1982

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Louise Everett Graham
University of Kentucky College of Law, lgraham@uky.edu

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STATE MARITAL PROPERTY LAWS AND FEDERALLY CREATED BENEFITS: A CONFLICT OF LAWS ANALYSIS

LOUISE GRAHAM†

The laws of individual states have historically controlled familial relationships and the rights and responsibilities derived from them. The injection of federal rights into the domestic relations area has generally been confined to resolution of claims that the application of particular state laws violated either due process or equal protection rights of particular persons. In a limited number of cases concerning marital property, however, one party has relied upon a federal law creating a benefit or right that conflicts with the state-created rule apportioning marital property or establishing a support obligation. Such a conflict of laws problem arose in McCarty v. McCarty. Richard and Patricia McCarty married in 1957 while Richard was a second year medical student. During Richard's fourth year in medical school, he began active military service. For the nineteen years of the McCartys' marriage, Richard remained in the military, attaining the rank of colonel and serving approximately eighteen of the twenty years needed for retirement pay eligibility.

† Assistant Professor of Law, University of Kentucky; B.A., University of Texas, 1965; J.D., University of Texas, 1977.—Ed.


3. Id. at 216.

4. Id. Military personnel may retire based on length of service. A regular commissioned Army officer who has served at least twenty years, with at least ten years of active service as a commissioned officer, may be retired by the Secretary of the
For the McCartys, as for many other married couples, Richard's retirement benefits were a major portion of the assets accumulated during the marriage. Not surprisingly, when the McCartys divorced in 1976, those benefits became a major feature of the property contest. Under the laws of the California divorce forum, the benefits were community property subject to division upon divorce. Richard

Army if the officer so requests. 10 U.S.C. § 3911 (1976). Accordingly, Richard McCarty was entitled to the monthly base pay of his retired grade multiplied by 21⁄2% of the service years credited to him. In any case he could not have received more than seventy-five percent of the pay upon which the compensation was based.

5. The only other assets accumulated by the McCartys were cash, two automobiles, the cash value of life insurance policies, and an uncollected debt. 453 U.S. at 218.

6. Although the McCartys had lived in Pennsylvania, Hawaii, the District of Columbia, Texas, and California, the California divorce court applied forum community property law to the divorce. The court divided the pension, without regard to other state rules, based upon a general, non-statutory rule that a divorce forum always applies its own law. RESTATEMENT (SECOND) OF CONFLICTS § 285 (1971); A. VON MEHREN & D. TRAUTMAN, THE LAWS OF MULTI-STATE PROBLEMS 84-90 (1965). Most divorce courts have ignored the problems arising when the forum recognizes community or marital property but the asset to be divided was acquired in part in a state or states that did not recognize the community concept at the time the parties resided there. Compare Cameron v. Cameron, 9 FAM. L. REP. 2001 (1982) (pension divisible though not earned in community property state) with Stephens v. Stephens, 95 N.M. 1, 595 P.2d 1196 (1979) (whether a pension is marital property depends upon the law of the state in which the benefits were acquired).

7. California statutorily defines community property as property acquired by either spouse during the marriage "when not acquired as the separate property of either." CAL. CIV. CODE § 687 (West 1982). Separate property is statutorily defined for both spouses as all property owned before marriage; property acquired after marriage by gift, bequest, devise or descent; and property that is the rent, issue, or profit from other separate property. Id. §§ 5107, 5108 (West 1970). Earnings of a spouse living separate and apart from the other spouse are also separate property. Id. § 5118 (West Supp. 1982). Living separate and apart requires an intention to separate that demonstrates a complete and final breakdown of the marital relationship. See In re Marriage of Baragry, 73 Cal. App. 3d 444, 140 Cal. Rptr. 779 (1977). Additionally, earnings following a legal separation are separate property. CAL. CIV. CODE § 5119 (West Supp. 1982). Under California law, the respective interests of both spouses in community property are considered present, equal, and existing interests. Id. § 5105. California also recognizes as divisible quasi-community property all property that would have been treated as community property of the spouse who acquired the property had the spouse been a California domiciliary at the time of acquisition. Id. § 4803. Upon divorce, a California trial court must divide community and quasi-community property equally. Id. § 4800. Between the time of the McCartys' 1957 marriage and their 1976 divorce they had been stationed in four different states and the District of Columbia. Only California and Texas were community property states. W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 1 (2d ed. 1971). Nevertheless, Hawaii would have permitted the equitable division of all property owned by either party in any divorce rendered after 1955. HAWAII REV. STAT. § 510-9 (1976). Similarly, though the District of Columbia did not recognize marital property, it permitted the just apportionment of all property. D.C. CODE ANN. § 16-910 (1981). Pen-
McCarty claimed, however, that federal laws creating the military retirement benefits preempted the application of California's community property laws and required that the assets be set aside to him as his separate, indivisible property. The Supreme Court agreed with his contentions. In McCarty, the Court held that the federal law creating military retirement benefits required those benefits to remain the personal entitlement of individual military personnel; the statute mandated that military retirement benefits be classified as the separate property of the military spouse upon divorce.

Before the Court's decision in McCarty, it had faced only a half dozen cases in which federal law allegedly conflicted with state marital property law. All but one of the pre-McCarty decisions were rendered prior to acceptance of the notion that marriage is an economic partnership and that property acquired during the marriage by either spouse should be available for equitable distribution upon divorce.

The adoption by many states of some form of marital property and the concurrent proliferation of federally connected benefits carries the potential for tension between state and federal policies in this area. The passage by a state legislature of a divorce act espousing the idea of marital property or equitable distribution is a strong statement of any state's social policy toward the marital institution and its dissolution. Therefore, important state policies in areas traditionally left to state regulations have been affected by the result in McCarty.

Pennsylvania, however, did not recognize the marital property concept until 1980. PA. STAT. ANN. tit. 23, § 401(e) (Purdon Supp. 1982-83). Therefore, because Pennsylvania had no equitable division rule it was the only state in which division of retirement benefits would not have been possible under state law.


10. Only Hisquierdo was decided after the Uniform Marriage and Divorce Act was adopted by the National Conference of Commissioners on Uniform State Laws in 1970. UNIF. MARRIAGE & DIVORCE ACT prefatory note, 9A U.L.A. 3 (1973).

11. See infra note 291.

Recent congressional action has mitigated the harsh result McCarty inflicted upon former spouses of military personnel. An amendment


From the point of view of former spouses, nondivisibility was an especially serious matter for two reasons. First, retirement benefits were likely to be the most important asset accumulated during the marriage. Second, the transient nature of military service dictated that spouses of military personnel had little opportunity to establish work records permitting them to acquire comparable, individual benefits in the private sector. See Hearings on H.R. 2817, H.R. 3677, and H.R. 6270: Legislation Related to Benefits for Former Spouse of Military Retiree Before the Military Compensation Subcomm. of the House Comm. on Armed Services, 96th Cong., 2d Sess. 71 (1980) (statement of Winifred Cowan). One survey conducted by an organization of former military spouses revealed that the average age of the wife at divorce was 44; the average length of the marriage was 22.5 years; the average number of moves made by the former spouses was 12. Id. at 75. See also Pension Problems of Older Women: Hearings Before the Subcomm. on Retirement Income and Employment of the Select House Comm. on Aging, 94th Cong., 1st Sess. 1 (1975); Women in Midlife—Security and Fulfillment, A Compendium of Papers Submitted to the Select House Comm. on Aging and the Subcomm. on Retirement Income and Employment, 95th Cong., 2d Sess. 1 (1978).

Since McCarty, the Court has extended its reach beyond the area of marital property division and has affected state court child support orders. In Ridgway v. Ridgway, 454 U.S. 46 (1981), the Court held that a beneficiary designation under a Serviceman's Group Life Insurance policy overrides a state court order requiring the policy holder to maintain that policy for the benefit of his minor children. Although the issue in Ridgway was technically not one of the marital property status of insurance benefits, the case involved a similar conflict between state domestic relations law and federal law creating a benefit for service personnel.

Richard Ridgway was divorced by a Maine court in 1977. The state court order, enforcing a settlement agreement between the parties, required Ridgway to maintain
to a defense department appropriations bill provides for some division of military retirement pay upon divorce. The amendment also provides former spouses with the right to enforce property division awards through garnishment of military retirement pay in some instances.

An analysis of *McCarty* and its predecessors remains important, however, because it provides insight into the Court's methodology for the resolution of asserted conflicts between state and federal law.

In *McCarty*, the Court characterized the issue as one of federal preemption of state marital property law. Outside of the domestic relations area, federal preemption is a familiar topic. The area of domestic relations, however, is one generally conceded to fall within the purview of the states. For that reason, tests that consider whether the federal government has intended to occupy the field are inappropriate. When the Court deals with the question of preemption of state law by federal statutes, the problem before it is one of choice of law. A case concerning federal preemption thus is essentially a conflicts case although the choice of law must be made vertically rather than horizontally.

The *McCarty* majority adopted an interest analysis method for resolving the choice of law question raised in that case. In so doing, however, the Court demonstrated a number of problems for which theories of governmental interest analysis have been criticized. This article will focus upon the problems raised by *McCarty* as a conflicts case.

The first section of the article briefly discusses the application of interest analysis to vertical choice of law problems. The second section traces the Court's prior cases and establishes the Court's use of interest analysis methodology. Part three discusses recent preemption cases and explains some of the problems raised by the Court's interest analy-
sis methods. Parts four and five discuss particular problems raised by both the Court's preemption analysis and the legislation overruling McCarty's result.

I. THE APPLICATION OF INTEREST ANALYSIS TO VERTICAL CHOICE OF LAW PROBLEMS

The preemption test adopted by the Supreme Court in McCarty requires that the conflict between the state and federal regulation be more than a "mere conflict in words." Instead, the application of state marital property law to federally created benefits must threaten harm to "clear and substantial" federal interests. In both the language and the structure of its opinion, the McCarty Court revealed its governmental interest analysis methodology. The Court identified the relevant federal interests and devoted a significant portion of its opinion to explaining those interests that it viewed as important. The concentration on policy, however, is not the only key to understanding the federal benefit/state marital property law clash as a choice of law problem to be resolved by interest analysis. Policy discussions are not limited to conflicts cases. McCarty and the cases preceeding it can be denominated conflicts cases by virtue of the requirement that the Court choose between the laws of two different sovereigns. That the cases exhibit the use of governmental interest analysis is demonstrated by the Court's application of the federal forum's policy in cases in which there is some apparent federal interest without regard to the content of the state marital property law that posed the alternative choice. McCarty demonstrates the use of interest analysis by the Court not only because the Court framed its language in terms of the interests of the federal government but because the Court looked to the policy underlying the federal rules it conceived to be relevant. The hallmark of interest analysis is that it is a system under which no rule can be applied without examining the rule's content. See B. Currie, SELECTED ESSAYS ON THE CONFLICTS OF LAWS 6 (1963). The Court's methodology in McCarty demonstrates that when federal regulations conflict with state marital property law, the issues cannot be resolved by asking general questions such as whether Congress has occupied the field. Campbell v. Hussey, 368 U.S. 297 (1961); Rice v.
its own law is supported by the presence of the supremacy clause, 27 which permits no balancing of the state and federal interests in contemplation.

Although governmental interest analysis is a system generally used to choose between the laws of sister states, it has also been applied to vertical choice of law problems. 28 Governmental interest analysis posits that every rule of law is predicated upon a legislative policy. 29 That policy expresses the governing sovereign's interest in the resolution of any particular dispute. 30 The basic questions asked in interest analysis seek to determine what the legislative body creating a rule of law intended when they drafted the rule. 31 Under interest analysis, when the laws of two sovereigns are potentially available to resolve a problem, each law must be examined in order to determine whether the policy underlying its enactment will be furthered by its application to the situation at hand. 32 A decision, therefore, that a legislature did not intend that its rule apply in a given situation is simply another way to ex-

Santa Fe Elevator Corp., 331 U.S. 218 (1947); Hines v. Davidowitz, 312 U.S. 52 (1941). Instead, interest analysis requires that specific policies underlying the federal rule in question be identified and evaluated. 453 U.S. at 227-32. See infra text accompanying notes 172-248. This article criticizes the Court for attempting to strengthen its rule of decision through reference to policies that are not necessarily connected to the conflicts question to be resolved and for failing to carefully analyze some policies suggested to support the decisions.

27. U.S. Const. art. VI, § 2., cl. 2.
28. Leathers, Erie and Its Progeny As Choice of Law Cases, 11 Hous. L. Rev. 791 (1974). Professor Leathers' use of governmental interest analysis to reconcile the cases from Erie Railroad v. Tompkins, 304 U.S. 64 (1938), to Hanna v. Plumer, 380 U.S. 460 (1965), demonstrates that in diversity actions conflicts between the Federal Rules of Civil Procedure and state rules can be resolved consistently only by examination of both federal and state interests in the application of each sovereign's rule. His article is especially helpful because it carefully explains the need for considering the particular policies embodied in any rule. His thesis, that the presence of a federal rule is not sufficient to bar application of state law unless the federal rule expresses a valid interest of the federal forum, has been accepted by the Court. See Walker v. Armco Steel Corp., 446 U.S. 740 (1980).
29. See Leathers, supra note 28, at 793. See also B. Currie, supra note 26, at 6.
30. B. Currie, supra note 26, at 6.
31. Professor Currie recognized that the task facing a court was one of construction and interpretation. See id. at 184, 627. Since its inception, governmental interest analysis has been criticized as a method allowing courts to conjure up legislative intent and policy to suit the result preferred in a particular case. Reese, Choice of Law: Rules or Approach, 57 Cornell L. Rev. 315 (1972). For a recent, well-articulated example of such criticism see Brilmayer, Interest Analysis and the Myth of Legislative Intent, 78 Mich. L. Rev. 392 (1980). It is beyond the scope of this article to evaluate various choice of law methods. For such evaluations, see D. Cavers, The Choice-Of-Law Process (1965); R. Weintraub, Commentary On The Conflict Of Laws (2d ed. 1980).
32. Leathers, supra note 28, at 793.
press the decision that no legislative policy would be furthered by the rule's application. 33

Interest analysis identifies a number of cases labelled "false conflicts" in which a forum can eliminate one of the conflicting rules because no policy underlying that rule can be furthered by its application. 34 The process thus reveals that in some cases there is simply no choice to be made since only one rule is intended to apply to the dispute. 35 In other instances, both sovereigns have adopted a rule intended to govern a particular situation and each has done so in order to further its policy regarding the situation. Further, the two policies clash and cannot be reconciled. In such an instance there exists a "true conflict," and many governmental interest analysis proponents have thought that the forum court must defer to its own legislature and apply its own rule. 36 In a conflict between state and federal law, if both sovereigns have expressed policies intended to govern a situation and those policies cannot be reconciled, the supremacy clause demands primacy for federal law. 37 The requirement for federal primacy, however, exists only when the state and federal rules actually conflict. If the interests of the two sovereigns can be reconciled, the Supreme Court need not operate to nullify the state law. 38

Clearly the Court's earliest opinions in this area, 39 written at a time when vested rights doctrines controlled the choice of law, do not use the language of governmental interest analysis. Nevertheless, those opinions do focus upon the congressional intention in enacting particular rules and the nature of the state interest to be overridden. 40 By

37. U.S. Const. art. VI, § 2, cl. 2.
38. See *infra* text accompanying notes 47-49. The language of the supremacy clause gives no direction to the Court to restrain its interpretation of federal law. Indeed, under the clause, the Court cannot balance competing federal and state interests. Ridgway v. Ridgway, 454 U.S. 46, 54-55 (1981); Free v. Bland, 369 U.S. 633, 666 (1962). However, the Court's acknowledgement of the force of the states' interest in the area of domestic relations has historically led the Court to interpret congressional intent cautiously. See *infra* text accompanying notes 163-71.
40. New York Life Ins. v. Dodge, 246 U.S. 357 (1918) represents an example of the Supreme Court's adoption of the vested rights doctrine. For other famous examples of vested rights decisions of the period, see Slater v. Mexican Nat'l R.R., 194
the time the Court decided *Free v. Bland*, it recognized that its task was to determine in the particular case before it whether a conflict existed between state and federal law. In order to make that determination, the Court has continuously looked to the federal policies or interests underlying the allegedly applicable federal rule.

