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A Wolf in Sheep's Clothing: Dressing-Up Substantive Legislation to Trigger the Interpretive Exception to Retroactivity Violates Constitutional Principles

A Wolf found great difficulty in getting at the sheep owing to the vigilance of the shepherd and his dogs. But one day it found the skin of a sheep that had been flayed and thrown aside, so it put it on over its own pelt and strolled down among the sheep. The Lamb that belonged to the sheep, whose skin the Wolf was wearing, began to follow the Wolf in the Sheep's clothing; so, leading the Lamb a little apart, he soon made a meal off her, and for some time he succeeded in deceiving the sheep, and enjoying hearty meals. Appearances are deceptive.

Despite jurisprudential efforts to protect the interpretive exception to retroactivity from legislative abuse, pronged tests and checklists cannot prevent attempts to squeeze substantive legislation into the law under the guise of interpretive legislation. The trappings of retroactive application that follow interpretive classification present an apparently irresistible opportunity to create substantive law that could receive such desirable effects with a mere moniker. Retroactive application of substantive law, even if it is presented as interpretive, impinges upon the judicial role of interpretation and violates constitutional principles.

I. INTRODUCTION

Louisiana modifies the rule against retroactive legislation with a civilian exception. Instead of universally prohibiting retroactive legislation, Louisiana grants a special exception for interpretive legislation.² This exception recognizes that interpretive legislation

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1. Aesop, *The Wolf in Sheep's Clothing*, in AESOP'S FABLES 102-03 (Thomas James & George Tyler Townsend trans., The Franklin Library 1982), available at http://www.pagebypagebooks.com/Aesop/Aesops_Fables/The_Wolf_in_Sheeps_Clothing_p1.html.

2. LA. CIV. CODE ANN. art. 6 (2006) ("In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural

is not "new" legislation as it merely explains or clarifies prior law. As such, retroactive application of interpretive legislation simply applies the original law.

Recently, the Louisiana Supreme Court has found the interpretive exception to the rule against retroactivity to be unconstitutional in certain circumstances.³ The reasoning behind the ruling is fundamental: because the Louisiana Constitution specifically entrusts the judiciary with the authority to interpret the laws, nominally "interpretive" legislation promulgated by the legislature violates separation of powers when the legislation is truly substantive.⁴ The legislative branch may not exceed its power by affixing an interpretive label on substantive legislation to trigger the exception to retroactivity.⁵

Retroactive laws undermine the ability of citizens to rely on their rights. However, the policy of encouraging such reliance does not justify casual disregard for this deep-rooted civilian exception. While the legislature should not usurp the judiciary's interpretive power, the interpretive exception should not be arbitrarily dismissed through judicial ruling. The interpretive exception to retroactivity should remain a component of Louisiana law since it is a recognized pillar of the civilian tradition.

This article demonstrates improved classification methods for interpretive and substantive legislation to allow proper characterization and prevent constitutional violations. To develop this classification scheme, Part II examines the evolution of the interpretive legislation exception to the rule against retroactivity by reviewing the policy considerations that have concerned

and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.").

3. *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So. 2d 392 (La. 2005) (on rehearing). The scope of this analysis does not encompass the retroactive effect of judicial opinions, which receive a different classification determination. See *Lovell v. Lovell*, 378 So. 2d 418, 421-22 (La. 1979). This comment will focus on the problems associated with the classification and retroactive application of legislative enactments.

4. LA. CONST. art. V, § 1 (defining judicial power); LA. CONST. art. II, § 2 (explaining that no branch may exercise the power of any other).

5. *Id.* art. II, § 2.

lawmakers and judicial figures when drafting and applying the controlling provisions. Part III derives a framework of characteristics for an accurate distinction between substantive and interpretive legislation so that temporal effects are constitutionally applied. Finally, Part IV concludes the analysis by considering the constitutional benefits and ramifications resulting from a clarified sorting scheme.

II. BACKGROUND: RECOGNIZING CONSTITUTIONAL PROBLEMS AND UNCOVERING THE REASONING BEHIND EXISTING CLASSIFICATION POLICIES

The interpretive exception violates due process and separation of powers principles when it is used to slip substantive law through the legislative cracks so that it may receive retroactive application.⁶

A. Legislative Abuse: Constitutional Consequences

Governmental powers are compartmentalized so that each branch of government derives power from a different article of the Constitution.⁷ This discrete demarcation of authority allows execution of governmental power as the Framers intended since each branch has a specific and complementary role. In accordance with the United States Constitution, the Louisiana Constitution also follows the principle of separation of powers.⁸ The executive branch has the power to carry out the law.⁹ The judicial branch has the exclusive authority to interpret the law by applying it to individuals.¹⁰ The legislative branch has the sole authority to write

6. *Unwired Telecom*, 903 So. 2d at 404.

7. See U.S. CONST. arts. I–III.

8. LA. CONST. art. II, § 2 (“Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.”).

9. U.S. CONST. art. II.

10. *Id.* art. III; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”); Francis Bacon, *Of Judicature*, in 12 THE WORKS OF FRANCIS BACON 265 (James Spedding et al. eds., 1900) (“Judges ought to

the legislation that becomes law.¹¹ Within this penumbra of authority, the legislature may pass interpretive legislation, which clarifies the meaning of an original law¹² and, thus, applies retroactively.¹³ Since the legislature only has the limited authority to elucidate previously enacted laws, legislation labeled "interpretive" can infringe on judicial powers when used to adjudicate a case¹⁴ or alter existing rights and duties.¹⁵

B. The Civilian Exception: French Foundation of Louisiana Tradition

The interpretive exception to the rule against retroactivity is a long-standing component of the civilian tradition.¹⁶ As a civilian jurisdiction in comparative infancy, Louisiana was heavily influenced by French laws.¹⁷ Accordingly, the addition of the interpretive exception in Louisiana law reflects the French civil law exception to retroactivity for interpretive legislation.¹⁸ French scholarly doctrine illustrates the utility and importance of the

remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law.").

11. U.S. CONST. art. I; LA. CONST. art. III, § 1 ("The legislative power of the state is vested in a legislature . . ."); P. Raymond Lamonica & Jerry G. Jones, LEGISLATIVE LAW AND PROCEDURE § 2.1, in 20 LOUISIANA CIVIL LAW TREATISE 6, 10 (2004) ("Legislative power' is primarily the power to make laws.").

12. LA. CIV. CODE ANN. art. 6 cmt. (d) (2006); Marcel Planiol, 1 CIVIL LAW TREATISE No. 251 (La. State Law Inst. trans., 1959) (1939).

13. LA. CIV. CODE ANN. art. 6 (2006).

14. *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So. 2d 392, 404–05 (La. 2005) (on rehearing).

15. *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 820 (La. 1992). Legislative power is abused when it is used to give "the name of 'interpretive law' to laws which contain new provisions." Planiol, *supra* note 12.

16. The interpretive exception to retroactive application is codified in article 6 of the Louisiana Civil Code. See LA. CIV. CODE ANN. art. 6 (2006). Article 6 "reproduces the substance of Article 8 of the Louisiana Civil Code of 1870 and accords with Louisiana jurisprudence interpreting the source provision. It does not change the law." LA. CIV. CODE ANN. art. 6 cmt. (a) (2006).

17. J.-R. Trahan, *The Continuing Influence of le Droit Civil and el Derecho Civil in the Private Law of Louisiana*, 63 LA. L. REV. 1019, 1026–36 (2003).

