court held that a state may apply a statute retroactively by virtue of its “police powers” when “necessary to the protection of the health, safety, morals, and general well being of the people.”\(^\text{121}\) For the third part of its analysis, the Bouquet Court articulated six factors to be considered in determining whether a retroactive application of a statute would violate the due process clause: (1) “the significance of the state interest served by the law;” (2) “the importance of the retroactive application of the law to the effectuation of that interest;” (3) “the extent of reliance upon the former law;” (4) “the legitimacy of that reliance;” (5) “the extent of actions taken on the basis of that reliance;” and (6) “the extent to which the retroactive application of the new law would disrupt those actions.”\(^\text{122}\) The Court determined that the State’s interest in correcting “the rank injustice of the former law,” which treated husband and wife differently for purposes of determining the character of property acquired after separation, and the State’s interest in promoting the equitable dissolution of marriage, justified a retroactive application of the statute at issue that did not violate due process.\(^\text{123}\) Bouquet’s doctrine is well supported in California case law. In Addison v. Addison, the California Supreme Court sanctioned the retroactive characterization of separate property acquired in a common law state into community property within California.\(^\text{124}\) In permitting the retroactive application of the 1961 quasi-community property legislation, the Court determined the State’s interest in protecting “offspring, property

\(^{115}\) Id.

\(^{116}\) Id. at 1372-78.

\(^{117}\) Id. at 1373.

\(^{118}\) Id. at 1373-1376.

\(^{119}\) Id. at 1376.

\(^{120}\) Id.

\(^{121}\) Id. (quoting Addison v. Addison, 399 P.2d 897, 902 (Cal. 1965)).

\(^{122}\) Id.

\(^{123}\) Id. at 1377-1378.

\(^{124}\) Addison v. Addison, 399 P.2d 897 (Cal. 1965).
interests, and the enforcement of marital responsibilities” through the equitable dissolution of the marital relationship justified the State’s ability to convert otherwise separate property into community property.125 In the absence of a need to correct a “rank injustice,” however, courts have determined a retroactive application would be unconstitutional. In In re Marriage of Buol, the court considered whether the retroactive application of a statute that changed the process by which a couple maintained separate property was constitutional.126 After it determined the legislature intended a retroactive application of the statute and that this application resulted in a deprivation of a vested property right, the court undertook the third part of the Bouquet analysis.127 It distinguished Bouquet and Addison, arguing that “no ‘rank injustice’ in the law” was present and that retroactive application “only minimally serves the state interest in equitable division of marital property.”128 Essentially, the new law merely clarified and further regulated the process by which a spouse could retain her separate property; unlike Bouquet or Addison, it did not alleviate an obvious injustice.129 Furthermore, retroactive application would only serve “to destroy [a spouse’s] legitimate separate property expectations.”130

2. Analysis: Retroactive Application of AB 205

In the instant case, it is clear the legislature intended community property rights be applied retroactively. The initial enactment of AB 205 was silent as to the date when community property attached for those couples who had registered prior to January 1, 2005. Recognizing this oversight, AB 2580 was passed in 2004, establishing that a couple’s registration date (like a marriage date for opposite-sex couples) would serve such purpose.131 Accordingly, the inquiry proceeds to whether the retroactive application of AB 205 constitutes an unconstitutional deprivation of property that would bar a retroactive application of the new law.

The status of property as community or separate is normally determined at the time of its acquisition.132 Thus, a registered partner who acquired property as her separate property prior to January 1, 2005, gained vested property rights in that separate property; the retroactive application of AB 205 deprives her of property accumulated after

125. Id. at 902-03 (quoting Williams v. North Carolina, 317 U.S. 287, 298 (1942)).
127. Id. at 355-60.
128. Id. at 360.
129. Id.
130. Id. at 362.
132. In re Marriage of Bouquet, 546 P.2d 1371, 1376 (Cal. 1976) (citing Trimble v. Trimble, 26 P.2d 477, 479 (Cal. 1933)).
a couple’s pre-AB 205 registration.

Nonetheless, a retroactive application is still viable if the statute in question is correcting an obvious injustice. In the instant case, the state interest furthered by AB 205 consists of “promoting stable and lasting family relationships, and protecting Californians from the economic and social consequences of abandonment, separation, the death of loved ones, and other life crises.” In essence, AB 205 aims to extend marriage-like rights to a community that has been neglected within the state.