This methodology is not without its difficulties. In the state and federal conflicts posed by the pre-*McCarty* cases, the supremacy clause dictates that the relative importance that a state places on its own laws becomes immaterial when there is a conflict with a federal law. The result is that only one-half of the policies involved are considered. Because the supremacy clause does not provide for a balancing of federal and state interests, the Court has spent little effort examining state policies in this area. At the same time, the Court has continued to insist that the supremacy clause does not mean that the presence of any federal rule will suffice to nullify state law. The Court has consistently reiterated that superficial conflicts do not trigger the operation of the clause. Thus, although the Court has said that the importance of a state's interest is immaterial, it continues to retain the power to give weight to some state rules by declaring that the federal interest does not intrude into the area asserted to be controlled by state law.

Those Supreme Court decisions that held state laws to be controlling were examples of false conflicts in which there was no federal interest articulated in a federal statute that would be hampered by application of the state law. In any case in which a federal interest has

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U.S. 120 (1904); Alabama Great So. R.R. v. Carroll, 97 Ala. 126, 11 So. 803 (1892); Milliken v. Pratt, 125 Mass. 374 (1878).


42. 369 U.S. 663 (1962).

43. See *infra* text accompanying notes 163-71.


46. The Court's examination of the institution of community property has been cursory at best. See, e.g., Wissner v. Wissner, 338 U.S. 655, 660 (1950). This tendency to brush aside state community property law may be the reason that the Court has not been able to recognize and explain the conflicting interests in *Hisquierdo* and *McCarty*. See *infra* text accompanying notes 189-221, 234-47.

47. See *supra* note 38.

48. 453 U.S. at 232.

49. *Id*.

been threatened, federal law has always controlled. Unfortunately, the Court has not clearly tied its articulation of the federal interests to the relevant statutes in its more recent cases. Further, the Court's ad hoc identification of federal interests has failed to give guidance in determining the requirements for federal preemption. The stacking of federal interests is not necessary for preemption and it has made the case law difficult to reconcile. This article attempts to effect that reconciliation.

II. HISTORICAL ANALYSIS

A. Early Ancestors: Wetmore and McCune

Because today's clash between federal rules creating benefits and state marital property laws has arisen in community property states,\(^51\) it is notable that the Court's first decision in the area arose not in a community property state but in New York, one of the last states to adopt the concept of marital property.\(^52\)

In 1890, a New York state court granted Annette Markoe an absolute divorce from William Wetmore on grounds of adultery.\(^53\) Mrs. Markoe also was awarded custody of their three minor children and alimony of three thousand dollars a year for her lifetime.\(^54\) The divorce decree did not reserve any right of subsequent modification or amendment.\(^55\) Some nine years later, Mr. Wetmore, who was almost twenty thousand dollars behind in alimony and child support payments, was adjudicated bankrupt.\(^56\) Mrs. Markoe made no proof of her claim for alimony in the bankruptcy proceedings, which resulted in Wetmore's discharge from all provable debts.\(^57\) After his discharge, Wetmore sought an order from a state court restraining Mrs. Markoe from her attempts to collect arrearages. The state court ruled that an arrearage for alimony was not dischargeable in bankruptcy. Wetmore appealed.

Under New York law, an alimony decree could not be changed or modified absent the reservation of such a right in the decree.\(^58\) The applicable federal bankruptcy law provided that a bankrupt's prov-

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54. Id.
55. Id.
56. Id.
57. Id.
able debts eligible for discharge included a fixed liability such as a judgment absolutely owing at the time of the filing of the petition against the bankrupt.59 Wetmore argued to the Supreme Court that the installments of alimony already due under a New York judgment could not be altered and therefore constituted a provable, fixed liability.60 As a fixed liability, Wetmore contended they were dischargeable as a provable debt in bankruptcy. The Court concluded, however, that the liability for alimony was not a provable debt, regardless of the judgment’s modifiability, because an alimony obligation was not a debt covered by federal bankruptcy law.61

In concluding that such an alimony obligation was not a provable debt, the Court focused primarily upon the general nature of alimony. Justice Day stated first that the Court had the power to review the alimony decree in order to determine the nature of the liability it imposed.62 He then quoted extensively from both federal and state opinions that held that an alimony obligation was not founded upon the typical business transaction involving either an express or implied contract, but upon a husband’s legal duty to support his wife.63 Any differences in state laws concerning the modifiability of alimony decrees did not affect the grounds upon which alimony was granted.64 Finally, he concluded that Congress could not have intended in passing the Bankruptcy Act to deprive former spouses and families of support.65 Systems of bankruptcy were designed to give a debtor a fresh start in business or commercial life and were not intended to relieve that debtor of moral and legal support obligations.66 Absent a direct and positive statement to the contrary, Congress had no intention of overriding state marital property law requiring such continued support.67

When the Wetmore problem is viewed in terms of interest analysis, it can be seen that the case presents a false conflict correctly resolved in favor of the state policy. A state legislature, such as New York, that permits divorce only upon grounds of adultery has a strong policy of deterring divorce.68 The New York rule, which barred alimony modifications when litigants did not reserve the right to modify in the decree, was a judicially created rule intended to complement

60. 196 U.S. at 71.
61. Id. at 76.
62. Id. at 73-74.
63. Id.
64. Id. at 74.
65. Id. at 76.
66. Id. at 77.
67. Id.
68. Until 1967, the only ground for absolute divorce in New York was adultery. See N.Y. DOM. REL. LAW § 170 (McKinney 1967).
the legislature's restrictive divorce rule. According to the New York judiciary, adoption of an implied jurisdiction to modify alimony not only would have impaired the separation of powers between the court and legislature but would have undercut the legislature's attempts to limit divorce.

Compared to New York's specific intent to deter divorce, the presence in Wetmore of a generalized federal interest is clear. The Constitution itself delegates authority over bankruptcy matters to the federal government; the express language of the clause itself demonstrates a clear federal interest in uniformity. Specific rules for the declaration of bankruptcy, like the power to regulate commerce among the states or to coin and regulate the value of money, are rules that recognize the economic interdependence of the states and provide the economic basis for a federal system. The general federal interest in establishment of bankruptcy rules was an interest in facilitating commercial dealings between the several states.

The supremacy clause dictates that when a federal law enacted under Congress' valid power conflicts with a state rule, the federal rule must be deemed paramount and the federal interest must prevail. The Wetmore test, however, makes clear that the mere presence of some federal interest is not sufficient to trigger the supremacy clause. In order for bankruptcy law to have been interpreted as discharging an alimony obligation, a direct, positive enactment by Congress is required. This test is simply a recognition that the federal policy of uniformity in bankruptcy expressed no federal legislative intent to affect the marital relationship or obligations arising out of it. Thus,

69. The precise reason why the New York courts prohibited the modification of alimony when the litigants did not reserve in the decree the right to future modification is unclear. One reason may be that while the New York legislature empowered its courts to alter alimony awards for the "care, custody, and education of children of the marriage," the wife had no similar statutory right. Erkenbrach v. Erkenbrach, 96 N.Y. 456, 466 (1884); Kamp v. Kamp, 59 N.Y. 212, 216 (1874).

It is true that New York's rule reflects judicial rather than legislative policy since New York had no statute on point. The observation is made later in this article that legislative intent can only be surmised where no statute exists. Thus, at most, this makes Wetmore a case in which neither sovereign had a specifically applicable law. In such a situation, the federal government might defer to the state rule since the federal rule reflected no policy toward marriage and the state rule reflected a general policy toward regulating divorce.

70. See Erkenbrach v. Erkenbrach, 96 N.Y. 456, 459 (1884).

71. U.S. CONST. art. I, § 8, cl. 4 provides congressional power "To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."

72. U.S. CONST. art. I, § 8, cl. 3.

73. Id. cl. 5.

74. U.S. CONST. art. VI, § 2, cl. 2.

75. 196 U.S. at 77.
Wetmore stands for the proposition that a specific federal interest other than a need for uniformity is required for the preemption of state domestic relations law. Absent such a specific, articulated federal interest pointing to preemption, no conflict exists between state and federal law, and the state rule is entitled to prevail.\(^\text{76}\)

In contrast to Wetmore, McCune v. Essig\(^\text{77}\) demonstrates a true conflict between state and federal interests, correctly resolved in favor of the federal interest. McCune involved title to land patented under the Homestead Act.\(^\text{78}\) The land was located in the state of Washington, which had enacted community property laws.\(^\text{79}\) William McCune and his wife Sarah settled the disputed land and McCune filed a proper homestead claim.\(^\text{80}\) Shortly thereafter, McCune died intestate leaving his wife Sarah and daughter Mary as his heirs. Sarah McCune and her daughter continued to reside on the land; Sarah eventually filed the required proof of compliance with federal law and was awarded a patent.\(^\text{81}\) In 1892, Sarah, who had remarried, sold the land to Fred and Emma Essig.\(^\text{82}\) Several years later, Daniel Donahue, Sarah's second husband, brought suit against the Essigs on behalf of Mary McCune claiming that William McCune's community property interest in the land had passed under Washington intestacy laws to Mary and that Sarah could not convey title to Mary's interest.\(^\text{83}\)

The Donahue-McCune argument was that William McCune's initial entry onto the land gave him an equitable interest under state law. Although they conceded that federal law controlled the requirement for vesting legal title to the real estate, they insisted that once the patent requirements were satisfied, state law required that the title relate back to and recognize the deceased husband's community property interest.\(^\text{84}\)

The Court noted first that the Homestead Act contained no ambiguities.\(^\text{85}\) The statute provided that upon a homesteader's death, the

\(^{76}\) Clearly Congress could have adopted a bankruptcy rule that would have affected support obligations. The point is that Congress had not enacted any rule intended to affect support obligations and, in the face of congressional inaction, the Court was unwilling to identify any federal interest. See Leathers, supra note 28, at 796.

\(^{77}\) 199 U.S. 382 (1905).

\(^{78}\) Id.; Homestead Act of 1862, ch. 75, 12 Stat. 392.

\(^{79}\) 199 U.S. at 382.

\(^{80}\) Id. at 387.

\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) Id.

\(^{84}\) Id. at 388.

\(^{85}\) Id. at 389. If William McCune had completed performance of all the requirements under the Homestead Act and had made final proof required by the statute before his death, his right to the patent would have vested under Washington law and passed to his daughter under that state's intestate distribution scheme. See
surviving spouse received the rights of residence and cultivation. Thus, as the Court noted, the surviving spouse was a statutory beneficiary in the same sense as the homesteader. To apply state community property law would have overridden the clear and express intention of Congress in passing the Homestead Act. Given the presence of an unambiguous and express federal rule intended to resolve the issue, the state's community property rule fell beneath the supremacy clause.

Unlike Wetmore, the McCune problem presents an actual conflict between state and federal law. State rules regarding intestate distribution provide for the orderly distribution of property at the owner's death. Such rules operate only in those cases in which a decedent made no valid testamentary disposition of his or her property. Because intestate distribution rules fill the gap left when there is a failure to make a will, they are probably an expression of what an individual would have done or should have done had there been a will drawn. A state might rationally use intestate distribution rules that would protect the persons who could expect to benefit from the decedent by virtue of their right to support from him or her during his or her lifetime. Typically, intestate distribution rules pass property to spouses and children in preference to other blood relatives. Thus, they both fulfill party expectations and provide support for the decedent's survivors.

Intestate distribution rules also tend to provide that the surviving spouse takes only a portion of the decedent's real property. In this re-

Rhymer v. Virgin Islands, 176 F. Supp. 338, 342 (D.V.I. 1959); Doran v. Kennedy, 122 Minn. 1, 5, 141 N.W. 851, 852 (1913). McCune died, however, before completion of all the requirements and, therefore, the federal statute remained in effect.
86. 199 U.S. at 389.
87. Id.
88. Id. Not all suits involving title to formerly public land reflect the federal interest present in McCune. See Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900). As a matter of federal question jurisdiction, the Court has distinguished between those cases in which the controversy surrounds the operation of the federal statute and those in which no such controversy exists. Id. at 507-09.
89. In sister state conflicts at the time that McCune was decided, domicile at death generally governed intestate distribution of personal property. See, e.g., In re Titterington's Estate, 130 Iowa 356, 106 N.W. 761 (1906); Temple v. Brittan, 12 S.W. 306 (Ky. Ct. App. 1889); Ellis v. Northwestern Mut. Life Ins. Co., 100 Tenn. 177, 45 S.W. 766 (1897). Distribution of real property was governed by the law of the situs. See, e.g., Gimball v. Patton, 70 Ala. 626 (1881); Cooper v. Ives, 63 Kan. 395, 63 P. 434 (1901); Cox v. Von Ahlefeldt, 105 La. 543, 30 So. 175 (1900). See also RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 245 (1934).
spect, they vary from the majority of testamentary distributions, which leave all property to the surviving spouse.\textsuperscript{91} Since intestate distribution schemes that pass real property to minor children can cause practical difficulties for surviving parents,\textsuperscript{92} it is hard to see why the typical statutory scheme perpetuates this problem. One answer may be that the death in the planners’ minds is not the death of a young person with small children but that of an older individual leaving a younger generation with a need for land. Whatever the legislative motivation may be, most intestate distribution schemes provide for the protection of a separate interest in the surviving children of a deceased person.\textsuperscript{93} Under the Washington statute, Sarah McCune would have owned a three-fourths interest in the land.\textsuperscript{94} Mary McCune would have owned a one-fourth interest. Washington’s interest, therefore, may be said to be an interest in the protection of all members of the immediate family of the deceased.\textsuperscript{95} The state policy provides significant protection to the widow, but also recognizes a separate, protectable interest in the child.