18. Louisiana laws reflect their French counterpart. *Id.* at 1052.

interpretive exception as a civilian and, thus, a Louisiana tradition.¹⁹

In one of the earliest examples of retroactive legislation, the French legislature passed new successions laws immediately after the French Revolution to instill parity into French law.²⁰ To expedite the absorption of the laws in response to demands of social equality, the laws were retroactively applied to all successions in the last five years—including settled and partitioned successions.²¹ Today, the U.S. Constitution protects against the retroactive alteration or creation of rights.²² Nevertheless, the rudimentary historical reasoning behind retroactivity remains current with modern policy: when legislation fixes itself to represent the “correct” law, it should apply retroactively.²³

As one author elucidates, the interpretive exception satisfies an important function of the Louisiana legal system and “can potentially affect any substantive area of the law and any number of rights”²⁴ The all-encompassing consequences of temporal effects emphasize the necessity of proper application for every area of substantive law. According to French scholarly doctrine, interpretive legislation indicates the law’s original purpose with precision and applies retroactively “to resolve difficulties concerning acts and effects accomplished before their promulgation and under the dominion of the interpreted law.”²⁵ As a component of our civilian tradition, the interpretive exception should be preserved in the law with integrity, avoiding legislative exploitation.

19. Gabriel Marty & Pierre Raynaud, 1 DROIT CIVIL: INTRODUCTION GÉNÉRALE À L'ÉTUDE DU DROIT 107, 192 (J.-R. Trahan trans., 1998) (2d ed. 1972).

20. Planiol, *supra* note 12.

21. *Id.*

22. See U.S. CONST. amend. V, and U.S. CONST. amend. XIV, § 1 (legislative power is limited by due process). See also LA. CONST. art. I, § 2.

23. In compliance with constitutional principles, interpretive laws should receive retroactive application only when they do not impermissibly alter a vested right. See *infra* Part III for a detailed discussion.

24. Jackie M. McCreary, Comment, *Retroactivity of Laws: An Illustration of Intertemporal Conflicts Law Issues Through the Revised Civil Code Articles on Disinherison*, 62 LA. L. REV. 1321, 1349 (2002).

25. Marty & Raynaud, *supra* note 19, at 192.

C. Existing Legal Regime: Classification Rules and Judicial Techniques

Louisiana Civil Code article 6 states: "In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary."²⁶ Even though article 6 contains a reservation for retroactive application of substantive law upon an expression of legislative intent, such application must comply with constitutional principles.²⁷

The general rule against retroactivity binds substantive laws, but grants an exception for interpretive legislation. Laws receiving retroactive application affect new cases and those that are not *causae finitae* (extinguished causes).²⁸ Civilian scholars explain retroactive restrictions as follows: "One can justify this solution by the idea . . . that the trouble born by a retroactive law will be all the more grave as it will revive difficulties born from the opposition of interests that have been definitively settled."²⁹ Once concluded, an issue should not be disrupted—despite subsequent changes in the law. Final judgments should be upheld in the interest of discouraging unnecessary litigation and protecting the parties' established reliance on the resolved rule. Delicate application of retroactive laws in accordance with these principles prevents due process violations and preserves their beneficial function.

26. LA. CIV. CODE ANN. art. 6 (2006). Procedural legislation also receives retroactive application, but it is beyond the scope of this comment. LA. REV. STAT. ANN. § 1:2 (2003) (proscribing retroactive application of any section of the revised statutes unless such application is expressly stated).

27. The Constitution is the supreme law of the land and preempts any laws that breach its principles. U.S. CONST. art. VI, § 1, cl. 2. Thus, a law cannot be applied retroactively, despite legislative intention reserved by article 6, if that application violates constitutional principles.

28. Kenneth M. Murchison & J.-R. Trahan, WESTERN LEGAL TRADITIONS AND SYSTEMS: LOUISIANA IMPACT 227 (rev. ed. 2003) (citing Patrice Level, ESSAI SUR LES CONFLITS DE LOIS DANS LE TEMPS 33 n.19, 161–62 n.90 (J.-R. Trahan trans., 1999) (1959)) (a matter is *causae finitae* when it receives judgment, is settled by compromise, or expires by prescription).

29. *Id.*

1. *Legislative Intent*

Legislative interpretation under article 6 requires a two-part inquiry: (1) has the legislature commanded retrospective or only prospective application; and (2) if not, is the law substantive, procedural, or interpretive?³⁰ Thus, the initial step in classification determines and defers to expressed legislative intent for temporal application.³¹ Statutory construction indicates the lawmaker's original objectives for the forthcoming law.³² Express legislative declaration on the intended temporal application of a law simplifies classification. When the legislature does not clearly express temporal desires, a court must closely read the language of the law to infer its implied classification and corresponding effects. A common law scholar, noted for studies of statutory construction, explains that future tense words "such as 'shall' or 'hereafter'" indicate prospective application, while the past tense "such as 'has been' or 'heretofore'" clearly signifies retrospective application.³³ Despite these seemingly simple inferences, conflicting opinions regarding legislative intent complicate the classification process.³⁴

30. *Pierce v. Hobart Corp.*, 939 F.2d 1305, 1308 (5th Cir. 1991).

31. *Reichert v. State*, 694 So. 2d 193, 199 (La. 1997). See generally François Gény, *METHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (La. State Law Inst. trans., 2d ed. 1954).

32. *Dumas v. State*, 828 So. 2d 530, 536 (La. 2002) ("[T]he starting point for the interpretation of any statute is the language of the statute itself."). See also Josef Kohler, *Judicial Interpretation of Enacted Law*, in *SCIENCE OF LEGAL METHOD* 187–201 (Ernest Bruncken & Layton B. Register trans., Sentry Press 1969) (1917) (explaining reasons and methods of legal interpretation).

33. F. McCaffrey, *STATUTORY CONSTRUCTION* § 65 (1953) (quoting Black, *CONSTRUCTION & INTERPRETATION OF LAWS* (2d ed. 1911)). Although McCaffrey is not a civilian scholar, his work on statutory construction equally applies to civilian jurisdictions. See *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 817 (La. 1992) (using McCaffrey's rules to determine that a delayed effective date is evidence of intent for prospective application); *Simmesport State Bank v. Scallan*, 134 So. 2d 391, 394 (La. App. 3d Cir. 1961) (citing McCaffrey's rules to forgo interpretation when the statutory language is clear).

34. See, e.g., *Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm'n*, 903 So. 2d 1071, 1085–86 (La. 2005) (discussing the difficulty in determining legislative intention and concluding that learned scholars disagree on the relationship between the two paragraphs of article 466, namely, whether the legislature intended them to be read disjunctively or interdependently).

Determinable legislative intent for temporal application that does not constitute a constitutional violation completes the classification inquiry, but uncertain or unconstitutional legislative intent necessitates further analysis.³⁵

2. Interpretive or Substantive?: Applying Jurisprudential Tests

When legislative intent is not apparent, courts must use circumstantial evidence to infer legislative intent regarding temporal effect.³⁶ Judicial analysis of legislation classification often produces learned discussion and well-intended remedies.³⁷ Unfortunately, the inherently subjective analysis by different judges reveals the ambiguity and insufficiency of existing tests.³⁸

St. Paul Fire & Marine Insurance Co. v. Smith developed an oft-cited³⁹ and equally criticized⁴⁰ test to resolve a workers' compensation claim involving the alteration of a pertinent statute.⁴¹ In an established line of cases, courts had interpreted workers' compensation laws to grant employers priority in the receipt of third party damage awards *only for an employee's lost wages or medical expenses*, and not for other damages, such as pain and suffering.⁴² In contravention of judicial interpretation, subsequent

35. *Bourgeois v. A.P. Green Indus., Inc.*, 783 So. 2d 1251, 1258 (La. 2001).