Arguably, AB 205 addressed an obvious injustice similar to the injustice that quasi-community property legislation aimed to cure in Addison. Like the financially dependent spouses in Addison, financially dependent partners will be greatly aided by AB 205. Quasi-community property laws are meant to protect families living within California, but who have maintained part of their relationship outside of the state. By providing these couples community property rights, the state ensures that the rights and responsibilities attendant to marriage are protected through an equitable dissolution. In a similar manner, AB 205 attempts to protect couples who were not recognized by the state, but deserved to be. These couples registered within the state, but, like couples in common law states, were not given community property rights. Accordingly, financially independent spouses were able to acquire property in their own name, even though the property was acquired through community labor. Upon dissolution, these couples deserve protection on account of their marriage-like relationship.

On the other hand, given that couples carried out their transactions with the understanding that community property principles were inapplicable, they failed to safeguard against the effect of AB 205 and would be punished for their reliance on the former law by a retroactive application. Accordingly, they likely did not create valid preregistration agreements that addressed the distribution of property. Nor did they make express declarations that property jointly held, but acquired through separate property, was intended to remain separate property. The application of AB 205 to these couples would destroy their legitimate separate property expectations.

However, the reliance on the former law is mitigated by the fact that the legislature provided domestic partners registered prior to AB 205’s effective date an option to terminate their partnerships before its application. In essence, couples who did not want the retroactive application of AB 205 to apply could terminate their partnership prior to January 1, 2005, without any disruption in vested property interests.

Thus, the failure to terminate their partnerships was an explicit acquiescence to the retroactive application of the new law and an acknowledgement that a couple’s reliance on the former law is illegitimate.

On balance, California’s police powers should allow for the retroactive application of AB 205’s community property regime. The injustice AB 205 strives to cure compellingly deserves the retroactive protection afforded married couples with respect to quasi-community property principles in Addison. Furthermore, given AB 205’s opt out provision, those couples who remained in the relationship explicitly intended for community property rights to apply retroactively, and should be estopped from arguing otherwise.

V. A PROPOSAL FOR REVISIONS TO AB 205

AB 205 is ambitious — perhaps too ambitious. Given that many same-sex couples desire the rights attendant to domestic partnerships but fear the uncertainty posed by AB 205’s compulsory financial responsibilities, the legislature should consider creating two distinct tiers for domestic partnerships: (1) full registration and (2) modified registration. Under the full registration model, domestic partners would acquire all rights granted under AB 205, including financial responsibilities. In contrast, under modified registration, domestic partners would retain their pre-AB 205 rights; in addition, they would acquire new rights without fiduciary obligations attached. This two-tier approach would have the effect of appeasing registered domestic partners who do not desire communal financial obligations, while still allowing those partners desiring such rights the ability to acquire them. One caveat to this approach would involve those couples who choose to rear a child together. In these situations, the child’s best interest would demand that the couple register under the full registration model.

The uncertainty posed by AB 205 demands that the legislature retain the prior system of domestic partner registration concurrently with the new framework created by AB 205. Couples who desire marriage do not necessarily desire to enter untested legal terrain. However, under AB 205, the California legislature has forced couples to accept uncertainty in their legal relationships or dissolve them immediately. Given that the purpose of AB 205 is to promote the creation and protection of gay and lesbian families, it seems foolish to force these relationships onto uncertain legal terrain or immediate dissolution under the guise of expanding rights. Instead, through implementation of a two-tier domestic partnership model,

135. See § 299.3, supra note 69.
136. See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 6.03(5) (2002) (recommending that partners sharing legal custody over a common child be found to have established a domestic partnership, irrespective of the absence of domestic partner registration or contracts between parties).
the state can allow registered couples to retain the rights they have acquired and have grown to rely on, while simultaneously allowing for a gradual transition into the "full registration" provided under AB 205 as the law becomes settled.

Detractors of a two-tier approach will likely argue that granting two models of domestic partner registration lessens the commitment made by partners, further removing them from the sacred institution of marriage. Either way, however, neither registration approach is marriage; thus, the symbolic loss that occurs by a two-tier approach is minimal at best. Furthermore, it would be desirable to provide multiple legal frameworks by which to protect relationships — for both same-sex and opposite-sex couples. After all, although people might choose not to marry or register as domestic partners under AB 205, this decision will not prevent them from cohabiting, rearing children, and holding themselves out to the world as a family. While our laws should arguably strive to promote “ideal” families, the law should also recognize and protect families in all forms. Accordingly, creating multiple tiers of legal domestic partnerships would further protect couples and their children, while preserving “the sanctity of marriage” for those couples desiring the ultimate commitment.