The federal statute in \textit{McCune} was the Homestead Act.\textsuperscript{96} Section 2291 of the Act provided that no patent could issue until five years from the date of entry.\textsuperscript{97} It also provided that if the party making the entry had died, his widow could make application for the patent.\textsuperscript{98} Despite the Court’s citation of an earlier case holding that sections 2291 and 2292 were not intended to establish systems of descent and distribution,\textsuperscript{99} it is clear that the federal rule in \textit{McCune} established a

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\item \textsuperscript{91} The Uniform Probate Code would eliminate this distinction. \textit{Unif. Probate Code} § 2-102, 8 U.L.A. 323 comment (1972).
\item \textsuperscript{92} Generally, guardians were required for minors. \textit{See}, \textit{e.g.}, Bernier v. Bernier, 147 U.S. 242 (1893) (homestead statute provides for sale of land by guardian for minor heirs); Fort v. West, 14 Wash. 10, 44 P. 104 (1896) (guardian required for minor children who inherited portion of father’s community property). These difficulties continue today. \textit{Unif. Probate Code} § 2-102, 8 U.L.A. 323 comment (1972).
\item \textsuperscript{93} \textit{Unif. Probate Code} § 2-102, 8 U.L.A. 323 comment (1972).
\item \textsuperscript{94} 199 U.S. at 388.
\item \textsuperscript{95} In \textit{Fort v. West}, 14 Wash. 10, 44 P. 104 (1896), the Washington court held that there was no distinction between real and personal property. The deceased spouse’s community share descended one-half to the surviving spouse and one-half to surviving children.
\item \textsuperscript{96} The original Homestead Act was passed in 1862 and permitted acquisition of 160 acres. Homestead Act of 1862, ch. 75, 12 Stat. 392. Case law consistently interpreted the purpose of the Act as the settlement and development of public land. \textit{See} Webster v. Luther, 163 U.S. 331 (1896); First St. Bank of Shelby v. Bottineau County Bank, 56 Mont. 363, 185 P. 162 (1919).
\item \textsuperscript{97} Homestead Act of 1862, ch. 75, 12 Stat. 392.
\item \textsuperscript{98} \textit{Id.}
\item \textsuperscript{99} Bernier v. Bernier, 147 U.S. 242 (1892), held that § 2292 of the Homestead Act, which provided that a guardian for the minor children of deceased homesteaders could sell the land for their benefit, did not mean that when both adult and minor
\end{itemize}
system of entitlement to the patent right. Since under the federal
system heirs and devisees could succeed to a patent right only if the
widow were dead, the federal law created an entitlement rule that
passed all real property in the process of being homesteaded to the sur-
viving spouse to the exclusion of children and other heirs.

The federal interest in protection of that entitlement necessarily
d dictated the application of federal law to the vesting requirem ents.\textsuperscript{100} Federal law was required to control vesting requirements in order to
enforce the federal scheme for homesteading. Once title to the land
had vested, however, no federal scheme remained to be enforced.\textsuperscript{101} The federal interest in protecting a surviving spouse who had resided
upon and cultivated the land also comports with general homestead
policies. Because the Act required considerable effort from the sur-
viving spouse in remaining upon the land, fairness dictated that she
expect to receive the benefit of the patent. The federal law thus con-
templated a situation in which the surviving spouse had performed
significant tasks in her own right and it awarded the land to her. Such a
rule complies with the general homestead policy because it awards
land to persons based upon use.\textsuperscript{102} The federal interest in awarding
the land to the party who resided upon or cultivated it would have
been severely undercut by the application of intestate distribution
rules that could have resulted in the award of such land to persons who
themselves were not using the land or, in the case of minor children,
were incapable of its use.

\textit{Wetmore} and \textit{McCune} demonstrate the futility of attempting to
resolve conflicts between federally created rights and state marital
property law through any attempt to label issues as either national or
local in character. Although bankruptcy's national character demands
uniform rules, the Court in \textit{Wetmore} refused to apply bankruptcy
rules to discharge an obligation for support. Actions concerning land

\begin{footnotesize}
\begin{enumerate}
\item The Court stated that § 2292 merely set out the requirements for proof of the minor children's claim. \textit{Id.} at 511.
\item The federal policy underlying the general homestead laws is further demonstrated by cases concerning an amendment to the Homestead Act granting to Union soldiers and sailors who served in the Civil War an additional right of entry. Anderson v. Clune, 269 U.S. 140 (1925); Webster v. Luther, 163 U.S. 331 (1896). Section 2304 of the Homestead Act was adopted in 1872 and was specifically directed to the veterans named above. \textit{See id.} at 587. Unlike the rights of entry reserved to other
citizens, the right under § 2304 was held to be assignable and alienable because the
governmental policy behind the grant was not limited to securing "bona fide settlers
on public land." \textit{Id.} at 539-40.
\end{enumerate}
\end{footnotesize}
are always localized in that they concern tangible property in an immutable location. A state is inherently interested in the soil within its own boundaries. In McCune, therefore, Washington had some interest in property within the state. Nevertheless, a federal rule expressly directed to the ownership of such land defeated state laws.

In both Wetmore and McCune, the Court adopted a pattern of statutory construction. Resolving those cases through interest analysis is not inconsistent with the Court's methodology. A test requiring a direct, positive legislative enactment means that, at a minimum, some federal statute must purport to govern the case in question. A federal rule on point indicates that a specific federal interest, clearly articulated by Congress, is present. When no such interest existed, the early Court decisions refused to hypothesize a federal interest at stake. Absent a federal interest, such a case is a false conflict and the state's interest may prevail. When the clearly articulated federal interest is present, the state rule falls. The Court's holding that federal law did not govern an alimony modification but was required to prevail in a homestead vesting dispute is a conclusion that no federal policy was served in the former area while one was served in the latter. Rationalizing these cases through interest analysis thus recognizes that, at its core, interest analysis is a method of statutory construction.

The Court's early decisions relied primarily upon judicial interpretations of statutory language without extensive reference to the legislative history and with scant explanation of the federal policies adopted by Congress. Issues arising from such sources, however, would eventually confront the Court.

B. Enter the Military: Wissner v. Wissner

Major Leonard Wissner entered the Army during the Second World War. At the time he entered the Army, or shortly thereafter Wissner and his wife developed marital difficulties. Three months after he entered the service, Wissner took out a National Service Life Insurance Policy naming his mother as principal beneficiary. Several months later, he stopped allotments to his wife. When Wissner was killed in 1945, the Veteran's Administration began paying the policy proceeds to his mother. Almost two years after Wissner's death, his widow sued the beneficiary in a California court claiming a right to one half of the proceeds.

The Wissner Court based its decision that Major Wissner's widow

106. Id. at 656-58.
was not entitled to one half the insurance proceeds upon two grounds. First, the legislation creating the insurance policy gave the insured the right to select or alter the beneficiary.\textsuperscript{107} To permit a community property claim by a spouse would have significantly undercut the free choice of beneficiaries afforded the service personnel. Second, the legislation contained an anti-attachment clause forbidding creditors from attachment, seizure, levy, or the like upon the proceeds either before or after their receipt by the beneficiary.\textsuperscript{108} Because Congress had not directed any exceptions to the statute for spousal claims, a spousal claim for a community property interest was treated like the claim of any other creditor. The Court also noted that Congress, in providing for insurance for service personnel, was clearly within its national defense powers.\textsuperscript{109} Because Congress had acted within its power and because the statute explicitly gave the insured the right to designate a beneficiary, no state community property interest in the proceeds could be given effect.

California's community property system, which would have given the surviving spouse an interest in the proceeds, superficially recognized marriage as a partnership in which each spouse had a protective interest in the community assets. At the time of the \textit{Wissner} decision, however, California vested sole management of community property in the husband during the term of the marriage.\textsuperscript{110} Although the wife at the time of \textit{Wissner} was recognized as having an existing community share during the marriage,\textsuperscript{111} she had no management rights in that share. On dissolution of the marriage by death or divorce, however, she took her share. The California insurance proceeds rule must be examined in light of this system. Had Leonard Wissner simply spent ten thousand dollars earned during the marriage to benefit his parents, his wife would have been entitled to recover some part of those community assets only upon a showing that his use of the money was an unreasonable gift to the parents.\textsuperscript{112} The husband's right to manage community assets gave him the right to expend the money, absent this showing. Proceeds of insurance policies in the state of California,

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  \item \textsuperscript{107} \textit{Id.} at 658.
  \item \textsuperscript{108} \textit{Id.} at 659.
  \item \textsuperscript{109} \textit{Id.} at 661.
  \item \textsuperscript{110} Originally the husband's control over community property in California was absolute. \textit{See generally} Prager, \textit{The Persistence of Separate Property Concepts in California's Community Property System}, 24 U.C.L.A. L. REV. 1, 26-27 (1976). Outside the area of life insurance, statutory restrictions requiring a wife's consent to gifts of community property were continually undercut by judicial decisions. \textit{Id.} at 48-52. Although California declared the spouses equal owners of community property in 1927, it was not until 1951 that women were accorded equal management rights over their own earnings. \textit{Id.} at 65 n.322.
  \item \textsuperscript{111} \textit{See generally id.} at 56-63.
  \item \textsuperscript{112} \textit{See generally id.} at 48 n.240.
\end{itemize}
however, remained community property without the necessity of the surviving spouse proving unreasonableness. The California rule thus functions much like a per se rule. That is, when an insurance policy is purchased with community property and a person other than the surviving spouse is named as beneficiary, the California rule deeming the proceeds community property treats this as an unreasonable gift without regard to the facts of the particular case. California's policy, therefore, was that the surviving spouse's community property right outweighed any obligation the deceased spouse had to the named beneficiary.

One federal policy underlying the provision of life insurance at low cost for service personnel during wartime is relatively clear. Most insurance policies do not cover war related deaths. Certainly to do so with low cost insurance would be actuarially unsound. Government policies for service personnel, therefore, provided protection for uninsurables. Within this scheme, giving an insured the right to select a beneficiary was not an innovative feature developed by federal law—most insurance policies so provide. In fact, under National Service Life Insurance an insured's choice was more restricted than it would have been under private insurance. The insured could choose as a beneficiary only a spouse, parent, child, or sibling. As the Court later pointed out in United States v. Henning, during periods of actual wartime, the list of potential beneficiaries was closely restricted to those persons to whom the deceased owed some type of moral obligation. The underlying reason for that restriction was a financial one. Wartime casualties could be expected to be high; the government assumed the extra losses caused by those casualties without actuarial adjustments that would have inflated the cost to policy holders. The federal interest in Wisnner was to provide insurance for personnel who would not otherwise be insurable but to restrict the beneficiaries of the insured to persons likely to be dependent upon the deceased.


114. Some states require the wife's showing that she has been defrauded by the husband's purchase of insurance. See generally W. De Funia & M. Vaughn, supra note 7, at 304-08.


117. Id.

118. Id.; see also United States v. Short, 240 F.2d 292 (9th Cir. 1956); Trathen
Wisner, like McCune, presents a true conflict required to be resolved in favor of federal law. California's policy chose the surviving wife over any other obligation; the federal statutory provision, permitting designation of other family members, explicitly recognized other obligations as more paramount.

An important idea remains with regard to Wisner. Justice Clark's opinion was carefully crafted to disclaim any federal interest in overriding "moral" obligations created by state law. At the time of Wisner, a number of state courts had created an exception to the anti-attachment statute barring attachment of National Service Life Insurance Benefits in order to permit insurance proceeds to be reached for alimony and child support claims. Justice Clark noted such an exception but he specifically stated that the principle behind a community property division rested more upon a business association for the mutual monetary profit of the spouses than upon a moral obligation between them. The Wisner opinion thus implies that if Mrs. Wisner's claim had been based upon a "moral" obligation created by state law, a contrary obligation sanctioned by the federal law creating the power to designate the beneficiary might not have prevailed. This cannot be true. Whatever labels are attached to the spousal claims involved, a federal rule could prevail over the interest created in a spouse by state law so long as Congress acted within its powers.


119. 338 U.S. at 660.
120. Id. at 659.
121. Id.
122. See Ridgway v. Ridgway, 454 U.S. 46 (1981); Free v. Bland, 369 U.S. 663 (1962). The test adopted by both Free and Ridgway confirms this article's criticism of Justice Clark's dicta in Wisner regarding moral obligations. If a federal law is the result of a valid exercise of congressional power, the character of the state obligation is unimportant. The supremacy clause carries with it no provision for balancing federal and state laws that are in conflict. Indeed, the Free Court stated that since Congress clearly intended to permit a serviceman to select the beneficiary of his government life insurance policy, Major Wisner could have passed the insurance proceeds to his surviving parent rather than to his wife—even if he had intended to defraud his wife of a right guaranteed by state law. Id. at 670. In Free, however, the Court found no similar congressional intention to bar a spouse from claiming he or she had been defrauded of the proceeds of United States Savings Bonds. Instead, the Court read into the federal statutory scheme governing bonds an implicit federal exemption prohibiting fraud or breach of trust. Id. Thus, this preempted any state law inconsistent with it.

The Court in Ridgway carefully avoided discussing the extent to which the doctrine of fraud may be used as an exemption to a congressional mandate. 454 U.S. at 59. First, the Court noted that the fraud or breach of trust exemption was not raised in the complaint. Id. Second, the Court drew a distinction between the surviving children's interest in the instant case and the interest of a spouse claiming a commun-
On the facts of *Wisner*, the state and federal government had indeed made different choices concerning the obligation deemed paramount and the federal choice did prevail. It should have been irrelevant for purposes of the supremacy clause that California's choice did not seek to enforce a "moral" obligation. Nevertheless, Justice Clark's observation on moral obligation does have an important meaning. Before the supremacy clause can take effect, the Court must determine that Congress did intend for the federal legislation to conflict with state marital property law. Justice Clark's definition of a moral obligation is an obligation to support. His point regarding state created moral obligations indicates that the Court was less willing to find an intention to cut off a spousal support claim than to find an intent to cut off other rights. 123 *Wisner* is thus consistent with *Wetmore* because the *Wisner* Court was prepared to defer to some state created moral obligations.