36. *See* LA. CIV. CODE ANN. art. 10 (2006); *Pierce v. Hobart Corp.*, 939 F.2d 1305, 1308 (5th Cir. 1991).

37. *St. Paul*, 609 So. 2d 809.

38. J.-R. Trahan, *Time for a Change: A Call to Reform Louisiana's Intertemporal Conflicts Law (Law of Retroactivity of Laws)*, 59 LA. L. REV. 661, 759 (1999) (describing conflicting conclusions of the judges on the Louisiana Supreme Court in *Chance v. American Honda Motor Co.*, 635 So. 2d 177 (La. 1994)). "Both the plurality and the concurring minority were able, evidently in good faith, to justify their respective characterization determinations by reference to one definition or the other. It would seem, then, that *even in practice* the line between the two categories is hopelessly blurred." *Id.*

39. *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So. 2d 392, 403 (La. 2005) (on rehearing); *Segura v. Frank*, 630 So. 2d 714, 723 (La. 1994); *Bourgeois*, 783 So. 2d at 1257.

40. Trahan, *supra* note 38, at 760–62 (asserting that the factors are ambiguous, circular, and insufficient).

41. *St. Paul*, 609 So. 2d at 819 (candidly admitting that the distinction between substantive and interpretive legislation is indistinct).

42. *Id.* at 811–13.

legislation allowed the employer first-payment rights from *all of an employee's damage awards*, including awards for pain and suffering.⁴³ Although lower courts allowed retroactive application of the new law, the *St. Paul* court found that the legislative alteration impermissibly targeted a judicial decision by overruling existing law and changing workers' compensation payment allocation.⁴⁴

Despite inherent ambiguities, the four-pronged *St. Paul* test contributed clarity to the murky waters of classification. First, the court considered the amount of time that elapsed between an "incorrect" judicial interpretation and the proposed legislative "remedy." Although a close temporal relationship between a piece of legislation and a prior case does not automatically indicate interpretive legislation,⁴⁵ an inference of retroactive legislative intent may arise from a timely and deliberate legislative response. A two-year legislative waiting period before rendering interpretation, as in *St. Paul*, is presumed to produce a substantive change.⁴⁶ In contrast, legislative response within two months and four days after the original ruling has been termed "swift and overwhelming."⁴⁷ Accordingly, two months is a sufficiently prompt response to infer interpretive motive, while two years allows stagnancy to corrupt suggestions of intent to interpret.

The second prong of the *St. Paul* test measures the extent to which the contested subject matter is embedded in the law: does the legislation affect a "single decision" or an "established line of jurisprudence"?⁴⁸ Law becomes settled over time as more cases are decided and reliance upon the particular law increases. Well-settled law is characterized by the number of appellate and federal

43. *Id.* at 813–14.

44. *Id.* at 810.

45. *Id.* at 820.

46. *See id.*

47. *Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm'n*, 903 So. 2d 1071, 1108 (La. 2005) (on rehearing) (Weimer, J., assigning additional reasons). *Willis-Knighton* was decided on April 1, 2005; legislative response was introduced on April 25, 2005, and enacted on June 29, 2005. *See* 2005 La. Acts No. 301, § 1.

48. *St. Paul*, 609 So. 2d at 820.

cases that apply the rule in question.⁴⁹ Legislation that concisely affects a single decision is more likely to be interpretive law than are attempts to redefine a governing law that has been repeatedly affirmed.

Third, the *St. Paul* test considers a party's reliance on the established rule as revealing interpretive or substantive effects.⁵⁰ For example, when parties agree to a stipulation about the very rule they later contest, their reliance on the rule in question indicates an understanding that the rule is settled.⁵¹ Accordingly, legislation that alters the rules and changes relied upon rights is substantive law and only receives prospective application. In pursuit of just classification, individual circumstances should be considered before temporal effects are blindly administered.

As the final prong of the *St. Paul* test, the amount of legislative interpretation at issue should be considered: does the contested legislation revise a single law, or is it part of a blanket revision on an entire collection of doctrines?⁵² For instance, in *St. Paul*, the legislature amended several sections of the Louisiana Workers' Compensation Law, not just the contested statute.⁵³ This broad amendment suggests that the legislature was making substantive changes, not an isolated correction. If the legislature truly intends clarification of the existing law, and not creation or alteration of rights and duties, interpretive legislation would more likely be dispensed in individual circumstances, rather than cranked out in legislative overhaul.

Virtually all subsequent jurisprudence considering retroactivity cites the *St. Paul* test,⁵⁴ but the test has not been closely followed and unquestioningly adopted. Courts have alternated between flexible and bright-line solutions to temporal application

49. *Id.* ("[L]egislation that changes settled law falls outside of [the interpretive] category.").

50. *Id.* at 820–21.

51. *Id.*

52. *Id.* at 821.

53. *Id.*

54. *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So. 2d 392, 403 (La. 2005) (on rehearing); *Bourgeois v. A.P. Green Indus., Inc.*, 783 So. 2d 1251, 1257 (La. 2001); *Segura v. Frank*, 630 So. 2d 714, 723 (La. 1994).

problems.⁵⁵ For example, in *Segura v. Frank*, the court found that new legislation requiring a plaintiff to exhaust uninsured motorist (“UM”) coverage before proceeding against the Louisiana Insurance Guaranty Association (“LIGA”) substantively amended the law that formerly allowed immediate action against LIGA.⁵⁶ The court addressed the *St. Paul* test, but only used parts of the analysis to reach its conclusion.⁵⁷ The court considered the alteration of a UM carrier’s rights and obligations for pending claims, the settled nature of the law by a decade of consistent interpretation allowing immediate action against LIGA, and the systemic amendment of other UM laws.⁵⁸ Thus, the analysis in the *Segura* decision adopted a hybrid classification approach; it examined the alteration of vested rights and evaluated the second and fourth prongs of the *St. Paul* test, which require consideration of the questioned rule’s jurisprudential establishment and the amount or specificity of legislative revision.

The opinion rendered from the Louisiana Supreme Court in *Chance v. American Honda Motor Co.* exemplifies the confusion surrounding statutory classification.⁵⁹ Here, the members of the majority opinion agreed upon the final legislative classification, but the justices reached the conclusion by using different methods.⁶⁰ Justice Marcus used a jurisprudential definition of substantive law to classify the law,⁶¹ while Justice Hall considered the constitutionality of disturbing vested rights as the appropriate benchmark for classification.⁶² One scholar offers this discrepancy as proof that jurisprudential definitions are “profoundly malleable” to the point that judges themselves cannot classify legislation with certainty.⁶³

55. Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1063 (1997).

56. *Segura*, 630 So. 2d at 724–25.

57. *Id.*

58. *Id.*

59. 635 So. 2d 177 (La. 1994).

60. *Id.*

61. *Id.* at 178.

62. *Id.* at 179–80.

63. Trahan, *supra* note 38, at 759.

The judicial response to classification problems has aided the endeavor of accurate classification, but since no existing test is universally applied, classification becomes unpredictable and haphazard. One scholar expresses his exasperation and the corresponding need for definitive scholarly response: "The definitions that the courts have so far supplied for these terms are indeterminate in the extreme and, still worse, even overlap to a significant degree. As a result, predicting into which of these categories the courts will place a particular law is not far from outright gambling."⁶⁴

The recent upsurge in Louisiana Supreme Court opinions dedicated specifically to the constitutional problems associated with improper legislative classification also illustrates the pertinence and timeliness of a consolidated sorting system.⁶⁵ For example, in the latest judicial statement on retroactivity from the Louisiana Supreme Court, the court recognized that separation of powers principles do not prevent the legislature from appropriately using the interpretive exception to retroactivity.⁶⁶ However, legislative abuse of the interpretive exception is explicitly condemned.⁶⁷ In light of current judicial acknowledgement, the Louisiana legal community is primed for a classification remedy to constitutional violations resulting from improper use of the interpretive exception to retroactivity.