VI. A CALL TO ABANDON DOMESTIC PARTNER LEGISLATION

Many of those who support same-sex marriage view domestic partner legislation as the expected and inevitable way of attaining marriage rights. One scholar has termed it a “necessary process” by which a slow and gradual expansion of rights leads to marriage equality. In the global context, the Netherlands and Belgium followed this gradual path on their way to legalizing same-sex marriage: Repealing sodomy laws led to equalizing the age of sexual consent as between same-sex and opposite-sex couples, which led to enacting anti-discrimination legislation protecting gays and lesbians that then led to establishing same-sex registered partnerships, which culminated with the legalization of same-sex marriages. Accordingly, supporters of same-sex marriage are cautiously optimistic about the United States’ chances of achieving marriage equality in light of the United States Supreme Court’s decision overruling a Texas sodomy statute in Lawrence, the Massachusetts same-sex marriages, and the few states that have enacted domestic partner legislation. In fact,

139. Id.
140. See Gretchen Van Ness, Symposium Transcription: The Inevitability of Gay
most Americans agree with this sentiment, believing that same-sex marriage is an event that will occur, if not in their lifetimes, surely during their children's.\textsuperscript{141}

But why should domestic partnerships necessarily lead to marriage in this country? Given that other European countries have stopped short of the rights they afford same-sex couples at the legalization of registered partnerships, could the results in the Netherlands, Belgium, Spain, and Canada be an anomaly? Given that Belgium does not afford same-sex couples the full rights of adoption,\textsuperscript{142} was marriage equality actually achieved? Does legal recognition of domestic partnerships lead to marriage equality or does it merely create two institutions granting the incidents of marriage: One with abridged rights for gays and lesbians and the other with full rights for their opposite-sex peers?

In order to achieve marriage equality through a process of gradually granting rights, current domestic partner legislation needs to be expanded considerably.\textsuperscript{143} However, this begs the question: Why should legislatures extend marriage rights to domestic partners? In fact, granting marriage rights would plainly run counter to the intent of domestic partner legislation. The clear mandate behind this legislation is not to make gays and lesbians equal to their heterosexual peers, but rather to offer their alternative lifestyle similar rights through a different and separate institution. If the legislature wants same-sex couples and opposite-sex couples to receive equal treatment, they would grant marriage licenses to both.\textsuperscript{144}

Thus, in order for legislative progress to affect marriage equality some external force must change the legislatures' intent from favoring two institutions of marriage rights to treating both sets of couples equally. Proponents of domestic partnerships argue that public sentiment toward same-sex marriage would gradually change, compelling the laws of states to change.\textsuperscript{145} This view of domestic partner legislation would argue that multiple elements factor into creating public support for marriage equality. First, the very act of enacting legislation establishes the legitimacy of rights

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\textsuperscript{141} See Baker and Gallagher, \textit{supra} note 137.

\textsuperscript{142} \textit{Inching Down the Aisle, supra} note 27, at 2007-08.

\textsuperscript{143} As a practical matter, it should be noted that if domestic partner legislation ever does provide the full level of rights afforded to marriage, the November 2004 election demonstrated that many years will likely pass before every state offers such benefits, if they ever do.

\textsuperscript{144} See Lynda Gledhill, \textit{Leno to Postpone Same-Sex License Bill Until Next Year,} S.F. Chron, May 19, 2004, at B1 (reporting on the inability of the California legislature to pass a statute that would allow same-sex marriage); Lynda Gledhill, \textit{Governor's Gay Rights Moves Please No One; Marriage Bill Vetoed, Partner Benefits Preserved,} S.F. Chron., Sept. 30, 2005, at A1 (reporting on Governor Schwarzeneggar's decision to veto the country's first same-sex marriage bill).

\textsuperscript{145} See \textit{Inching Down the Aisle, supra} note 27, at 2004-05.
for same-sex couples. Second, opponents of same-sex marriage will be able to witness that granting same-sex couples rights does not damage the sanctity of marriage. Third, when couples are granted legal rights through legislation, they will be officially recognized by the state. They will then lessen the negative image of gays and lesbians through the positive example of their committed and lasting relationships. While these arguments may be compelling when viewed independently, I argue, however, that domestic partner legislation has inherent negative consequences that undermine the notion that such legislation will change public sentiment.