The Court's unwillingness to cut off a former spouse's or child's right to support is an indication of deference to the state interest in property interest. *Id.* at 59-60. For federal preemption purposes, however, noting a difference between the rights of Ridgway's surviving children and those of a spouse in a community property state is merely makeweight. Nevertheless, such a distinction could be important in other instances. For example, the children's support award might be modifiable under state law while an allocation based upon property division would not. See UNIF. MARRIAGE & DIVORCE ACT § 316, 9A U.L.A. 183 (1979).

The real distinction between *Ridgway* and *Free* is the presence of an anti-attachment clause in *Ridgway* and its absence in *Free*. The anti-attachment statute in *Ridgway* independently compels the Court to avoid the imposition of a state court constructive trust upon the insurance proceeds. 454 U.S. at 60-61. Thus, the complaint in Justices Powell's and Rehnquist's dissent, *Id.* at 70-71, is no more dispositive than the majority's distinction between the children's claims and those of a spouse in a community property state. Further, if the Court was correct in *Free* that Major Wisner's fraudulent intentions were immaterial, that same result is correct in *Ridgway* regardless of the particularly vulnerable nature of children. The anti-attachment statute applicable to the insurance policy bars their claim unless a congressionally enacted exception exists.

Finally, it should be noted that *Ridgway* does not raise the issue whether the federal garnishment statute present in *McCarty* might permit attachment of the insurance proceeds in the hands of a beneficiary. See 42 U.S.C. § 659 (Supp. IV 1980). That section states that money, based upon remunerations for employment by the government or its agents, is subject to legal process to provide for child support. *Id.* § 659(a). The status of the insurance company in *Ridgway* as a possible agent for the government was not litigated. In any event, it is likely that the government insurance proceeds would not be termed "remunerations for employment." See, e.g., Elmwood v. Elmwood, 295 N.C. 168, 244 S.E.2d 668 (1978); Harris v. Harris, 40 N.C. App. 26, 252 S.E.2d 95 (1979).

123. A recognition that Congress, through its restriction of beneficiaries, had intended to protect persons dependent upon service personnel explains the Court's unwillingness to treat claims of dependency in the same way it treated ownership claims. That protective system continues today. See *infra* text accompanying notes 205-21.
providing adequate support to its citizens. Additionally, the Court's attitude demonstrates an understanding that a state's ability to control the marital relationship may be significantly affected by its ability to impose obligations which extend beyond the relationship's termination. Although the federal interest prevailed in Wissner, the decision established a promise of deference for certain kinds of state interests—those related to claims by needy spouses. Therefore, at the time Wissner was decided, it accorded full play to the rights arising from marriage in almost any state. Outside of the eight community property states, few states had adopted the concept of marital property. Almost all recognized a right to alimony upon divorce. The federal interest that prevailed in Wissner did not prevent the basic rights arising out of marriage from being shaped at the state and local level.

C. Monetary Obligations: Free and Yiatchos

The Court's next two encounters with federal preemption of state marital property law each involved federal monetary obligations. In Free v. Bland, the Court held that federal regulations, which recognized the surviving co-owner of United States Savings Bonds as the sole owner, preempted a state community property law which provided the deceased co-owner's heir with a half-interest in the bonds since they were purchased with community property. In Yiatchos v. Yiatchos, based upon a similar purchase of bonds with community property, the Court ruled that federal regulations deeming the surviving co-owner as the exclusive owner of the bonds upon the death of the other owner were not intended to cut off a spouse's claim of fraud or breach of trust permitted under state law.

Mary Ida Free died in 1958, naming her son as the principal beneficiary under her will. Prior to her death, Mrs. Free used community funds to purchase a number of savings bonds issued to her or to her husband. Under the Treasury regulations governing the jointly held bonds, the survivor was recognized as the bond's sole and absolute owner. Therefore, the Treasury regulations mandated that Mr. Free, as the surviving co-owner, take sole possession of the bonds. Mrs.

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124.  But see Ridgway v. Ridgway, 454 U.S. 46 (1981). By the time Ridgway was decided, the Court could not defer to a state created support obligation except in those instances in which Congress had specifically directed it to do so. See 42 U.S.C. § 659 (Supp. IV 1980).
125.  For a discussion of the diverse availability of alimony, see H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 421 n.12 (1968).
128.  31 C.F.R. § 315.61. The Treasury Regulations were promulgated under 31 U.S.C. § 757(c) (1921).
Free's son, however, claimed that under Texas community property laws he was entitled to either one-half of the bonds or reimbursement for Mrs. Free's interest in them because Texas spouses could not hold community property as joint tenants with a right of survivorship.129

Similarly, Angel Yiatchos, prior to his death, purchased with community funds approximately $15,000 worth of savings bonds payable to himself or his brother. Upon his death, the bonds were paid to his brother in compliance with the Treasury regulations. Nevertheless, Yiatchos' widow asserted that Yiatchos had named his brother as the alternative payee of the bonds under circumstances that amounted to fraud upon her.130

In Free, the Court set out a two part test for determining federal preemption: first, whether the federal regulations were valid and second, whether those regulations were in actual conflict with state law.131 If a valid federal law conflicted with state law, the state rule fell beneath the supremacy clause without regard to the relative importance of the state's interest. The Treasury regulations governing jointly held bonds were a clear exercise of constitutional power. Congress was specifically empowered to borrow on the government's credit.132 The federal interest in the survivorship program demonstrated a clear conflict between state and federal law. Successful management of the public debt depended upon the bond's attractiveness to purchasers.133 One attractive feature of the bonds was that the survivorship provision allowed purchasers to avoid complicated probate proceedings.134 Allowing a community property state to require division or reimbursement would have frustrated the federal purpose.

In Yiatchos, however, the Court held that the survivorship provisions of the bonds could not be used to commit fraud upon the surviving spouse.135 The Court determined that Yiatchos' surviving brother was entitled to at least one-half of the bonds but remanded the case to the Washington Supreme Court for a determination of whether Yiatchos' widow had consented to the transfer in such a manner as to bar her claim of fraud.136 Under state law, Mrs. Yiatchos could have ratified or consented to a gift of community property during the par-

129. Texas community property law prohibited the creation of a joint tenancy with a right of survivorship in community property prior to its partition. Williams v. McKnight, 402 S.W.2d 505 (Tex. 1966).
130. 376 U.S. at 308.
131. 369 U.S. at 666.
132. Id. at 667.
133. Id. at 669.
134. Id.
135. 376 U.S. at 307.
136. Id. at 312.
ties' lifetime or a gift to become effective only upon the death of one of the parties.\textsuperscript{137} If the widow had consented, the Court would find the husband not guilty of fraud or breach of trust sufficient to avoid the Treasury regulations.\textsuperscript{138}

The state interest in \textit{Free} and \textit{Yiatchos} was superficially the same. Both Washington and Texas had an interest in the distribution of community property when the marriage was dissolved by the death of one of the spouses.\textsuperscript{139} Examination of the facts of the cases, however, demonstrates that different state policies were at stake in each case. In \textit{Free}, the Texas Constitution prohibited the use of community property to create joint tenancies with a right of survivorship.\textsuperscript{140} Even when both spouses agreed and no issue of fraud arose, the Texas law barred interspousal joint tenancies. The Texas rule, therefore, had nothing to do with protection of the surviving spouse from fraud. It operated on a much broader scale to force the parties through probate. Denying married persons the right to create joint tenancies with a right of survivorship did not prevent the parties from agreeing that the surviving spouse take an asset. As long as a married Texan could leave all of his or her assets to the surviving spouse in a will, the transfer was not prohibited.\textsuperscript{141} Refusal to recognize a right of survivorship simply forced a testamentary disposition. Washington, on the other hand, permitted both joint tenancies and the lifetime gift of community property.\textsuperscript{142} The interest present in \textit{Yiatchos} was not prevention of joint tenancies themselves, but an interest in protection of the surviving spouse from fraud.

The federal interest in both cases was an interest in selling as many bonds as possible. Marketability of the bonds may well have depended upon an assurance to purchasers that the bonds could be used as reliable estate planning devices, allowing buyers to avoid probate.\textsuperscript{143}

\textsuperscript{137} Id. at 309; see also Hanley v. Most, 9 Wash. 2d 429, 458, 115 P.2d 933, 934 (1941).
\textsuperscript{138} 376 U.S. at 312.
\textsuperscript{139} See supra text accompanying notes 133-34.
\textsuperscript{140} Williams v. McKnight, 402 S.W.2d 505 (Tex. 1966); Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565 (1961). The constitution defines community property as all property acquired by gift, devise, or descent. Tex. Const. art. XVI, § 15.
\textsuperscript{141} Community property can be partitioned into separate property and a joint tenancy created with that separate property. Tex. Rev. Civ. Stat. Ann. art. 881a-23 & 4624a (repealed 1963). An agreement alone was not sufficient. Id. Neither of the couples in \textit{Williams} nor \textit{Hilley} had effected a partition that complied with the statute. Williams, 402 S.W.2d at 507; Hilley, 161 Tex. at 571, 342 S.W.2d at 566.
\textsuperscript{142} Wash. Rev. Code Ann. § 26.16.030 (Supp. 1982). Washington also permitted the commutation of community property by agreement of the spouses. Id. § 26.16.120 (1961). One spouse, however, could not convert community property without the other's consent. Id.
\textsuperscript{143} See \textit{Free}, 369 U.S. at 669.
Free and Yiatchos demonstrate that the necessity for federal preemption cannot be judged by broadbased standards that ignore the content of a particular federal rule or the policy underlying it. Instead, preemption must be determined by analysis of the federal and state rules that are asserted to be in conflict. In both cases, federal treasury regulations provided for disposal of a bond through the federally created right of survivorship provisions. Only Free, however, presented a true conflict required to be resolved in favor of federal law. Texas had attempted to require a testamentary disposition to achieve the results normally permissible under a right of survivorship. The federal interest in creating an estate planning device that avoided probate directly conflicted with and overruled the state interest.

In Yiatchos, the conflict was a false one since the state interest could be protected by the use of the federal rule as interpreted by the Court. The State of Washington had no interest in an absolute bar; rather its interest was to protect defrauded spouses and to enforce the fiduciary duties of the spouse with control of community property. The presence of a federal monetary obligation indicated a strong federal interest. The Court’s construction of the federal statute, however, allowed it to protect that interest through the use of a federal standard without thwarting the state interests involved. Therefore, Yiatchos presents a false conflict that is the reverse of Wetmore. In Wetmore, no meaningful federal interest existed, allowing the state rule to prevail. In Yiatchos, both the federal and state policies could be served by application of the federal rule.

Free also establishes the importance of the anti-attachment portion of any federal statute. The Free Court distinguished the interest of Major Wissner’s former wife from the claims before it by noting that Wissner, unlike a bondholder, would have been free to name his mother as a beneficiary even if that act had defrauded his wife of com-


146. See supra text accompanying notes 74-76.

147. In contrast, the Court in Ridgway faced a true conflict. The state’s interest in the enforcement of the deceased father’s support obligation is clear. The federal interests in Ridgway are similar to the interests asserted in Wissner: providing insurance for persons who otherwise were likely to be uninsurable and enhancing the morale of service personnel by permitting them a free choice of beneficiary within a limited class. See supra text accompanying notes 115-18. As in Wissner, the state and federal governments had made conflicting choices that could not be reconciled. The supremacy clause, therefore, dictated preemption by the federal rule.
munity property. The power to cut off the spouse's claim in Wissner came not from the difference in the type of benefit but from the anti-attachment clause which gave absolute protection to Wissner's choice.

D. The SBA and the Coverture Defense: Yazell

Delbert and Ethel Yazell operated a small children's clothing store in Lampasas, Texas. In 1957, a flood destroyed the store's inventory. In order to refurbish the store after the flood, the Yazells borrowed $12,000 from the Small Business Administration (SBA). The note to the SBA was signed by both the Yazells, who also gave the SBA a chattel mortgage on the store's merchandise and fixtures. When the Yazells failed to repay the SBA loan, the government attempted to collect part of the deficiency judgment remaining after the property had been sold from Ethel Yazell's separate property. Although her signature on the note and mortgage bound her community interest in the business, under Texas law her separate property could not be subjected to the debt because of the coverture defense. The SBA argued that the coverture defense was not available because the source of the loan was federal money.

The coverture defense at issue in Yazell originated in a Texas statute which forbade married women from contracting to bind separate property unless they had their incapacity removed by a court decree. While recognition of the principles of coverture may seem at odds with the general principles underlying the community property concept, the defense existed at one time in a number of community property states. A coverture defense indicates a state's general interest in the protection of married women. That protection, however, is not absolute. Only the separate property of married women was protected and the protection could be removed by court decree. Under Texas community property laws, separate property consisted of property acquired before the marriage and property acquired during the marriage by gift, devise, or descent. Thus, the Texas law would have protected only some married women and only some of their assets. The limitations of its coverture defense, however, probably do not indicate that Texas' interest in the protection of married women is

148. 369 U.S. at 670.
151. Id.
152. See generally W. De Funiak & M. Vaughn, supra note 5, at 388 n.91. Oddly enough, the defense was repealed in Texas as a result of Yazell. See 382 U.S. at 351.
153. See infra note 157.
any less than the interest of a common law state. The lack of protection for a married woman's community assets fits logically within the Texas rule that the husband was the sole manager of the community property. To protect women's community assets would have burdened business transactions since only a limited amount of any business could have been subjected to a creditor's demands. Covern-ure, therefore, in a community property state acts just as it does in common law states. It provides protection for some familial assets that cannot be reached by any creditor.

The generalized federal interest in Yazell was an interest in the collection of money owed the government. The Yazell Court, however, dismissed that generalized federal interest as insufficient to require application of a federal rule. Three factors barred the general federal interest from forming a basis for preemption. First, no federal statute or regulation provided for governmental immunity from a state created defense of coverture. Second, the government had negotiated the loan to the Yazells with knowledge of the Texas rule. Third, the state law dealt with what the Court characterized as intensely local interests in the protection of family, property and the status of married women.

Of the three factors cited by the Court, the absence of a governing federal statute is dispositive. Federal knowledge of the state rule and the individualized nature of the contract support the use of the state


156. 382 U.S. at 348.

157. Id. at 349. The Court stated that the problem before it was whether the government might obtain "a preferred right which is not provided by statute or specific agency regulation." Id.