III. ANALYSIS

To substantively improve the existing classification techniques, a new classification method should provide consistent results. With a clearer differentiation between substantive and interpretive legislation, fewer constitutional violations will occur.

64. *Id.* at 765.

65. *See* *Mallard Bay Drilling, Inc. v. Kennedy*, 914 So. 2d 533 (La. 2005); *Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm'n*, 903 So. 2d 1071 (La. 2005) (on rehearing); *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So. 2d 392 (La. 2005) (on rehearing).

66. *Mallard Bay Drilling*, 914 So. 2d at 544.

67. *Id.*

A. *Optimal Characteristics of a Proposed Definition*

The temporal effect of legislation hinges on its classification as substantive or interpretive law.⁶⁸ The ultimate system of legislative classification should blend the existing techniques into a consistently utilized and concise hybrid.

1. *Peripheral Issues of Definition Development*

Defining the difference between substantive and interpretive laws will require legislation. Jurisprudential tests are insufficient because they are vulnerable to various interpretations. Furthermore, jurisprudence is not a primary source of law in Louisiana.⁶⁹ Legislation and custom are primary sources of law that impose binding authority; jurisprudence is a secondary source of law that carries only persuasive authority.⁷⁰ Although the jurisprudential tests are not authoritatively binding, they were created in a good faith effort to improve the existing (or rather non-existent) methods of classification by establishing an equitable standard.⁷¹ Ideally, the necessary definitions will appear in the Louisiana Civil Code or Revised Statutes, thus carrying the corresponding binding authority of a primary source of law.

Next, the creation of a sufficient classification system must include an *affirmative* definition of interpretation that independently determines interpretive status. While the present criteria indicate whether a legislative enactment fails the interpretive test, no device determines whether a law affirmatively

68. *Id.* at 543. See also William Reed Huguet, *Hulin v. Fibreboard Corp.—In Pursuit of a Workable Framework for Adjudicative Retroactivity Analysis in Louisiana*, 60 LA. L. REV. 1003, 1007 (2000).

69. See LA. CIV. CODE ANN. art. 1 (2006).

70. *Id.* “Judicial opinions, although invaluable interpretations of the law, are merely that; interpretations of the legislative will. The supreme expression of legislative will in Louisiana is of course the codes and statutes.” *Winstead v. Ed’s Live Catfish & Seafood*, 554 So. 2d 1237, 1242 (La. App. 1st Cir. 1989), *writ denied*, 558 So. 2d 570 (La. 1990).

71. LA. CIV. CODE ANN. art. 4 (2006) (“When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.”).

passes the test. For instance, jurisprudential tests classify interpretive laws as those that produce a non-substantive result.⁷² As one scholar has noted, "To be sure of [the classification], of course, one needs a list of *sufficient* conditions for 'interpretativeness.' Unless and until the courts or the legislature come up with one, the interpretive-substantive boundary will remain unfixed."⁷³ Accordingly, the definition should include sufficient characteristics of interpretive legislation so that a law can be definitively classified, and not merely deemed interpretive by default.

2. Skeletal Requirements of Interpretive/Substantive Classification System

Although scholars have recognized the need for a clear statement of interpretive and substantive classification to correctly apply temporal law, neither scholars nor judges have undertaken the daunting development of a new test that can displace existing tests with a concise, simple, yet sufficiently conclusive classification scheme.⁷⁴ Clarification of the existing two-part test, combined with an additional element considering constitutionality, creates an improved classification scheme.⁷⁵ As such, skeletal requirements of the proposed scheme include the following: (1) deference to express legislative intent about a law's temporal application; (2) judicial inference of legislation classification in the absence of express legislative intent; and (3) safeguard of constitutional principles, regardless of express or implied legislative intent.

72. Trahan, *supra* note 38, at 761-62.

73. *Id.* at 762.

74. See generally Trahan, *supra* note 38.

75. Since a definition cannot be at once flexible and definitive, it is impossible to create a perfect legislation classification scheme. However, the system produced by this analysis improves the existing tests by providing clear and constitutional, albeit imperfect, results.

a. Express Legislative Intent for Temporal Application

When the legislature expresses an intended temporal application, that intention should be applied.⁷⁶ Typical expressions of intent for temporal application specifically indicate whether the act should receive prospective application only, or both prospective and retroactive application.⁷⁷ As the Louisiana Supreme Court has recently stated, it is presumed that each word of statutory language was chosen for a distinct purpose since the legislature does not use words that are “redundant or useless.”⁷⁸ Accordingly, statutory language should be read exactly as it is written, giving each word its commonly understood syntax and meaning.⁷⁹ Interpretation should be utilized as a secondary method of understanding legislative intent.⁸⁰

b. Judicial Classification of Interpretive and Substantive Legislation When the Legislative Intent is Indeterminable

Although judicial interpretation is only necessary when the plain meaning of statutory text does not reveal clear legislative intent or leads to ambiguous results,⁸¹ interpretation of legislative intent is also required when the legislature does not give any

76. LA. CIV. CODE ANN. art. 6 (2006); *State v. Washington*, 830 So. 2d 288, 290 (La. 2002).

77. For example, in *Cole v. Celotex Corp.*, the court referred to the following statement as a “clear and unmistakable” expression of legislative intent for prospective application: “The provisions of this act shall not apply to claims arising from events that occurred prior to the time this act becomes effective.” 599 So. 2d 1058, 1064 (La. 1992).

78. *Mallard Bay Drilling, Inc. v. Kennedy*, 914 So. 2d 533, 546 (La. 2005) (citing *ABL Mgmt., Inc. v. Bd. of Supervisors of Southern Univ.*, 773 So. 2d 131, 135 (La. 2000)).

79. LA. CIV. CODE ANN. art. 11 (2006) (“The words of a law must be given their generally prevailing meaning.”).

80. LA. CIV. CODE ANN. art. 9 (2006) (“When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.”).

81. The principle is based on the Latin maxim of statutory interpretation, *interpretatio cessat in claris*: there is no need for interpretation when the text is clear.

statement of its temporal intention for the law.⁸² Since the various jurisprudential tests currently available simply muddle legislative categorization, classification will be simplified if definitive measures are reduced to their essence.⁸³ Thus, laws can be sorted by examining a single characteristic: interpretive classification should rely on clarification of original legislative intent, and substantive classification should depend on creation or alteration of existing rights.

To achieve its purpose, scholars explain that an *ideal definition* will "settle on a single . . . criterion for retroactivity. Maintaining multiple definitions of the term (as the courts now unwittingly do) not only is intellectually sloppy, but also breeds uncertainty."⁸⁴ Establishment of a new system is admittedly complicated and lofty. However, such efforts are necessary to untangle the insufficient methods available and to mollify their resulting problems.

i. Interpretive Legislation: Problems in Clarifying Original Legislative Intent

A panoply of cases and scholars finds that interpretive legislation corrects the law to reflect the original legislative intention and true meaning of a law without impermissible creation or alteration of rights.⁸⁵ Determination of the legislature's *original intention*, however, becomes problematic when the legislative members have changed since the law was enacted.⁸⁶ While

82. *Pierce v. Hobart Corp.*, 939 F.2d 1305, 1308 (5th Cir. 1991).