Domestic partnerships are not marriage. They are instead a substitute intended to protect gays and lesbians, but are often better used to appease and, arguably, to oppress. First, domestic partnerships create the illusion that gays and lesbians are granted substantial rights. In reality, of the mere seven states with such laws, none grants the full panoply of rights attendant to marriage. This misperception, however, allows many supporters of same-sex marriage to feel equal, or at the minimum, to believe that substantial rights have been achieved. Thus, they are unlikely to protest the lack of true marriage equality. Second, the discourse that marriage is soon to become a reality as a result of domestic partner legislation has the damaging effect of creating a sense of apathy among would-be supporters: Why fight now when same-sex marriage is going to happen anyway, someday? These first two dangers of domestic partner legislation stifle the discourse toward marriage equality by weakening the popular movement. With advocates for marriage being appeased by limited rights, the legislatures will have no reason to either enact marriage equality legislation or even to continue the work of expanding domestic partner rights. Finally, and most troubling, legislation like AB 205 creates a middle ground between no rights and marriage equality, which elected officials may exploit, causing confusion as to what they stand for, and curtailing the possibility of same-sex marriage.

The presidential campaign of 2004 serves as an example. Neither candidate endorsed or condoned marriage equality, but both supported domestic partner legislation. That is not to say, however, that both had the same position. Senator John Kerry of Massachusetts envisioned a system where each state was free to establish legislation it felt best served its residents: from no rights to full civil unions. President Bush's

146. See, e.g., David B. Cruz, "Just Don't Call it Marriage": The First Amendment and Marriage as an Expressive Resource, 74 S.Cal. L. Rev. 925 (2001).


position, however, is unclear given that his announcement in support of same-sex rights came abruptly in the last days of the election and was never discussed again. Yet, given that the President considers his presidency to be a mandate from a Christian God, it seems unlikely he would support legislation like AB 205, which grants same-sex couples many of the same rights opposite-sex couples currently enjoy within the institution of marriage.

With both sides supporting domestic partnerships, it is apparent that this middle of the road position was strategically orchestrated to garner the most votes possible: Voters interested in same-sex rights received limited support, while social conservatives were able to keep gays and lesbians away from marriage rights. If domestic partner legislation were not on the table, however, it would be hard to imagine both candidates unequivocally dismissing marriage equality. It would be an untenable position to take, not only because of the hypocrisy and injustice, but because of the voting power of gays, lesbians, and their many supporters.

Arguably, with domestic partner legislation enacted in multiple states, opponents of same-sex marriage are ironically in a better position than without it. Marriage equality can never be achieved through legislation if our elected officials support domestic partnerships at the expense of condemning same-sex marriage. Accordingly, many opponents would likely welcome domestic partner legislation. These opponents argue that same-sex marriage should not be recognized because gays and lesbians live a life of their choosing which is morally reprehensible. Allowing same-sex marriage is at best accepting, and at worst, promoting a lifestyle that is incapable of procreation, is a radical departure from our nation’s core Christian values, and is deadly. While opponents despise the notion that same-sex couples should receive any rights to enable their lifestyle, better it be domestic partnerships than marriage. Not only because marriage has a certain sacred connotation in the minds of social conservatives, but also because “domestic partnership” has a clear denotation: a relationship created by a legal framework. Within this legal framework there is no set of rules mandating what rights need to be given to same-sex couples in order to create domestic partnerships, if any rights at all. When individuals say they support such legislation, it speaks little to what rights they believe

same-sex couples are entitled. Domestic partner legislation can be as robust as California's AB 205 or as modest as a statute that merely allows same-sex couples the right to visit one another in a hospital.

Accordingly, calling for the enactment of domestic partnerships is a position with little substance. Yet, it has the power of clouding the issue of marriage equality. Our elected officials cannot be held accountable for their positions if these positions are not easily defined. Given that domestic partnerships mislead the public as to what rights gays and lesbians possess, create apathy among many potential supporters, and allow elected officials to skirt the marriage equality issue, how can the public perception, and, accordingly, the legal recognition of same-sex marriage change? I argue it cannot change through domestic partner legislation. The gay and lesbian community should stop waging a campaign for domestic partner legislation and should focus its efforts squarely on steering public opinion toward legalizing same-sex marriage.