158. Id.

159. Id. The Yazell Court faced three alternatives. A uniform rule might have been judicially created. See, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363 (1942). Second, in a number of cases, the Court had incorporated state rules by reference and thus imported them into federal law. E.g., Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204 (1946). Finally, the state rule might have prevailed without specific incorporation. By disclaiming the first alternative, Yazell implies that no federal common law existed in the area. Justice Harlan's concurring opinion indicated that the state rule could prevail without the particularized contract, indicating that he believed incorporation unnecessary. 382 U.S. at 358.
Federal knowledge, however, is important only because there was no federal statute present. Because no federal statute purported to govern the United States' rights as a creditor, the Court had no clear guidance on congressional intention. The lack of a federal rule governing the situation left only generalized federal interests such as uniformity, yet these interests alone have never been sufficient to require preemption of state marital property law. Therefore, Yazell demonstrates that a federal statute seeking to control the situation before the Court is necessary in order to have the Court find that federal preemption of state marital property law is required. Without a controlling federal statute, there is no federal interest to be protected and state marital property law cannot be impeded.

Finally, as Yazell illustrates, any attempt to characterize the predominant interest as either "national" or "local" does not provide a workable test. The national interest in uniformity is always present when the federal government asserts that its power requires preemption. Although bankruptcy clearly demands uniformity and is of national concern, the Wetmore Court found that the bankruptcy rules did not override state law. Conversely, although California sought to protect Major Wissner's widow, this "local" interest bowed to a federal rule.

E. Summary

The six cases from Wetmore to Yazell establish that the Court has decided questions concerning federal preemption of state marital property law under what is essentially a conflict analysis. In each case, the Court has looked to congressional intention as demonstrated in a federal statute in an attempt to identify relevant federal policies at stake.

Several things are clear from the Court's work in this area. First, the existence or nonexistence of a federal interest depends upon the presence of a federal statute that expressly governs the federal right asserted. Thus, the federal or "national" nature of a program is not dispositive. Yazell most readily demonstrates this necessity. The Small Business Administration was created by a federal statute. Neither the creating statute nor the agency regulations, however, made provisions for governmental preference in case of default. Absent an ar-

160. The agency's awareness of the Texas law was demonstrated by its compliance with Texas rules regarding separate attestation. 382 U.S. at 345.
161. See supra text accompanying notes 75-76.
162. See supra text accompanying notes 107-09.
164. 382 U.S. at 348 n.17.
articulated congressional intent manifested in express statutory language, the Court found no relevant federal interest to be promoted. Second, when the Court has found a federal interest to exist, it habitually has defined the federal interest narrowly. *Wetmore, Wisner,* and *Free* provide examples of such narrow interpretations. In *Wetmore,* the Bankruptcy Act, read on its face alone, could have been interpreted to cut off a fixed obligation to pay support.\(^\text{165}\) The Court, however, refused to infer such a purpose in an essentially commercial statute. In *Wisner,* the Court in dicta carefully conceded that state-created support obligations might be entitled to a different treatment from property division, thereby protecting the state interest in continued support of its citizens.\(^\text{166}\) Finally, in *Free* the Court noted that, absent explicit congressional direction through the use of an anti-attachment statute, federal bonds could not be used to avoid state rules on fraud against a spouse.\(^\text{167}\) This again gave protection to state interests.

Taken as a whole, these cases established a deference toward state created support and fiduciary obligations arising out of marriage when Congress had not expressly cut off the possibility of such deference. Since the Court never was required to cut off support obligations and its analysis protected the state's interest in the fiduciary responsibility of the managing spouse, the cases had a marginal impact upon state control over domestic relations.\(^\text{168}\) Only eight states recognize community property.\(^\text{169}\) In some of those states, support obligations were also recognized.\(^\text{170}\) Prior to *Hisquierdo* and *McCarty,* in most states the notion of marital property did not exist and support obligations were the sole claim of a divorced spouse.\(^\text{171}\) Protection of these support claims, combined with a refusal to use federal rights to shield fraud, did not put the federal government in the position of seriously interdicting state marital property law. At that time, therefore, states continued to regulate the basic obligations arising from marriage without federal interference.

III. FEDERAL ENCROACHMENT ON STATE DOMESTIC RELATIONS—
*HISQUIERDO AND MCCARTY*

Although the cases continue to be susceptible to reconciliation through interest analysis methodology, the Court's most recent

\(^{165}\) See supra text accompanying note 59.
\(^{166}\) 358 U.S. at 659-60.
\(^{167}\) 359 U.S. at 670.
\(^{168}\) See infra text accompanying notes 291-305.
\(^{169}\) See supra note 51.
\(^{171}\) Id.
analysis of preemption problems reflects wide ranging policy searches rather than identification and interpretation of conflicting statutes. The Court’s lack of precision in identifying the federal interests requiring preemption has made it difficult to understand that its most recent decisions protect a federal property distribution scheme that stands in direct contradiction to state marital property law in a number of states. Recognition of the existence of the federal property distribution plan is essential to an understanding of the Court’s resolution of recent cases.

A. *Hisquierdo v. Hisquierdo*\(^{172}\)

Jess and Angela Hisquierdo were married in 1958. At the time of their divorce after seventeen years of marriage, Jess Hisquierdo had worked in the railroad industry for thirty-three years and was eligible to receive benefits under the Railroad Retirement Act. Angela claimed a portion of those retirement benefits under California’s community property laws.\(^{173}\) Alternatively she claimed an off-setting award of the marital home, which was the only other significant community asset.\(^{174}\)

In rejecting both claims, the *Hisquierdo* Court first explained the Railroad Retirement system. The retirement system was a combination of a private pension plan, tied to earnings and career service, and a welfare plan, under which the faltering Railroad Retirement system had received infusions from Social Security.\(^{175}\) The plan provided benefits not only for workers but also for children, parents, and spouses of workers.\(^{176}\) In addition, the Railroad Retirement benefits, like Social Security, were not contractual benefits and could be eliminated by Congress at any time.\(^{177}\) The Court noted that Railroad Retirement benefits were subject to an anti-attachment clause similar to the clause present in *Wisner*.\(^{178}\) Since *Wisner*, however, Congress had adopted a statutory exception to the anti-attachment clause that subjected certain federal benefits to garnishment for support claims.\(^{179}\)

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173. *Id.* at 578.
174. *Id.* at 588.
175. *Id.* at 574-75.
177. The Court concluded that Railroad Retirement benefits, unlike Social Security benefits, contained no direct congressional reservation of the right to alter or repeal the act. 439 U.S. at 575 n.6. The power to repeal the benefits, however, could be inferred from the fact that the minimum Railroad Retirement benefit was the Social Security benefit. *Id.*
The *Hisquierdo* Court began its analysis by pointing out that a mere facial conflict between federal rules creating benefits and state domestic relations law was not sufficient to justify preemption.\(^{180}\) Thus, although a state community property law facially conflicted with the federal anti-attachment clause as well as the federal statute terminating a spousal annuity at divorce, these conflicts did not dispositively preempt the operation of state law.\(^{181}\) Instead, the state law was required to do "major damage" to a "clear and substantial" federal interest.\(^{182}\)

The Court cited three federal interests that would be threatened by state community property law if it were applied. The first was a personnel management interest in the creation of a retirement system that would encourage older workers to retire by assuring them adequate support during their post retirement years.\(^{183}\) The second was an interest in funding within limited boundaries.\(^{184}\) The final interest was an interest in a national uniform system.\(^{185}\)

The first interest was found in the statements of the creating bill's sponsors.\(^{186}\) The second was found in Congress' 1974 failure to award a divorced spouse a benefit similar to that available to divorced spouses under Social Security.\(^{187}\) The anti-attachment clause supported both interests since it prevented any diminution in the amount available to the retired worker.\(^{188}\)

Although one of the stated goals of the Railroad Retirement Act was to promote retirement of older workers, an analysis of that goal and of the Court's own opinions demonstrates that the federal interest in personnel management is insufficient to support an argument that Congress intended to bar the application of state marital property law to retirement benefits. One of the federal government's articulated concerns in the initial Railroad Retirement Act was to reduce the number of workers over sixty-five in the railroad industry. Section 2(a) of the Act set out a dual purpose to provide "adequately for the satisfactory retirement of aged employees" and "to make possible greater employment opportunities and more rapid advancement" for younger employees.\(^{189}\) When the Act was challenged as unconstitutional the Railroad Retirement Board argued strenuously, but unsuc-

\(^{180}\) 439 U.S. at 581.

\(^{181}\) *Id.*

\(^{182}\) *Id.* (quoting United States v. Yazell, 382 U.S. 341, 352 (1966)).

\(^{183}\) *Id.* at 585.

\(^{184}\) *Id.* at 585 n.18.

\(^{185}\) *Id.* at 584.

\(^{186}\) *Id.* at 576 n.7.

\(^{187}\) *Id.* at 585.

\(^{188}\) *Id.*

cessfully, that superannuation was a severe industry problem that could only be alleviated by the Act.\textsuperscript{190}

The Court in \textit{Hisquierdo} accepted not only the argument that the statutory purpose of encouraging retirement continued to have significance, but the corollary notion that the division of retirement benefits upon divorce would discourage the divorced employee from retiring.\textsuperscript{191} The Court failed to take into account, however, an argument that the primary purpose of the 1934 Act was to prevent the collapse of a faltering pension plan in a depressed economy rather than to relieve industry of the superannuation problem.\textsuperscript{192} In 1934 the nation's railroads, like the rest of the country, suffered in the throes of the Depression. Congress passed the 1934 Railroad Retirement Act using its commerce clause power to regulate the safety and efficiency of interstate commerce.\textsuperscript{193} The continued expansion of power under the commerce clause and its close connection to the economic problems of a depression must have led New Deal architects to conclude that legislation enacted under the commerce clause could not be successfully challenged.\textsuperscript{194} However, some sixteen small railroads in \textit{Railroad Retirement Board v. Alton}\textsuperscript{195} convinced the Supreme Court that Congress had exceeded its authority in that instance.

Today the \textit{Alton} opinion molds safely into constitutional law textbooks as an example of the kind of scrutiny the Court has not applied to social legislation in years. Yet the testimony of one witness who appeared in that case may be resurrected to suggest that the underlying motive for the Retirement Act had a broader purpose than that of relieving an industry top heavy with seniority. The dissent in \textit{Alton} noted that a witness testified that the Depression had demonstrated the weakness of voluntary pension plans.\textsuperscript{196} The dissent also pointed out that at stake were labor relations in the railroad industry.\textsuperscript{197} Thus, what hung in the balance was not a plan to encourage more workers to retire but a plan to avoid the chaos that would occur if railroads that already had retirement plans cut off those plans in the face of a depressed economy.\textsuperscript{198}

The Act itself lends support to such an interpretation. It provided that anyone from fifty-one to sixty-five could retire if he or she had

\textsuperscript{191} 439 U.S. at 585.
\textsuperscript{192} 295 U.S. at 381 (Hughes, C.J., dissenting).
\textsuperscript{193} See \textit{id.} at 362-63.
\textsuperscript{194} See G. GUNThER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 140-41 (10th ed. 1980).
\textsuperscript{195} 295 U.S. 330 (1935).
\textsuperscript{196} \textit{Id.} at 381 (Hughes, C.J., dissenting).
\textsuperscript{197} \textit{Id.}
\textsuperscript{198} \textit{Id.} at 380-81.
thirty years of service; but it still permitted an employee to work until the age of seventy.\footnote{In 1939, five years after the original act, the average life expectancy of white males was 62.8 years. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 69 (1981).} If the primary purpose of the Act had been to encourage early retirement, an age so near the average life expectancy would hardly have been set.\footnote{Cf. Califano v. Jobst, 434 U.S. 47 (1977) (upheld termination of disabled person's Social Security benefits when he married).}

For these reasons, it is hard to argue that the personnel policies in question made a significant difference. If the government's primary interest had been in encouraging prompt retirement, it could have been so by a mandatory retirement age. To assert that workers, who would be required to split their pensions upon divorce, would necessarily remain in employment is speculative since the railroad authority could control their retirement in any case. Permitting governmental personnel policies to form a basis for preemption, therefore, seems inappropriate at best.

The federal interest in funding the system within practical limits could provide a more positive reason for the primacy of federal law.\footnote{See 439 U.S. at 575, 585.} The legislative history relating to the 1974 amendments to the Railroad Retirement Act indicates that Congress' primary concern was to save a retirement system on the brink of bankruptcy.\footnote{Id. at 574 n.3.} The system's beneficiaries outnumbered the contributing employees and there were significant problems with dual entitlements under the Social Security Act and the Railroad Retirement Act.\footnote{Id. at 585 n.18.} Some authorities feared that unless the serious actuarial problems were remedied, the fund could be used up by 1988.\footnote{See supra text accompanying notes 156-59.} A major difficulty with according this federal interest such great weight, however, is the general nature of such an interest. No matter how important the government's fiscal interest may be, that interest is a general one that will always be present when any portion of the benefit is funded from general tax revenue. To uphold any federal rule on the ground of limited funds would make the federal interest invincible. Cases such as \textit{Yazell} show that a fiscal interest, standing alone, will not require the preemption of state law.\footnote{See supra text accompanying notes 156-59.} In addition, focusing upon a congressional refusal to create an independent benefit for a divorced spouse drastically altered the methodology of the Court's prior opinions. In its earlier work, the Court had held that state community property could
be preempted only by an express federal directive. 206 In *Hisquierdo*, the Court inferred a congressional intent from Congress' failure to act and from the statutory provision for a separate, spousal benefit that ends upon divorce, 207 yet a provision for a spousal benefit that terminates upon divorce does not expressly prohibit recognition of a marital property interest in that part of the pension earned during marriage. Such a prohibition must be implied. 208 Furthermore, the Court made its inference from congressional failure to act. The policy behind the enactment of any legislation is difficult enough to discern. Failure to act provides an even more insurmountable problem since the legislative body may have acted from several motivations, some of which are likely to be unrecorded.