83. As discussed *supra* Part II.C.2, the *St. Paul* court formulated factors to aid legislative classification. However, these factors do not all apply to interpretive or substantive classification since two factors really identify fairness considerations. See *infra* Part III.A.2.b.iii. The existing factors provide the basis of a new test that identifies the steps to accurate and constitutional classification.

84. Trahan, *supra* note 38, at 766.

85. *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 817 (La. 1992); *Ardoin v. Hartford Accident & Indem. Co.*, 360 So. 2d 1331, 1338 (La. 1978); Planiol, *supra* note 12; A.N. Yiannopoulos, LOUISIANA CIVIL LAW SYSTEM 196 (2d ed. 1999).

86. Paul Roubier, LE DROIT TRANSITOIRE 245-63 (J.-R. Trahan trans., 2d ed. 1960) ("[H]ow, in the modern legislative regime, where the law is the work

preparatory works in the legislative history are helpful guides to legislative intention at the time of enactment,⁸⁷ such sources are sometimes unreliable and inconclusive since votes are also influenced by unknown sources of self-interest or legislative logrolling.⁸⁸

Judicial application of a uniform test will render results that are less partial and more consistent. Accordingly, two of the four factors established in *St. Paul* can be used to recognize original legislative intention when the legislature has not affirmatively expressed intended temporal application. For example, the first prong of the *St. Paul* test considers the timing of the legislative response.⁸⁹ This factor illuminates original legislative intent since only a prompt response can indicate clarification of the original meaning of the law. A prolonged period of time, on the other hand, would result in new members of the legislature with different personal and political agendas who are less likely to incant "original legislative intent." Similarly, when an error is made, conscientious parties make vigilant efforts to quickly fix the problem. If an error remains untended for a period of time, sudden desire to remedy the mistake suggests the development of an ulterior motive for revision that would not have been delayed if the party was motivated by portrayal of original legislative intent. Thus, swift legislative response suggests a good faith effort to clarify original legislative intent; lengthy periods of inaction before response is mobilized smack of alternative revision motives.

Similarly, the fourth prong of the *St. Paul* test also helps discover original legislative intent by considering the amount of

of numerous assemblies whose membership is frequently renewed, can the legislative power pretend that it alone has a lock on the true interpretation of the law?"). But see generally Antonin Scalia, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Princeton Univ. Press 1997).

87. *Theriot v. Midland Risk Ins. Co.*, 694 So. 2d 184, 186 (La. 1997) (declaring legislative history to be a "particularly helpful guide in ascertaining the intent of the legislature").

88. Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369 (1999).

89. *St. Paul*, 609 So. 2d at 820.

legislation in the revision.⁹⁰ If the legislature truly intends to correct interpretation to reflect original legislative intent, such corrections will most likely be made on a situational basis with attention devoted to the detailed application of the particular law. Conversely, blanket revision of an entire section reflects substantive change in the law. It is unlikely that an entire section of legislation will be simultaneously misinterpreted to require mass revision, which will then enable each law in the section to concurrently portray original legislative intent. Thus, correction of a single law indicates interpretation of original legislative intent, while substantial revision suggests the intent to change substantive law.

ii. Substantive Legislation: Creating, Impermissibly Altering, or Destroying Rights

To encompass the definition of substantive laws, the Louisiana Supreme Court has stated: "Substantive laws,' for purposes of determining whether a law should be applied retroactively, are those which establish new rules, rights, and duties, or change existing ones."⁹¹ Thus, any law that creates a new right is automatically substantive and should only receive prospective application. New rights are created when the obligations associated with an existing right are changed. Although the alteration of rights can constitute substantive law, it is more difficult, depending on the nature of the change, to classify legislation based on mere alteration. Louisiana courts determine whether a right has been impermissibly altered by applying a test based on vested rights.⁹² However, the application of this test is problematic since the term "vested right" receives variable interpretation.⁹³

90. *Id.* at 820–21.

91. *Anderson v. Avondale Indus.*, 798 So. 2d 93, 97 (La. 2001).

92. *McCreary*, *supra* note 24, at 1324–25.

93. *Bryant Smith, Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 246 (1927) (illustrating the variance in jurisprudential treatment of vested rights); Michael A. Cancienne, Note, *Smith v. LASERS: The Louisiana Supreme Court Adjusts a Legislative Miscalculation*, 65 LA. L. REV. 881, 898–901 (2005) (discussing the faulty application of vested rights).

Courts explain the vesting process as follows: "When a party acquires a right to assert a cause of action prior to a change in the law, that right is a vested property right which is protected by the guarantee of due process."⁹⁴ In Louisiana, a cause of action accrues when the party has the right to initiate a lawsuit.⁹⁵ Thus, from the moment a party may sue in protection of his violated right, the cause of action has accrued and his right has become vested.

Vested rights, which create substantive law, are distinguished from expectant rights, which can be retroactively destroyed by subsequent legislation.⁹⁶ For example, the right to own public property does not vest until a proper survey is conducted;⁹⁷ the right to inherit from a will does not vest until the decedent has died.⁹⁸ In short, vested rights are fully realized and exercisable, while expectant rights are those that will be realized in the future, but are not yet exercisable.⁹⁹

Finally, what amount of change in rights constitutes an impermissible alteration? The United States Supreme Court has defined the alteration of vested rights as attaching new legal consequences to behavior completed before the law is enacted.¹⁰⁰ The Louisiana Supreme Court has ruled that a change in the manner of exercise may not impermissibly alter a vested right.¹⁰¹ The court determined that vested rights were not altered since the legislative amendment only changed the *order of recovery* from insurance defendants, not the general *right to recover* at all.¹⁰² Thus, retroactive application of a law that actually alters existing

94. *Bourgeois v. A.P. Green Indus., Inc.*, 783 So. 2d 1251, 1259 (La. 2001).

95. *Id.* (citing *Cole v. Celotex Corp.*, 599 So. 2d 1058, 1063 (La.1992)).

96. *Yiannopoulos*, *supra* note 85, at 196.

97. *Smith*, *supra* note 93, at 245 (citing *White v. Martin*, 66 Tex. 340 (1886); *Milam County v. Blake*, 54 Tex. 169 (1880); *Milam County v. Bateman*, 54 Tex. 153 (1880); *Wright v. Hawkins*, 28 Tex. 452 (1866)) (explaining that "the location of public lands is immune to retroactive deprivation after a survey but not before").

98. *McCreary*, *supra* note 24, at 1325 n.15 (explaining that until the moment the testator dies, any inheritance rights are mere expectancies).

99. *Id.* at 1325.

100. *Landgraf v. USI Film Prods.*, 511 U.S. 269, 269-70 (1994).

101. *Segura v. Frank*, 630 So. 2d 714, 723-24 (La. 1994).

102. *Id.*

rights, rather than merely changing the manner of exercise, violates due process since consequences are attached to behavior without sufficient notice.¹⁰³

iii. *Exceptions to the Interpretive Exception*

Although the interpretive exception allows retroactive application in specific circumstances, this application is not always desirable. Civilian scholars recognize that retroactivity rules cannot be absolute since the most equitable application considers the personal circumstances of the parties of each case.¹⁰⁴ When retroactive application of an otherwise eligible piece of interpretive legislation is unfair, the law should receive prospective application instead.¹⁰⁵

For example, upon rehearing of *Willis-Knighton Medical Center v. Caddo-Shreveport Sales and Use Tax Commission*, the court found that retrospective application of a judicial opinion,¹⁰⁶ which changed the test used to determine component parts of immovables, imposed unwarranted inequity upon individuals who relied on the old test.¹⁰⁷ The court explained that retroactive application particularly hinders the affected legal field—property law—since property law is an area in which “predictability and stability [are] particularly important.”¹⁰⁸ The Louisiana Supreme

103. See *infra* Part III.C.3.

104. Murchison & Trahan, *supra* note 28, at 209–10 (citing Eduardo García Máynez, INTRODUCTION AL ESTUDIO DEL DERECHO 388–90 (J.-R. Trahan trans., 1996) (38th ed. 1986)).