As evidenced in decisions by state courts in Hawaii, Massachusetts, Vermont and, most recently, California, 152 same-sex marriage advocates have had success in the campaign for marriage equality by appealing to the judicial system. However, when change is mandated by the courts state legislatures and popular referendums have limited or completely repealed the courts' decisions. 153 Although courts recognize the inequality inherent in denying same-sex couples the freedom to marry, popular opinion often does not. Accordingly, the success that is accomplished through the courts can quickly be swept away through a state constitutional amendment. Thus, garnering public support to defeat these "popular vote" tactics should be the chief focus of the same-sex movement.

Changing public opinion, however, is not a simple matter and this paper does not address the possible avenues to achieve this end. 154

152. Marriage Cases, No. 4365 (Cal. Super. Ct., San Francisco Co. 2005), available at 2005 WL 583129 (holding that the denial of marriage licenses to same-sex couples fails both strict and rational scrutiny, thus violating California's equal protection clause).


154. Nonetheless, many groups have tried to court public opinion in favor of marriage equality: Rona Marech, Marriage Rights Caravan Gets Lots of 'No Thanks' from Gays Along Road, S.F. CHRON., Oct. 10, 2004, at A21 (reporting on the mixed reception a bus of same-sex couples received as they traveled across the country promoting marriage equality); Ken Stammen, Gay-Rights Group Hopes to Cash in on Boycott Group Encourages Gays to Make Statement By Withdrawing Money From ATMs, COLUMBUS DISPATCH, Oct. 8, 2004, at 2B (reporting on marriage equality activists organizing a financial boycott in order to demonstrate the financial contribution made by same-sex couples); Darryl Fears, Gay Blacks Launch Ads to Broaden Support, WASH. POST, Dec. 9, 2003, at A03 (reporting on a coalition on black gay and transgender groups coordinating a national advertising campaign promoting same-sex marriage); Judith Nygren, Gay Marriage Ban Is Fought with Ads, OMAHA WORLD HERALD, Jan. 12, 2004, at 8b (reporting on the
Nevertheless, this paper does argue that the campaign for public support is not furthered by domestic partner legislation. As discussed above, such legislation creates apathy among would-be supporters, leads people to wrongly believe that same-sex couples are well cared for by these laws, and allows for our elected officials to avoid the discourse on marriage equality. Yet, the greatest damage done by domestic partner legislation, I argue, is that it furthers the notion that gays and lesbians are not equal members of society. Instead of acquiring the marriage rights that they deserve, gays and lesbians are afforded a separate system of rights, which constructively has the effect of making those relationships less than equal, not only morally, but also legally. Public support will not change when the very community affected is arguing that a separate and unequal institution is a legitimate remedy for the lack of marriage equality.

VII. CONCLUSION

To be clear, the California legislature has made a substantial contribution toward gay and lesbian equality through AB 205. With the exception of Connecticut, no other state has ever granted its gay and lesbian citizens such expansive rights without judicial compulsion. The enactment of AB 205 is even more impressive in light of the recent states that have added constitutional amendments stripping their citizens of vested rights. Accordingly, AB 205 should stand as a beacon of hope for those who are fighting for gay and lesbian civil rights across the country.

However, proponents of marriage equality should refrain from blindly accepting legislation merely because it confers new rights to same-sex couples. Instead, those proposing legislation must have the foresight to see how these laws will affect gays and lesbians; not only the benefits derived therefrom, but also the consequences of creating new legal frameworks. Thus, while AB 205 provides greater protection for many of California's same-sex couples, it also has forced a significant number of couples into a worse position than had the law never been enacted.

Furthermore, proponents of marriage equality should reflect on the wisdom of seeking marriage-like rights outside of a marriage paradigm. While domestic partner legislation protects gay and lesbian families in the face of marriage inequality, it also has the effect of inhibiting the progress toward same-sex marriage. Given the relentless power of state constitutional amendments to impede progress, the focus of the campaign for marriage equality should be on garnering the American public's support. For the aforementioned reasons, I submit domestic partner legislation fails to achieve equality.

efforts of the Human Rights Campaign, a Washington-based gay and lesbian lobbying group, to influence public support through the use of newspaper advertisements and radio announcements).