Another federal interest, however, not relied upon by the Court but present in *Hisquierdo*, does sustain the decision to apply federal law. That interest is reflected in a federal statute permitting garnishment of federal benefits and the definitional sections controlling that exception. 209 The federal policy that demands preemption is an interest in the protection of a federally created property distribution system. 210 Under that property distribution system, rights to participate in entitlements under the Act are based upon an individual's status as either a primary beneficiary of the Act or as a recognized dependent. For persons other than the primary beneficiary, participation is tied to their dependent status. 211 This dependency-based system

207. 439 U.S. at 587.
208. *But see* Wisner v. Wisner, 338 U.S. 655 (1950). The statute in *Wisner* required no inference to determine that Major Wisner was afforded the choice of beneficiary if he chose within a specified class. However, a statute creating benefits for the spouses of married workers requires an inference to determine that a former spouse may not claim an interest under state community property law.
211. 45 U.S.C. §§ 231c-231d (1976). The current act provides benefits for spouses, widows, children, and parents. *Id.* § 231a. In order for a spouse to be entitled to benefits, the individual worker must be entitled to an annuity under separate sections of the Act and the spouse must meet age requirements or have in her care a child who qualifies under the Act. *Id.* § 231c. That the entitlements under the Act are dependency based is demonstrated by the section of the Act defining spouse. *Id.* This section requires either a marriage of not less than one year or that the nonworker be the parent of the annuitant's child if the nonworker was either a member of the annuitant's household or entitled to court ordered support from the annuitant. *Id.* Although the latter situation seems a stronger argument for dependency because it relates to either household membership or court defined need, Congress apparently presumed that marriage entitled women to strong dependency claims. The Act requires that a male, basing his entitlement on the household or court ordered support section, demonstrate that he was receiving at least one-half of his support from his wife.
functions to dispose of the benefit in question whether the marriage is dissolved by death or divorce. If the marriage is dissolved by death, the surviving spouse and other statutory beneficiaries are recognized in the Act.\textsuperscript{212} Upon divorce, the claims of some spouses are recognized, but only if the claimants demonstrate their dependency through acquiring a support order from a state court.\textsuperscript{213}

This explanation of the \textit{Hisquierdo} outcome requires recognition of the garnishment statute as a substantive rule of law.\textsuperscript{214} If the garnishment provision indicated only a change in federal procedure, no substantive federal interest in limiting recovery to dependents alone would have existed. Thus, no conflict with state marital property law would have arisen. The garnishment statute, however, deals not only with a waiver of sovereign immunity but creates substantive rights by expressing a policy that participation in the retirement benefit be limited to proven instances of dependency.\textsuperscript{215} It specifically excludes

at the time the annuity began. \textit{Id. But see} Frontiero v. Richardson, 411 U.S. 677 (1973) (providing increased benefits for women officers only if their husbands were dependent for more than one half of their support held unconstitutional).

A major feature of many government entitlement programs is that their structure extends benefits to a worker and to his or her dependents. \textit{See generally} SUBCOMM. ON RETIREMENT INCOME AND EMPLOYMENT, WOMEN AND RETIREMENT INCOME PROGRAMS: CURRENT ISSUES OF EQUITY AND ADEQUACY, H.R. Doc. No. 190, 96th Cong., 1st Sess. 1 (1979). Dependent benefits, furthermore, are not viewed as having been earned in the same sense that worker benefits are earned. They are intended to provide a supplemental income in addition to that received by the worker in recognition of the fact that married workers have greater expenses. For that reason dependent benefits tend to be extended only to those persons likely to be living with the worker or dependent upon him or her. In this context, the congressional scheme outlined in \textit{Hisquierdo} makes sense. The federal law does protect some divorced spouses. It does so consistently with its theory of allocating resources to persons other than the primary beneficiary only if those persons show a dependency status.

213. \textit{Id.} § 659.
214. The substantive-procedural dichotomy has continually plagued courts in horizontal choice of law cases. \textit{See, e.g.,} Kilberg v. Northeast Airlines, Inc. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953). In these cases, the traditional rule is that a forum may always apply its own procedural rules but must apply the substantive law of the proper state. \textit{Restatement (Second) of Conflict of Laws} § 122 (1971). Attaching labels of substance or procedure to various rules, however, is not particularly helpful. What must be considered is whether the forum has an interest to be promoted by application of its law. \textit{See} Leathers, supra note 28. \textit{See also Sedler, The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws, 37 N.Y.U. L. REV. 813 (1962).}

215. 42 U.S.C. §§ 659, 662 (Supp. IV 1980). The 1975 adoption of section 659 reflected congressional concern that recipients of federal benefits were evading support obligations. S. REP. NO. 1556, 95rd Cong., 2d Sess. 42, \textit{reprinted in} 1974 U.S. CODE CONG. & AD. NEWS 8133, 8134. The congressional amendment to the anti-attachment statute was intended to cut down welfare claims by former spouses of
from its reach property or ownership claims. Congress incorporated concepts from state law into the federal scheme to the extent of recognizing need-based claims by former spouses. It did not choose to do more.

The major obstacle preventing the recognition of this argument lies in the Court holding that some government benefits are not property because Congress may terminate them at any time. A number of states have used this rationale to prohibit the division of social security benefits. If the benefits are not property, argue these states, then they cannot be marital property. Because some part of Railroad Retirement benefits is funded through Social Security, the same claim could be made with regard to Railroad Retirement benefits that is made with regard to social security. A rule that either social security benefits or any other government entitlement are not divisible property because the asset can be cut off by Congress ignores the reality that such entitlements are valuable assets.

A better reason for the refusal to divide social security is that the system provides for divorced spouses. Since the federal system aids

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218. Umber v. Umber, 591 P.2d 299 (Okla. 1979); In re Marriage of Kelley, 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (1977); In re Marriage of Nizenkoff, 65 Cal. App. 3d 136, 135 Cal. Rptr. 189 (1976). When the issue is consideration of Social Security benefits in order to determine the obligor's ability to pay maintenance the result is different. Such benefits may be considered in order to determine the amount of maintenance that should be awarded. Paxton v. Paxton, ___ Ind. App. ___, 420 N.E.2d 1546 (1981); Meadows v. Meadows, 619 P.2d 598 (Okla. 1980).
219. 499 U.S. at 575.
former spouses, contrary rules by the state could not survive. The same reasoning applies to Railroad Retirement benefits, although the provision for former spouses in these latter benefits is different from the provision made under Social Security. While government benefits may not be property as between the government and the recipient, the Railroad Retirement system's benefits represented a major asset for the Hisquierdos and others in similar positions. Therefore, it is fair to characterize their distribution as the distribution of property or something closely analogous.

The federal system is designed to protect both the worker and statutorily recognized dependents, including those to whom support has been awarded under state law. This federal dependency based system is clearly in conflict with the state system stressing individual ownership as a result of economic partnership. The conflict requires federal preemption of state marital property law because the federal scheme has a specific, articulated provision for divorced spouses who may recover only in the limited manner allowed by federal law.

Thus, it is the federal provisions permitting former spouses to claim support awards, rather than generalized interests in either personnel management or uniformity, that support the Court's decision in *Hisquierdo*. If the federal system makes provision for resolution of the issue, the supremacy clause mandates that the federal provision control. That the congressional resolution relegating ex-spouses to support awards failed to take account of state policy indicating a preference for property division is immaterial for purposes of the Court's resolution of federal-state conflicts. Although the Court's reasoning failed to clearly articulate this basis, its decision was ultimately correct.

**B. McCarty v. McCarty**

Like *Hisquierdo*, *McCarty* also involved a long term marriage in which an important asset was a federally created benefit. *McCarty* involved, however, military retirement benefits. As it had in the previous case, the Court began by noting the reasons for the establishment of the military retirement system. Justice Blackmun stated that from its inception the system had been a personnel management tool. Second, he noted that the system was funded by annual appropriations and not by employee contributions. Finally, he pointed out that non-disability retirement terminated with the member's death.

The Court applied a two part test requiring a conflict with the express terms of federal law and a sufficient injury to the federal objec-

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223. Id. at 213.
224. Id. at 214.
tives to require nonrecognition of the state law. The Court found three conflicts with the retirement system. 226 The first arose between state law and the federal statute concerning a military personnel's entitlement to retirement pay. 226 Second, the Court found that state law conflicted with the statutory Survivor Benefit Plan. 227 Third, the Court found that state law permitting property division conflicted with the statute permitting garnishment of benefits to satisfy support but not property claims. 228 Further, these conflicts did major damage to the federal goals of providing for surviving spouses and dependent children of military personnel and inducing enlistment in the armed forces. 229

The nondisability retirement system described by the Court entitled military personnel to retirement pay and permitted the individual to elect a beneficiary to receive unpaid arrearages due upon his death. 230 While both the retired member and the spouse lived, no separate benefit for the spouse existed. 231 However, the service member automatically provided a survivorship interest to his current spouse unless he or she actively opted not to do so. 232 The articulated federal interests underlying these statutory sections include providing compensation to retired personnel, encouraging personnel to provide for their survivors through the use of an annuity, and permitting the individual the freedom to dispose of money due to him or her upon his or her death. 233

The federal interest in personnel management in McCarty poses some problems unique to that case. In Hisquierdo, the personnel management interest arose out of the Court's claim that refusal to divide retirement benefits promoted early retirement. In McCarty, the personnel management goal is complicated by the presence of the military and the claim that nondivisibility promoted enlistment.

Governmental goals in providing fringe benefits to military personnel are complex. Although the provision of benefits carries with it an inducement for both enlistment and retirement, other reasons for

225. Id. at 215.
226. Id. at 224-26.
227. Id. at 226-27.
228. Id. at 228-32. In McCarty, the Court recognized the conflict between state marital property law and the exception to the anti-attachment clause. The Court, however, did not go beyond indentification of the conflict. Id.
229. Id. at 227-28.
231. 453 U.S. at 226-27.
232. 10 U.S.C. §§ 1434, 1450 (1976 & Supp. IV 1980). Upon divorce, the ex-spouse loses his or her survivorship interest under this federal statute. This causes a conflict when state law provides a divorced spouse with an interest in the retirement pay.
233. See infra notes 235-47.
providing benefits also exist. Those reasons implicate governmental policies that do not necessarily lead to the conclusion that the separate nature of the benefits is mandated. Whether or not fringe benefits originally induced enlistment or retirement, the most probable reason for congressional continuation of military retirement pay in the modern era is to provide the same array of fringe benefits for military personnel that are available in the private sector.\footnote{234}

Arguably, the policy behind the extension of benefits is one of parity with civilian employment. If parity were the congressional intention, the separate nature of the benefits would not necessarily follow. Most private pensions would be treated as divisible under state marital property law.\footnote{235} Providing benefits on par with civilian employment would simply require granting the benefits without mandating non-divisibility. Thus, it could be left to the states to determine the property rights of spouses of military personnel and the distribution of military retirement benefits.\footnote{236} A federal interest in parity alone, therefore, would not necessarily be sufficient to override state law.

The arguments against a congressional goal of parity alone arise from both the source of congressional power over the military and from its historical treatment of military personnel. Congressional power to govern the military is constitutionally based.\footnote{237} Standing alone, that constitutional basis is not necessarily a deterrent to state regulation. In \textit{Wetmore}, for example, Congress' power to regulate bankruptcy rules did not dictate preemption of a state law limiting alimony modification.\footnote{238} There is, nevertheless, an important difference between bankruptcy power and military control. Unlike the former, military control is not based upon an underlying obligation created by the state. That difference is accentuated by the historical treatment of military personnel. Both the state and federal governments have traditionally afforded military personnel special treatment. During the Second World War, Congress enacted the Soldier and Sailor's Civil Relief Act, prohibiting suits against certain absent military defendants.\footnote{239} States in which military personnel have

\footnotesize{234. This becomes a probable goal when it is recognized that retirement age can be directly mandated. 10 U.S.C. § 3883 (1976 & Supp. IV 1980), \textit{repealed by Act of Dec. 12, 1980, Pub. L. No. 96-513, § 216, 94 Stat. 2886.}}

\footnotesize{235. In many states, divisibility would depend upon whether pension rights were vested or nonvested. A vested pension is one in which termination of the employment before retirement does not subject the employee to a condition of forfeiture. \textit{In re Marriage of Brown}, 15 Cal. 3d 858, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).}

\footnotesize{236. See infra text accompanying notes 283-85.}

\footnotesize{237. U.S. CONST. art. I, § 8, cl. 12-14.}


\footnotesize{239. The Soldiers' and Sailors' Civil Relief Act of 1940 has been codified at 50 U.S.C. § 520 (1976). The basic provisions of the Act forestall action against persons serving in the military. They act as tolling statutes rather than as a bar to liability.
resided while in the military service are not traditionally considered the domiciles of such individuals. The military justice system functions in a manner different from civilian courts. Historically, military occupations have not been considered similar to civilian employment. That historical treatment argues strongly against mere parity.

The reality of congressional intent probably lies somewhere between the two poles of inducing enlistment through providing separate benefits and attempting to induce enlistment by providing parity of benefits to military personnel. In both Hisquierdo and McCarty this difficult personnel management issue obscures the real conflict between state marital property law and the federally created property distribution system.

A second federal interest noted by the McCarty Court was an interest in the protection of the survivors of military personnel. According to the Court, that interest affected the outcome of the case by demonstrating a congressional choice of one set of beneficiaries over another. The Court felt that recognition of a divorced spouse's state-created interest would have damaged the federal plan because it might have caused some members to opt out of the Survivor Benefit Plan in order to meet obligations from a prior marriage. The Court also believed that congressional preference for survivors over ex-spouses was demonstrated by Congress' failure to enact an independent benefit for ex-spouses.

The Court is correct that Congress has indicated a preference for another class of individuals rather than the class of ex-spouses with state-created property claims. Arguably, however, the preferred group is not the class of present spouses but that class of ex-spouses.

240. Restatement (Second) of Conflict of Laws § 17 comment d (1971). See also Thames, Domicile of Servicemen, 34 Miss. L.J. 160 (1965).
243. Id. at 235. The initial plan to provide annuities for surviving spouses was voluntary. 10 U.S.C. §§ 1431-46 (1976 & Supp. IV 1980). Under this plan, known as the Retired Serviceman's Family Protection Plan (RSFPP), the service member could elect to reduce his or her retirement pay in order to provide an annuity to survivors. In 1972 Congress enacted a second plan, the Survivor Benefit Plan (SBP), in which service personnel automatically participate unless they opt out. Id. §§ 1447-55. Unlike the RSFPP, the SBP is not self-financing. In both cases, however, military personnel must take lower retirement pay to fund the survivor annuity. Neither plan provides for former spouses. Id. § 1434(a) (RSFPP); id. §§ 1447(3), 1450(a) (SBP).
245. 453 U.S. at 228.
with support claims. Recognition of those ex-spouses who have state adjudicated support claims as the preferred class helps in understanding the substantive nature of the federal garnishment statute. The Court’s reference to a congressional failure to enact legislation establishing rights for ex-spouses is confusing. Despite much testimony by both sides on what congressional policy should be, a failure to enact legislation does not really establish any articulated policy. Congressional reluctance to adopt independent benefits for ex-spouses may be as easily tied to the price tag involved as to a preference for present spouses. On the other hand, congressional passage of the garnishment statute does articulate a federal policy. That policy is that ex-spouses with support or need-based claims should be able to assert those claims against federally funded military retirement benefits. Thus, the garnishment statute must be viewed as more than a mere procedural tool because it expresses an important federal interest. Further, since military retirement pay carries with it no anti-attachment clause similar to that in Wissner or Hisquierdo, the garnishment statute appears in McCarty as an independent federal statute with controlling force.