105. Fisch, *supra* note 55, at 1084–87. Fairness considerations are usually based on the protection of settled law and justified reliance on that law. *Id.* at 1085.

106. As a secondary source of authority, a different set of factors measures the temporal application of judicial opinions. These factors are delineated in *Lovell v. Lovell*, 378 So. 2d 418, 421–22 (La. 1979).

107. *Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm'n*, 903 So. 2d 1071, 1107–08 (La. 2005) (on rehearing) (defining a component part by the degree of attachment rather than societal expectations).

108. *Willis-Knighton*, 903 So. 2d at 1108. Property law requires special stability since it is the foundation of almost all other rights; substantive retroactive changes immediately disrupt the individual's property rights and eventually disturb the entire economy. *Id.*

Court also considered fairness factors in *Tullier v. Tullier*.¹⁰⁹ Before applying article 2340, concerning the presumption of community property in a matrimonial regime, the court considered whether the retroactive application of the article would be fair to the plaintiff wife.¹¹⁰ These decisions illustrate the importance of fairness factors in classification determination.

Repeated jurisprudential enforcement settles law and increases reliance upon the law.¹¹¹ Relied-upon principles should not be reversed and applied retroactively because established reliance on a law should be fairly considered before a different interpretation of the law applies retroactively.¹¹² Accordingly, the settled jurisprudence prong (second) and the reliance prong (third) of the *St. Paul* test should be incorporated into the analysis so as to temper any definitive findings of legislative classification with individualized fairness.¹¹³

Legislative enactments are not subject to fairness considerations since the legislative branch has the absolute authority to make law.¹¹⁴ However, the fairness considerations should be used as an extra safeguard when the judicial branch is forced to classify legislation. Nevertheless, classification by either the legislative or judicial branch must comport with constitutional principles.¹¹⁵

While weighing the unique circumstances of a case before rendering a decision produces the most just result, customized

109. 464 So. 2d 278 (La. 1985).

110. *Id.* at 283.

111. *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 820 (La. 1992).

112. Fisch, *supra* note 55, at 1086. "Reliance depends upon the nature of the rule, the clarity and predictability of the law prior to the adoption of the new rule, the relative extent to which expectations about the rule affected the primary conduct to which the rule applies, and the degree to which these expectations were reasonable." *Id.* (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)).

113. *St. Paul*, 609 So. 2d at 820-21.

114. U.S. CONST. art. I, § 1; LA. CONST. art. III, § 1.

115. The Constitution is the supreme law of the land and preempts any laws that breach its principles. U.S. CONST. art. VI, § 1, cl. 2. Thus, a law cannot be applied retroactively, despite legislative intention reserved by article 6, if that application violates constitutional principles.

analysis is problematic since it lends itself to inconsistency. Despite the convenient advantages promoted by bright-line tests,¹¹⁶ fairness considerations depend on the facts of the individual circumstances and do not fit neatly into a classification scheme. Though it is impossible to create a system that is perfectly accurate and fact-conscious, an *improved* classification scheme will strive for consistent and constitutional results that are tempered by fairness considerations when necessary.

c. Constitutional Considerations: Adding a New Ingredient to the Analysis

Classification according to legislative intent seems simple, but only superficially so. Unfortunately, legislative intent as to temporal application does not always comply with constitutional principles. Academic doctrine recognizes that “[a]lthough the legislature is free to express (or not express) intent regarding prospective or retroactive application of an enactment, such expressions cannot usurp the judicial function of *interpreting* the law, nor can such expressions trump constitutional considerations that prevent application in a fact-specific context.”¹¹⁷

Recent Louisiana Supreme Court decisions place the interpretive exception under the judicial microscope. In 2005, the court addressed the import of effects caused by retroactive classification in three major decisions.¹¹⁸ According to these rulings, the legislature may not re-interpret a law once the judiciary has rendered an authoritative interpretation.¹¹⁹ This heavy-handed approach drastically limits legislative use of the interpretive exception to retroactivity and illustrates the court’s intent to curtail constitutional violations committed when the legislature dresses-up

116. As discussed in this comment, a clearly defined classification scheme prevents separation of powers violations.

117. Lamonica & Jones, *supra* note 11, at § 6.4, at 113, 116.

118. *Mallard Bay Drilling, Inc. v. Kennedy*, 914 So. 2d 533 (La. 2005); *Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm’n*, 903 So. 2d 1071 (La. 2005) (on rehearing); *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So. 2d 392 (La. 2005) (on rehearing).

119. *Mallard Bay Drilling*, 914 So. 2d at 544 (“Such legislation effectively constitutes the adjudication of cases in contravention of [article II, section 2 of the Louisiana Constitution].”).

substantive legislation under an interpretive guise to receive retroactive application.

If retroactive application of a law allows the legislature to usurp judicial power by adjudicating a case via legislative interpretation, the law should be applied prospectively to avoid a separation of powers violation.¹²⁰ This principle is illustrated in *Unwired Telecom Corp. v. Parish of Calcasieu*, where a cell phone service provider filed a petition for recovery of sales and use taxes.¹²¹ While the appeals were pending, legislation amended the provisions by redefining the terms “retail sale,” “sales price,” and “use.”¹²² Since the legislative amendment extinguished Unwired Telecom’s existing tax obligations by redefining the terms on which the obligations were based, the enactment was an unconstitutional attempt to disguise substantive law as interpretive legislation.¹²³ The *Unwired Telecom* court was particularly offended by the targeted legislative response to a specific appellate decision that had already interpreted the terms; the legislation was clearly amended to legislatively overrule the underlying case.¹²⁴ In response to the unconstitutional appropriation of judicial power, the court declared: “[I]t is not within the province of the Legislature to interpret legislation after the judiciary has already done so.”¹²⁵ This proclamation marks the beginning of a boundary-enforcement approach to preventing constitutional violations.

In the wake of *Unwired Telecom*, legislative authority to exercise the interpretive exception to retroactivity appears to be limited to “virgin” statutes that have not received prior judicial interpretation. Upon rehearing of *Willis-Knighton*, the court found that retrospective application of the judicial opinion overturning the original test used to classify component parts of immovables in

120. *Unwired Telecom*, 903 So. 2d at 406.

121. *Id.* at 396–97.

122. *Id.* at 397.

123. *Id.* at 405–06.

124. *Id.* at 404–06 (“By passing [the act] in order to abrogate the appellate court’s interpretation and application of a long-standing revised statute, the Legislature clearly assumed a function more properly entrusted to the judicial branch of government.”).

125. *Id.* at 405.

favor of another test imposed unwarranted inequity upon individuals who relied on the original test.¹²⁶ Since this case involved the retroactive application of a judicial decision, rather than legislation, its details are not directly applicable. However, the concern for correct retroactive application notably reappears on the Louisiana Supreme Court docket.

The court continued to emphasize the progression toward strict constitutional compliance by refusing to retroactively apply legislative amendments in conflict with prior judicial decisions.¹²⁷ In *Mallard Bay Drilling, Inc. v. Kennedy*, a drilling company received a tax refund for the purchase of diesel fuel for their tug boats under the sales tax exemption for owners of ships and vessels on the basis that imposition of the tax would unconstitutionally burden interstate commerce.¹²⁸ The application of the tax exception to the drilling company was based upon a legislative amendment redefining interstate commerce to include tugboat operation. However, the amendment was enacted in response to a contrary judicial ruling which did not allow the exemption for tugboat operators since those vessels never left state waters.¹²⁹ Thus, the court concluded that the legislative amendment of a law in direct conflict with a reaffirmed judicial interpretation violates separation of powers.¹³⁰ Although compliance with separation of powers principles does not completely preclude the legislature from exercising the interpretive exception to retroactivity,¹³¹ the legislature's interpretive powers are restricted to "clarifying the meaning of previously enacted texts outside the context of litigation."¹³² The narrow scope of exercisable power does not

126. *Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm'n*, 903 So. 2d 1071, 1107-08 (La. 2005) (on rehearing) (defining a component part by the degree of attachment to the immovable, rather than by societal expectations).

127. *Mallard Bay Drilling, Inc. v. Kennedy*, 914 So. 2d 533 (La. 2005).

128. *Id.* at 537-38.

129. *Id.* at 539-40. The court found that the tax exemption did not apply based on the inapplicability of the legislative amendment (Act 40) and the fact that Mallard's drilling barges cannot be classified as either ships or vessels in order to qualify for the exception. *Id.*

130. *Id.* at 544-45.

131. *Id.* at 544.

132. *Id.*

allow the legislature to interpret a law already interpreted by the judiciary and reaffirmed without ambiguity.¹³³

Retroactive application of interpretive legislation continues to be a prevalent issue in the Louisiana courts, frustrating scholars and judicial figures in search of correct configuration and application of a categorical determination. However, in *Mallard Bay Drilling*, the court recognized the necessary fact that the existing two-part classification test should be modified when the result violates constitutional principles.¹³⁴ Thus, Louisiana is ready for a properly codified classification system that improves the existing schemes by: (1) clarifying the appropriate division between laws that receive the interpretive exception; and (2) preventing constitutional violations.

B. Finding a Solution: Proposed Classification Scheme and Temporal Effect

This analysis sets forth an affirmative definition that consolidates the existing jurisprudential tests into a single body, providing clearer categorization and more equitable results. The first two steps of the analysis are derived from existing jurisprudential and doctrinal sources. However, the third step provides a response to the recent trends in retroactivity disseminated from the Louisiana Supreme Court.

1. Did the legislature express its intention regarding temporal application?
 - If there is an expressed legislative intention, proceed to step three.
2. If there is no expressed legislative intention, the law should be judicially classified as interpretive or substantive.
 - a. Interpretive legislation *clarifies the original meaning of the law*.
 - This legislation receives prospective and retroactive application.
 - b. Substantive legislation *establishes new rules*,

133. *Id.*

134. *Id.* at 543.

changes existing rules, or extinguishes existing rules.

- This legislation receives prospective application only.
- c. Fairness exception to the interpretive exception: Is the law *justifiably relied upon* such that retroactive application unfairly *upsets settled jurisprudence*?
 - The above determination should be weighed against the effects it would cause and should only be applied if it is fair and equitable.
- 3. Does adherence to the expressed legislative intention or judicial classification violate constitutional principles?
 - a. Separation of powers principles are violated when the legislature assumes a judicial role.
 - b. Due process notice requirements are violated by retroactive application of a law that alters existing obligations.

In the scope of this analysis, it is interesting to consider whether the actual definition of temporal application will be applied prospectively or retroactively. Here, the proposed legislation is a definition of interpretive and substantive legislation intended to aid temporal assignment. Necessarily, the definition concisely synthesizes existing jurisprudential tests.¹³⁵ This synthesis changes the existing law by sifting through the current tests and using their separate parts to create a new whole. However, as the Louisiana Supreme Court explains, jurisprudentially-created rules *cannot create substantive rights since they are not primary sources of law*.¹³⁶ The court says that “decisions of our state courts do not create or eliminate substantive rights as this is the proper function of the legislature.”¹³⁷ Since “[t]he sources of law are legislation and custom,”¹³⁸ and here, only jurisprudential tests were altered, the new classification scheme does not create or alter substantive law, so it can be applied retroactively.

135. See Trahan, *supra* note 38, at 766 (emphasizing that an effective definition must settle on a single set of criteria for retroactivity).

136. Tullier v. Tullier, 464 So. 2d 278, 282 (La. 1985).

137. *Id.*

138. LA. CIV. CODE ANN. art. 1 (2006).

To explain, the classification scheme itself is interpretive legislation since it clarifies ambiguity in the existing field of legislation and jurisprudence without altering existing substantive rights.¹³⁹ Since the judicial tests that were altered in the course of creating a definition were not capable of creating substantive rights,¹⁴⁰ the new definition has not impermissibly created or altered existing rights. As a result, if the legislature adopts this proposed definition, retroactive application is permissible.

C. Impact: The Aftermath of a Classification Revolution

In direct contrast to traditional accommodating measures,¹⁴¹ recent statements of the Louisiana Supreme Court have stifled the interpretive exception by limiting its use to instances where the judiciary has not already pronounced its own interpretation.¹⁴² This 180 degree revolution is likely a reflection of increased instances of improper use of the interpretive exception. If constitutional principles are not respected, the court might further limit the exception such that its niche in Louisiana jurisdictions fades away. Thus, compliance with constitutional tenets is more important than ever; the new classification scheme aids correct and constitutional application of the interpretive exception.

A distinction between interpretive and substantive legislation will trickle down to individual applications of law and percolate up to the fundamental governmental branches. Since the temporal effects of law simultaneously impact individual persons whose fates can depend on statutory classification, as well as the separation of powers between the judicial and legislative branches, the peripheral effects of definitive classification will have enormous consequences. Correct classification (1) fosters the

139. *Tullier*, 464 So. 2d at 283.

140. *Id.* at 282.

141. *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809, 817–22 (La. 1992) (dedicating considerable effort to creating a five-factor test to classify legislation).

142. *Mallard Bay Drilling, Inc. v. Kennedy*, 914 So. 2d 533 (La. 2005); *Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm'n*, 903 So. 2d 1071 (La. 2005) (on rehearing); *Unwired Telecom Corp. v. Parish of Calcasieu*, 903 So. 2d 392 (La. 2005) (on rehearing).

legislature's integrity, (2) prevents the disappearance of the civilian notion of the interpretive exception, and (3) protects the branches from inappropriate appropriation of power.

1. Protecting the Legislature from Itself

A clarified standard prevents separation of powers violations by accurate legislative classification. A standardized method of classification allows the legislature to assign the proper temporal effect to legislation. As a result, laws receive greater judicial deference because a universal standard lessens the need for judicial scrutiny. Increasingly accurate legislative proclamations teamed with a resulting upsurge in judicial deference reflect the recognition of legislative integrity. The judicial branch acknowledges that "[t]his judicial deference to legislative discretion in the enactment of laws . . . is a cornerstone of the doctrine of separation of powers."¹⁴³ When a component of a whole is strengthened, the entire body benefits from the isolated improvement. Accordingly, a precise statement of retroactive criteria will immediately impact the legislative branch and will ultimately cause far-reaching effects.

2. Reviving the Civilian Tradition

Recently, the Louisiana Supreme Court has disseminated opinions that subject the interpretive exception to serious accusations of unconstitutional application, thereby threatening its continued existence.¹⁴⁴ Although the embers of disapproval have smoldered for years, the recent opinions have reignited the debate. When appropriately used, interpretive legislation provides the legislature with the unique opportunity to "pronounce the 'correct' interpretation to be given to existing laws."¹⁴⁵ As a correct pronouncement of law, retroactive interpretive legislation remedies malfunction—it does not impermissibly create new rights or alter

143. *Hernandez v. City of Lafayette*, 399 So. 2d 1179, 1182 (La. App. 3d Cir. 1981).