In McCarty, the Court recognized the peculiar nature of congressional control over the military and the importance of congressional legislation directing that military retirement benefits could be garnished for support claims. Unfortunately, the Court failed to make clear that this federal law overrode state marital property law because the federal scheme for benefit distribution had made a different provision for asset distribution upon divorce from that selected by state law. It is the congressional adoption of that different scheme, rather than the congressional failure to provide benefits, that supports the McCarty outcome.

C. Summary

Governmental interest analysis can be used to reconcile and explain the Court’s work in the area of federal preemption of state marital property law. Under the Court’s current analysis, federal preemption of state marital property law will occur whenever any federal statute articulating a substantive federal interest conflicts with a state’s marital property regulation. The Court’s more recent decisions demonstrate that the statute setting out the federal interest need not be the statute that creates the federal benefit. Congressional exceptions providing for recognition of state created support claims create substantive federal interests in protecting workers and their dependents sufficient to preempt state community property law.

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246. Congress might rationally make such a distinction.
The use of governmental interest analysis to reconcile the Court’s position in federal preemption cases should not overshadow the difficulties presented by the current methodology. The Court has moved away from interpreting the statutory language creating a particular benefit toward a policy search that will demonstrate federal interests damaged by state law’s application. In making this policy search, the Court has considered a number of factors including the personnel management needs of the federal program, fiscal policy, and the needs of statutory beneficiaries other than former spouses. The difficulty with these factors is that they numerically increase asserted federal interests but they have no necessary connection to a federal interest in preempting state marital property law.\textsuperscript{248} Such an interest arises only if the federal government has created a provision requiring a disposition of benefits contrary to that required by state law. The Court’s use of general interests that are present in any federally created program has prevented it from making a clear explanation of the contrary federal and state systems and from demonstrating that, once the federal system provides for recovery by an ex-spouse, no state law permitting a contrary recovery will be permitted.

IV. CONGRESSIONAL RESOLUTION OF \textit{McCarty}

Congressional action has recently altered the rule of \textit{McCarty}.\textsuperscript{249}

\textsuperscript{248} In this paper I have tried to show that the conflicts before the Court can be resolved by governmental interest analysis. A basic assumption of that argument has been that governmental interest analysis is compatible with a rule that requires a “direct and positive enactment” by Congress in order to find federal preemption. See Wetmore v. Markoe, 196 U.S. 68, 77 (1904). The actual number of federal interests present makes little difference. Since the supremacy clause does not provide for balancing with the state interests, a single federal interest will suffice. The lack of connection, however, between some asserted interests and the issue at hand is more problematic. In Ridgway v. Ridgway, 454 U.S. 46 (1981), the Court continued to rely upon minimal federal interests, such as the source of funding from general revenue for insurance premiums to buttress a claim for federal preemption. In two other recent cases, the Court has demonstrated its ability to identify and weigh heavily interests that are not relevant or dispositive. In Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981), the Court permitted the application of a Minnesota statute allowing the “stacking” of insurance policies because, among other things, the decedent was a Minnesota employee. The accident that claimed the decedent’s life, however, did not occur in Minnesota and was not employment related. In Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980), the Court held that the state of an employee’s residence had such a significant interest in that employee’s welfare that the state would be permitted to make a supplemental worker’s compensation award after a prior award made by the state of injury. The identification of that interest ignored serious problems of res judicata. A similar sort of random interest identification pervades \textit{McCarty}.

\textsuperscript{249} As a part of the 1983 defense appropriations bill, Congress amended Title X of the United States Code to provide for division of military retirement pay. Uniform Services Former Spouses’ Protection Act, Pub. L. No. 97-252, § 1002 (Sept. 8, 1982) (to be codified at 10 U.S.C. § 1408) [hereinafter cited as Former Spouses’ Pro-
The resolution adopted by Congress is complex. Under Title X, Congress has permitted the division of military retirement benefits by states subject to certain federal requirements. In addition, the Act carries with it a jurisdictional section, providing that benefits may be divided only by particular courts. Finally, Congress has settled the issue of McCarty's retroactivity.

The new federal legislation permits states to treat military retirement pay as marital property. Although the original House proposal had contained a ten year marriage requirement similar to that present in Social Security benefits, a special House and Senate committee eliminated that provision of the bill. Notwithstanding the clear congressional power to insert such a requirement, the deletion represents an appropriate and permissible congressional deference to state control over domestic relations. As a general matter, domestic relations are conceded to be within the province of the states. No state marital property law contains requirements that the parties be married for a substantial amount of time before an asset becomes marital property. Usually, the marital property character of an asset is determined by the time of its acquisition and the manner in which it is acquired. Duration of the marriage may affect the amount of property received by a party upon division but it does not relate to the characterization of the property as marital in the first instance. Thus, eliminating a ten year requirement allows military retirement benefits to be treated as would the retirement benefits arising from any other pension plan.

The congressional resolution does not guarantee, however, that all states will divide military retirement benefits. Unlike many private pension plans, military retirement benefits do not vest for twenty years. Although some states permit retirement benefits to be divided
whether or not the employee's right to the benefit has vested,\textsuperscript{259} others do not permit division of retirement benefits that have not vested.\textsuperscript{260} Since the legislation only permits, but does not require division, in a number of states spouses of military personnel still will not be able to claim a property interest in their ex-spouse's retirement benefits. That inability will arise, however, not from federal rules but from state law prohibiting division. Furthermore, it is unlikely that such state laws would give rise to any claim of discrimination under an equal protection analysis, since military ex-spouses would receive exactly the same treatment as other spouses whose divorce involved non-vested pensions in such a state.\textsuperscript{261}

The ten year marriage requirement does continue to have a significant impact upon the ease with which an ex-spouse may collect those benefits awarded to him or to her. Congress retained a feature in the Act that would permit payment of retirement benefits directly from the government to an ex-spouse only if the marriage had continued for at least ten years.\textsuperscript{262} The ten year restriction on direct payments applies only to property division orders; it has no application to payments based on support requirements whether the support is adult maintenance or child support.\textsuperscript{263}

\begin{itemize}
\item \textsuperscript{259} See infra note 303.
\item \textsuperscript{260} See infra notes 301-02.
\item \textsuperscript{261} Ex-spouses of military personnel also would not have a claim for violation of due process rights where a state simply chooses not to provide for marital property division.
\item \textsuperscript{262} Former Spouses' Protection Act § 1002 (to be codified at 10 U.S.C. § 1408(d)(2)). The section requires not only that the marriage duration be for more than ten years, but also that, during those years, the member has performed ten years of creditable service in determining the member's eligibility for retirement pay. Thus, for direct payment purposes, the marriage must not only be of substantial length, but must involve substantial military service during the marriage. An additional limitation upon direct payment is that only fifty percent of a member's retirement pay may be reached in this manner. \textit{Id.} (to be codified at 10 U.S.C. § 1408(c)(1)). The fifty percent limitation applies only to an award for direct payment under § 1408(d) because of the specific reference to that section in the limitations imposed by § 1408(e). It does not refer to a limitation upon a state court's ability to divide retirement pay in the first instance. \textit{Accord} Foreign Service Act of 1980, § 814, 22 U.S.C. § 4054 (Supp. IV 1980). Section 1408(e)(4)(B), however, provides that notwithstanding any other law, the total amount of retirement pay subject to all court orders under § 1408 and 42 U.S.C. § 659 (garnishment statute under the Social Security Act) may not exceed sixty-five percent of the member's disposable pay. Further sections provide for resolution of conflicting orders and for priority where more than one order is served on the Secretary. Former Spouses' Protection Act § 1002 (to be codified at 10 U.S.C. § 1408(c)(2)(3)).
\item \textsuperscript{263} 10 U.S.C. § 1408(d)(2) provides that, unless its provisions are satisfied, no payment may be made by virtue of a court treating the retirement pay as "property of the member or property of the member and his spouse." Former Spouses' Protection Act § 1002. Since the section does not refer to maintenance or support, such payments are excluded. See \textit{id.}.
\end{itemize}
Congressional reports indicate Congress intended that former spouses with property claims be entitled to enforce those claims even though they were not entitled to direct payment by the government based on marriage duration.\textsuperscript{264} Although this portion of the Act could have significant meaning to former spouses, the enforcement procedure available to them is not clear. The Federal Garnishment Statute provides no avenue because its provisions have not been amended.\textsuperscript{265} No clear direction has been given as to how those without rights to direct payment are to proceed. However, other sections of the Act provide for the effective date of court orders and for resolution of both conflicts between different courts and priority disputes between different claimants. For that reason, a right to enforcement will have to be developed.\textsuperscript{266}

In \textit{McCarty}, the Court tied federal preemption to military personnel policies.\textsuperscript{267} The Court indicated that divisibility or nondis divisibility of pensions could affect enlistment and retention abilities of the Armed Services. Congressional reconsideration of \textit{McCarty} now clarifies legislative concerns. Congress kept the ten year requirement for direct payment of retirement benefits only after some debate concerning the impact that the rule would have upon military retention rates.\textsuperscript{268} Congress believed that there was no significant evidence that the ten year rule would have a detrimental impact upon retention.\textsuperscript{269} However, Congress requested the Armed Services Committee to continue to study the problem. Thus, personnel policies other than provision of parity with civilian employee benefits are of actual congressional concern.\textsuperscript{270}

That concern, however, cannot necessarily be translated into a congressional intention to reinstate \textit{McCarty} should direct payment of benefits have an impact upon retention. While it is true that the current legislation does not bar Congress from that result, Congress might also cure problems with retention by dropping only the ten year rule. Absent that rule, service personnel with domestic difficulties would

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\textsuperscript{264} \textit{See} 128 CONG. REC. H5999 (daily ed. Aug. 16, 1982).
\textsuperscript{265} \textit{Id.} (to be codified at 10 U.S.C. § 1408(d)(1)(A), (e)(2)).
\textsuperscript{266} \textit{Id.} (to be codified at 10 U.S.C. § 1408(d)(1)(A), (e)(2)).
\textsuperscript{267} 453 U.S. at 232-33.
\textsuperscript{268} 128 CONG. REC. H5999 (daily ed. Aug. 16, 1982).
\textsuperscript{269} \textit{Id.}
\textsuperscript{270} \textit{See supra} text accompanying notes 234-41.
\end{flushright}
receive no advantage by failing to reenlist after ten years of marriage since their retirement pay could be reached directly at all times.

The McCarty Court pointed out two ways in which military personnel were distinguishable from other citizens. First, the Court noted that military service was national in its scope. Second, the Court noted that unlike other individuals, military personnel could not choose their place of residence. The first distinction may be important in showing differences between military programs and private employment, but it has little relevance when interpreting the balance to be struck in a federal preemption case where all programs are national by definition. The importance of the second distinction is made clear by the legislation overruling McCarty. Congress placed a jurisdictional requirement in the legislation. Although military retirement pay now is potentially divisible, a division cannot be affected unless a court has jurisdiction over the member based upon (1) the member's consent; (2) the member is a domiciliary of the state; or (3) the member is a state resident, other than because of military assignment. Thus, retirement benefits will be divisible only in bilateral divorces or in a divorce rendered in the state of the military personnel's domicile or non-military residence.

While the jurisdictional aspect of the statute is clearly directed to legitimate federal concerns, it raises a number of questions. First, is the issue of the relationship between the federal jurisdictional statute and state statutes on divorce jurisdiction. Within the last decade, most state divorce laws have been amended to provide jurisdiction for military divorces upon a showing of "military presence" for a substantial period of time, typically 90 days. Military presence, of course, is not the same thing as domicile. The latter generally is regarded as a

271. 453 U.S. at 234.
272. Id.
273. Former Spouses' Protection Act § 1002 (to be codified at 10 U.S.C. § 1408(c)(4)).
274. Id.
276. Where the divorce is sought in the member's domicile while he or she is absent, the petitioner must comply with the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 App. U.S.C.A. §§ 501-591 (West 1981). The provisions of that Act permit a stay of the action if, in the discretion of the trial court, the defendant is found to be materially affected in his or her ability to conduct a defense. Accord Bond v. Bond, 547 S.W.2d 43 (Tex. Civ. App. 1976). A trial court in the military member's domicile might grant marriage dissolution but stay the property division portion of the action.
jurisdictional prerequisite to non-military divorces and arguably could not be established by military personnel ordered to a state in connection with military service.

Enactment of the federal rule will have little impact upon the state jurisdictional statutes in most cases. Military personnel will continue to seek divorces under state statutes. When the military member initiates the divorce action in a state where he or she is neither a domiciliary or a resident, that initiation could provide the consent necessary for division of retirement benefits. When the member is sued for divorce in his or her domicile but is absent due to military service, the domicile would have jurisdiction over him or her for both dissolution and division of military retirement pay. Since the military member ordinarily selects the domicile, however, there is no disappointment of his or her expectations when domiciliary rules are applied in divorce. Application of the domicile's rule does not unfairly disadvantage the military personnel because, like everyone else, he or she had a choice of domicile.

Suppose, however, that a member of the military is sued for divorce in a state in which he or she is stationed but which is not a state of domicile or legal residence. Does the federal legislation prevent the state court from doing more than granting the plaintiff spouse a divorce? Arguably, the answer is no. In such an instance, the state court should be able to divorce the parties and to award either maintenance or child support consistent with traditional notions of due process. The court, however, is not able under the statute to divide the military retirement pay unless the respondent spouse consents. To interpret participation in a divorce on the issues of maintenance and child support as consent for division of military benefits would hold the member's rights hostage. Normal due process notions compel the respondent to litigate maintenance and child support since the forum has personal jurisdiction over

280. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 17 (1971). In some cases, service personnel living off base have been regarded as establishing a domicile within a state. See, e.g., Martin v. Martin, 253 N.C. 704, 118 S.E.2d 29 (1961); Slade v. Slade, 122 N.W.2d 160 (N.D. 1963); Sasse v. Sasse, 41 Wash. 2d 363, 249 P.2d 380 (1952). A decision to live in off base quarters, without more, probably does not indicate an intention to acquire a domicile in a particular state. Other factors such as the availability of base housing and its relative expense and attractiveness are likely to motivate the individuals involved, rather than domiciliary desires.
281. But see infra text accompanying note 284.
283. Former Spouses' Protection Act § 1002 (to be codified at 10 U.S.C. § 1408(c)(4)).
him or her. If that presence also provided for consent, the statutory
rights of military personnel would be considerably weaker.