144. *Willis-Knighton*, 903 So. 2d at 1109; *Unwired Telecom*, 903 So. 2d at 404-06.

145. *Pierce v. Hobart Corp.*, 939 F.2d 1305, 1309 (5th Cir. 1991).

existing rights.¹⁴⁶ Clarification would likely placate critics who oppose the exception, thus reinstating a pillar of the Louisiana civilian tradition.¹⁴⁷

3. *Protecting Constitutional Principles*

The United States Supreme Court has addressed the constitutional implications of retroactivity, but has never fully confronted and defined the ramifications of the controversial temporal doctrine.¹⁴⁸ Opponents justifiably complain that the interpretive exception creates opportunities for separation of powers violations.¹⁴⁹ These loopholes are closed by a clarified standard of legislative classification. Principles affected by a refined definition include the following: (1) equal protection of the law; (2) the due process notice requirement; and (3) prohibitions against vague statutory language.

a. Equal Protection Requires Equal Application of Law

Although the judicial role is inherently interpretive,¹⁵⁰ judicial interpretations should correlate so that different judges reach the same conclusion under a specific set of facts. A clearer definition

146. *Terrebonne v. S. Lafourche Tidal Control Levee Dist.*, 445 So. 2d 1221, 1225 (La. 1984).

147. The interpretive exception traced back to 1789 in post-revolution France; the exception was introduced into Louisiana law via the heavy French influence on the Louisiana Civil Code. See *supra* Part II.B.

148. Fisch, *supra* note 55, at 1073.

149. H. Alston Johnson, *Legislation—Procedure and Interpretation*, 45 LA. L. REV. 341, 344 (1984) (“There is serious doubt about the validity of this exception in any event . . . because an ‘interpretive’ enactment begins to give the legislature judicial power.”). See also *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576, 590 (La. 1975) (on rehearing) (arguing that the exception is “unconstitutional because it is a legislative usurpation of judicial power to interpret legislation”).

150. See U.S. CONST. art. III; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”); Bacon, *supra* note 10, at 265 (“Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law.”).

effects equal protection of law since universal criteria for interpretive legislation affords equal application of law and prevents *individualized* judicial interpretations which, albeit learned and well-intended, are personalized by each judge.¹⁵¹ Touting this lofty principle in respect to temporal application of law may seem self-important or overreaching, but fundamental elements of American government cannot be ignored. Since the beginning of legal history, courts have found that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."¹⁵² When a party accepts an adverse judgment, despite similar cases reaching favorable results, the disfavored party is injured by inconsistent interpretations of the same law. The application of elementary justice principles emphasizes the scope of impact for appropriate distinction between interpretive and substantive legislation and the corresponding temporal effect.

b. Classification Effects on the Notice Requirement

The Due Process Clauses of the Federal and State Constitutions limit the legislative power to make laws.¹⁵³ Constitutional tenets of due process impose a notice requirement;¹⁵⁴ in compliance therewith, one must receive fair notice of conduct deserving punishment and the severity of the penalty that may be imposed.¹⁵⁵

151. The need for consistency is not intended to undermine judicial creativity as a crucial component of justice. Some scholars rebuke the notion that the judicial role should be confined to strict interpretation. See Huguet, *supra* note 68, at 1032 ("Misled by Francis Bacon's half-truth, 'Judges ought to remember that their office is . . . to interpret law, and not to make law' and by several generations of oversimplifying high school civics teachers, multitudes of our citizenry have come to believe that it is somehow improper for judges to admit to law-innovation, law-choice, or law-revision If the courts will not perform this duty, the legislatures cannot—and the reasoned development of the law and its ability to serve current needs must suffer.").

152. *Marbury*, 5 U.S. (1 Cranch) at 163.

153. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; LA. CONST. art. I, § 2.

154. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; LA. CONST. art. I, § 2.

155. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (noting that a fundamental element of due process "is notice reasonably

A scholar expounds: “[F]air retroactivity rules should provide notice of applicable standards and protect reliance interests The justice of a legal system is what gives its rules legitimacy. Notice enables people to predict the consequences of their transactions and increases the influence of legal rules upon primary conduct.”¹⁵⁶ Respect for the notice requirement of due process supports a definitive classification of legislation so that true substantive legislation will not receive haphazard retroactive application under the guise of interpretive designation.

c. Vague Statutory Language Inhibits Proper Notice

A person should not be subjected to a law that could be unintentionally violated—if an intelligent person must guess a law’s meaning, imposition of liability for its breach is unjust. The Supreme Court of the United States has determined that “[a] law is unconstitutionally vague if its lack of definitive standards either (1) fails to apprise persons of ordinary intelligence of the prohibited conduct, or (2) encourages arbitrary and discriminatory enforcement.”¹⁵⁷ Vague statutes violate the fair notice requirements since they do not clearly state legal parameters.¹⁵⁸ Interpretive legislation ameliorates vague statutory language by resolving ambiguity.¹⁵⁹ Accordingly, retroactive application of

calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”); *Grannis v. Ordean*, 234 U.S. 385 (1914) (adding that notice must convey all relevant and necessary information); *Roller v. Holly*, 176 U.S. 398 (1900) (adding that notice must provide a reasonable time to enable proper response).

156. Fisch, *supra* note 55, at 1084–85.

157. *City of Chicago v. Morales*, 527 U.S. 41, 90 (1999).

158. See generally *id.* (finding that city may not order dispersal for gang loitering without knowing if congregation had purpose); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (finding that city cannot vaguely criminalize vagrancy); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (finding that city cannot vaguely prohibit more than three persons from assembling on a sidewalk and exhibit annoying conduct).

159. Interpretive laws may replace vague statutory language with a specific delineation of original legislative intent.

interpretive law fosters constitutional principles since improperly vague laws are clarified by the original legislative intention.

IV. CONCLUSION

While the law is definitively based on right and wrong, justice hangs in the balance among the many shades of gray. Although a clear-cut definition will prevent legislative abuse and judicial inconsistency, it is not an instant cure capable of perfecting every future legislative classification. The nature of the judicial process requires judicial interpretation of law based on a judge's personal conceptions of fairness. Diversity is a necessary component of fairness: all judges do not form universally equivalent conclusions, even on the same fact pattern. The Supreme Court recognizes this proposition:

Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government.¹⁶⁰

The judicial branch is not a machine that can or should produce the same opinion from every judge. As humans, judges each receive conscious and unconscious influences from innumerable sources, not just a definition of legislative classification.¹⁶¹ A uniform system of legislative classification should not aspire to instantly fix all problems caused by interpretive or substantive temporal application. Instead, clarification reduces ambiguity and supplements theoretical and practical aspects of law: due process

160. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535–36 (2004) (addressing a citizen-detainee's due process right to receive notification of the basis for enemy-combatant classification and a fair opportunity to rebut classification before a neutral decision maker).

161. Jerome Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 24 (1931) (discussing the human variables that affect judicial opinions); Eric L. Muller, *Constitutional Conscience*, 83 B.U. L. REV. 1017, 1038 ("Justices Black and Douglas implied that the guarantee of due process was determined by what the judge ate for breakfast.").

principles are furthered by easy legislation identification by governmental bodies. In turn, the definitive result of the classification analysis must be balanced with the ensuing results; unjust consequences adulterate gains achieved through consistent identification. If the interpretive exception to retroactivity is abused or neglected, it becomes the problem child of temporal law. However, if the exception is well-groomed and nurtured, it is a vehicle for legislative improvement and a protector of constitutional principles.

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