In what is perhaps the most confusing section of the Act, Congress
also addressed the problem of McCarty's retroactivity.285 Congress
noted that the enactment of Title X should not be interpreted to permit
reopening of pre-McCarty cases where military pay was not divided.286
This avoided a number of potential problems for state courts. Where a
property division excluded retirement benefits as non-divisible prop-
erty, a state court probably arrived at quite a different division than it
would have reached had the retirement benefits been included.287
Whatever the state court's division, it rationally created a set of expecta-
tions for both parties that should not now be disturbed.288 Congress also
concluded, however, that post-McCarty modifications setting aside a
pre-McCarty division of military retirement benefits should not be
recognized.289 In other words, state courts which adopted an analysis
similar to McCarty's would not be required to reopen cases that were
decided under that analysis. State courts which held McCarty retroac-
tive, however, and that required modification of existing decrees on that
basis were instructed that such modifications should not be recognized.

Taken as a whole, this congressional action rendering military
retirement pay divisible strikes an appropriate balance in state and
federal relations. States are given greater scope to exercise their
marital property rules and to effectuate state policy underlying those
rules. During the last ten years, significant changes have occurred in
state divorce laws. Although the Uniform Marriage and Divorce Act
has been adopted in only a few states,290 a number of states have intro-
duced the marital property concept.291 Because those states treat most
property acquired after marriage as marital property, their property

286. Id.
288. Indeed, prior to the enactment of the legislation, courts considering
McCarty's retroactivity had found that it should not be given retroactive effect. Erspan
v. Badgett, 659 F.2d 26 (5th Cir. 1981); Fellers v. Fellers, 125 Cal. App. 3d 254, 178
Cal. Rptr. 35 (1981); Mahone v. Mahone, 123 Cal. App. 3d 17, 176 Cal. Rptr. 274
290. The Uniform Marriage and Divorce Act has been adopted in Arizona, Illi-
nois, Kentucky, and Montana. 9A U.L.A. 91 (1979). Colorado has adopted Parts
I-IV of the Act. Id. Minnesota, Missouri and Washington have adopted only Parts
III and IV of the Act. Id. at 17 (Supp. 1982). The Act originally provided for apportion-
ment of all property owned by either spouse. In 1973, it was amended to recognize the
distinction between marital and nonmarital property. Id. at 142-44 (1979). The
amendment reflected the interest of community property states in preserving their
distribution system. Principles similar to the alternative provided for community prop-
erty states were adopted by a number of non-community jurisdictions. See infra note
291.
characterization for divorce purposes is similar to that in community property jurisdictions.

Perhaps more significant than the growing adoption of the marital property concept is the changing relationship between property division and maintenance. States adopting the Uniform Marriage and Divorce Act have provided for payment of maintenance only under limited circumstances. In other states using the marital property concept, property division is preferred although maintenance continues to be available.

A state's preference for property division rests upon several considerations. First, the preference for property division has exemplified state acceptance of the marital unit as an economic partnership to which each spouse makes a contribution. The primary beneficiaries


292. Under the Uniform Marriage and Divorce Act, a spouse seeking maintenance must demonstrate a lack of property sufficient to provide for his or her reasonable needs and an inability to support himself or herself with appropriate employment. Unif. Marriage & Divorce Act § 308 comment, 9A U.L.A. 161 (1973). The Act encourages courts to provide for the financial needs of spouses by property disposition rather than by an award of maintenance. Id. Because the economics of individual marriages may make that scheme unrealistic, some states that have adopted the Act have continued to recognize the need for more extensive maintenance in particular cases. See, e.g., Lindsay v. Lindsay, 115 Ariz. 322, 565 P.2d 199 (1977); Richie v. Richie, 596 S.W.2d 32 (Ky. Ct. App. 1980); In re Marriage of Johnsrud, 175 Mont. 117, 572 P.2d 902 (1977).


of this concept have been women working as homemakers. Under prior law, their failure to make monetary contributions to the acquisition of significant property had barred their claims to most assets and left them as the recipients of long term support.\(^{295}\) Acceptance of marriage as a partnership endeavor permitted recognition of their nonmonetary contributions to the shared enterprise.\(^{296}\) Second, the preference for property division was based upon a theory that no real break could occur in a relationship in which one party was tied to the other by a support obligation. Finality was a statutory objective.\(^{297}\) Limitation of maintenance and the contrasting expansion of property rights reflect state policies designed to encourage spouses to become financially independent upon divorce.\(^{298}\) Ownership of marital property promotes independence by allowing each spouse to claim a share of the marital assets upon dissolution.\(^{299}\) Limited maintenance encourages a divorced spouse to acquire financial independence. In many states, the assumed pattern of post-marital dependency has been eroded through changes in divorce law.

State divorce law also demonstrates a trend toward recognition of retirement benefits as an asset that may be divisible upon divorce. The notion that retirement benefits are deferred compensation earned during marriage has received increasing recognition.\(^{300}\) While some states have barred the division of pension plans too speculative for

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\(^{295}\) See Bruch, Property Rights of De Facto Spouses Including Thoughts on the Value of Homemaker Services, 10 Fam. L.Q. 101 (1976).

\(^{296}\) See Prager, supra note 294, at 1-3.


\(^{300}\) See Van Loan v. Van Loan, 116 Ariz. 272, 569 P.2d 214 (1977); Pieper v. Pieper, 79 Ill. App. 3d 885, 398 N.E.2d 868 (1979); Kikkert v. Kikkert, 177 N.J. Super. 471, 427 A.2d 76 (1981); Farver v. Department of Retirement Sys., 29 Wash. App. 138, 629 P.2d 903 (1981). The seminal case treating pensions as divisible without regard to whether they were vested or nonvested was In re Marriage of Brown, 15 Cal. 3d 858, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). See generally Note, Pensions as Property Subject to Equitable Division upon Divorce in Oklahoma, 14 Tulsa L.J. 168, 182-87 (1978). As some commentators have pointed out, there are difficulties with treating pension rights as compensation. One difficulty is that most benefit plans involve a complex system of age and length of service requirements which must be
allocation.\(^{301}\) A growing number of states permit division of plans that involve vested employee rights.\(^{302}\) Some states permit division of retirement benefits without regard to whether the benefits are vested or not.\(^{303}\)

Many state divorce laws may currently be characterized as based upon principles of shared economic endeavor and concomitant recognition of each spouse's right to independent ownership of marital property without regard to dependency. Retirement benefits form an important part of this scheme. Under \textit{McCarty}'s rule, the federal system for allocation of military retirement pay continued to rely upon dependency rather than ownership as a criteria for spousal participation.\(^{304}\) While Congress had the power to adopt such a system with regard to federally connected benefits, the balance that it struck in doing so had a definite impact upon federal and state relations. Congressional determination that military retirement pay was separate, indivisible property denied flexibility to states in an area largely conceded to be within their control.\(^{305}\) A congressional mandate that retirement benefits were the separate property of a worker spouse prevented state

\(^{301}\) See, e.g., Goodwill v. Goodwill, ___ Ind. App. ___, 382 N.E.2d 720 (1978) (lack of present interest in pension plan prevents its division); Ratcliff v. Ratcliff, 586 S.W.2d 292 (Ky. Ct. App. 1979) (nonvested pension too speculative for division); Daffin v. Daffin, 567 S.W.2d 672 (Mo. Ct. App. 1978) (interest is indivisible if contingent or subject to divestment). A vested pension is one in which the employee's right to contributions is not lost through termination of employment. Under a nonvested plan, employer contributions would be lost.


\(^{304}\) See \textit{supra} text accompanying notes 222-48.

development of a marital property scheme grounded upon ownership rather than dependency. The special competency of state trial courts to fashion equitable remedies for the cases before them thus was disrupted by federal intervention. The recent legislation overturning McCarty and the previous intent of Congress permits the states to develop marital property schemes based upon theories of ownership. At the same time, it protects military personnel from the specter of forum shopping since only a forum which is the domicile of the military member, or to which he or she has consented, may divide the military pay.

V. PROSPECTIVE APPLICATION OF McCARTY TO ERISA PENSIONS

Since Congress chose to deal only with military retirement pay in its legislation, the Court could extend the reasoning of McCarty to other types of retirement benefits covered by federal law. The most significant of these are benefits under the Employee Retirement Income Security Act (ERISA), passed by Congress in 1974. The Act covers employee benefit plans established by private employers, sets minimum participation standards, controls minimum vesting standards, and mandates benefit accrual requirements. It also directs funding standards and fiduciary duties for fund trustees.

There are a number of similarities between ERISA and the legislation at issue in earlier cases. Like the National Service Life Insurance Act in Wissner and the Railroad Retirement Act in Hisquierdo, ERISA provides that benefits under an approved plan may not be assigned or alienated. Additionally, like the military retirement plan in McCarty, ERISA mandates that qualified benefits plans provide an option for joint and survivorship annuities but does not mandate any benefit for ex-spouses.

One possible distinction between ERISA benefits and military retirement benefits arises from the manner in which ERISA is funded. Unlike military retirement benefits, ERISA benefits are not a government entitlement. Private pension plans under ERISA are funded by employee contributions. The amount of the benefit received under the plan is directly related to the individual's contribution. Conversely,

307. Id. § 1003.
308. Id. § 1052.
309. Id. § 1053 (Supp. IV 1980).
310. Id. § 1054 (1976).
312. Id. § 1056(d) (1976).
313. Id. § 1056(a).
314. Id. § 1003.
military retirement benefits are funded by annual congressional appropriations.315 A funding distinction, however, would have to ignore the decision in Hisquierdo.316 That pension system had aspects similar to both ERISA and to military retirement.317 If the two-tier Railroad benefit, with its upper private pension tier, could be deemed separate, non-marital property under federal law,318 some other distinction must justify a different treatment of ERISA.

The most viable distinctions between military retirement benefits and those under ERISA arise from the peculiar nature of military benefits and the congressional purpose in enacting ERISA. To a large extent, the military is sui generis. As stated earlier, historical treatment of military personnel by Congress and the states demonstrates that military matters require particular deference.319 Although the concept of deference to the military is somewhat amorphous, at a minimum it historically includes the idea that military service is an especial type of occupation. Both the federal government's need to control military personnel and its need to support those defending the country upholds the idea that the military is to be treated differently in some instances. The legislation overturning McCarty's result demonstrates Congress' concern that military personnel not be subject to the rules of a divorce forum in which they have no contact other than their presence in the state due to military service. Post-McCarty legislation has demonstrated a congressional intent to require only the limited federal intervention necessary to protect the party designated as the primary recipient of the federal benefit. Because the congressional purpose in creating ERISA was protection of employees from manipulation of pension moneys320 and because workers covered by ERISA do not face disabilities similar to those recognized by Congress in the instance of military personnel, no intent to bar divisibility should be inferred.

Attempts to evaluate ERISA statutorily are more difficult. The major thesis of this article has been that military retirement benefits are not subject to division as marital property because the federal government has created a conflicting alternative distribution scheme permitting distribution only in those cases in which a former spouse has a support claim.321 The heart of that federal scheme is the garnishment statute which permits claims for support but not property

315. See McCarty, 453 U.S. at 210.
316. See Hisquierdo, 439 U.S. at 274-75.
317. Id.
318. Id.
319. See supra notes 244-46.
321. See supra text accompanying notes 179-255.
That statute is not applicable to ERISA since it only applies to "moneys . . . due from, or payable by, the United States . . . ."\textsuperscript{322} ERISA, however, does contain an anti-attachment clause similar to that in \textit{Wissner.}\textsuperscript{324} Section 1056(d)(1) of the Act provides that benefits under the plan "may not be assigned or alienated."\textsuperscript{325} At least one court has distinguished \textit{Wissner} from the problem in ERISA cases by pointing out that to permit community property division in \textit{Wissner} would have frustrated a deliberate act of Congress allowing military personnel to choose their beneficiary.\textsuperscript{326} In contrast, that court argued, no similar choice of a beneficiary would be frustrated by division of ERISA benefits.\textsuperscript{327} Thus, \textit{Wissner} could be distinguished because the congressional plan in that case provided for the free choice of a beneficiary and backed that choice with an anti-attachment clause. Under ERISA, no provision directs a particular distribution of benefits once they have vested.\textsuperscript{328} The anti-attachment clause, therefore, could not have been intended to buttress a particular distribution of assets upon divorce. The difficulty with this argument is that ERISA, like the military retirement scheme in \textit{McCarty}, does provide for current spouses while failing to provide for an ex-spouse.\textsuperscript{329} Because ERISA permits an election of joint and survivor annuities, it is similar to military retirement plans in its failure to include former spouses specifically.\textsuperscript{330}

Because the issue is one of congressional intent, it is preferable to determine that intent from evidence of a congressional enactment rather than a congressional failure to act. In order for federal law to preempt state law in an area such as domestic relations, a clearly articulated federal interest has generally been required. Under such a test, Congress would not intend to cover the issue and federal law would not apply unless Congress had made some provision for ex-spouses akin to the garnishment statute in the military retirement cases. Unfortunately \textit{McCarty}, with its references to congressional inaction and its failure to identify the relevancy of the garnishment statute, muddles the possibility of such a resolution of the ERISA cases.\textsuperscript{331}

\textsuperscript{322} 42 U.S.C. § 659 (Supp. IV 1980).
\textsuperscript{323} \textit{Id.}
\textsuperscript{325} \textit{Id.}
\textsuperscript{327} \textit{Id.}
\textsuperscript{328} \textit{See id.} at 982.
\textsuperscript{329} 29 U.S.C. § 1056(a) (1976).
\textsuperscript{330} \textit{See supra} text accompanying notes 170-78.
\textsuperscript{331} 439 U.S. at 588.
VI. CONCLUSION

The congressional decision that military retirement pay may be subject to division under state marital property law manifests Congress' intention to remove the problem of federal preemption. The legislation implementing that decision recognizes that the states created the marriage obligations giving rise to the claim of divisibility upon divorce and that the ability of a particular state to shape both the ongoing marital relation and its incidents upon dissolution is impaired by extensive federal control. At the same time that Congress has been willing to allow states to apply their marital property rules, it has been careful to protect those federal interests that, in its view, are substantial. Thus, it was unwilling to abandon military personnel to what it regarded as their particular vulnerability. The legislation overturning McCarty represents a careful balance of the interests of both the state and federal governments. In addition, it represents a solution for the allocation of assets upon divorce that may become more attractive to other federal programs as budget concerns become paramount.