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Samuel D. McVey

The Federal Military Retirement System Preempts State Community Property Law at Divorce: *McCarty v. McCarty*

Courts in community property states have been applying their state community property laws to military retired pay.[1] Upon dissolution of a marriage in which one of the spouses was an active or retired military member, these courts have divided the current or expected military retired pay by giving the non-service-member spouse a vested right to receive a community share of the pay after divorce.[2] This practice was relatively unfettered by interference from the federal courts' interpretation of federal retirement laws until the 1981 Supreme Court ruling in *McCarty v. McCarty*,[3] which held that the federal military retired pay scheme preempts state community property law.

I. *McCarty*

In *McCarty v. McCarty* a husband and wife sought dissolution of their marriage.[4] The husband, Colonel McCarty, was an Army surgeon with eighteen years of service. He planned to retire at half pay after completing twenty years of service. The

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1. *See, e.g., In re* Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, *cert. denied*, 419 U.S. 825 (1974); Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969). States with other kinds of marital property classifications have also been holding that military retired pay is marital property subject to division upon divorce. *See, e.g., In re* Marriage of Miller, 609 P.2d 1185 (Mont. 1980), *vacated sub nom.* Miller v. Miller, 101 S. Ct. 3152 (1981). *But see* Cose v. Cose, 592 P.2d 1230 (Alaska 1979) (holding that federal militry retired pay law preempts state marital property law), *cert. denied*, 101 S. Ct. 3158 (1981).

Community property is property acquired by a husband and wife during marriage, CAL. CIV. CODE § 687 (West 1970). On dissolution of the marriage the community property is basically divided equally between the spouses. *See id.* § 4800 (West Supp. 1981).

2. *See, e.g., In re* Marriage of Fithian, 10 Cal. 3d 592, 596, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371, *cert. denied*, 419 U.S. 825 (1974).

3. 101 S. Ct. 2728 (1981). Before Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), state courts had found almost no congressional hostility to the application of community property law to federal funds paid to married persons. Some federal statues even made special provision for community property law, such as I.R.C. § 66 (1980). Reppy, *Learning to Live with* Hisquierdo, 6 COMMUNITY PROP. J. 5, 7-8 (1979).

After *Hisquierdo* a few state courts began to hold that their community property laws were preempted by federal military retired pay laws. *See, e.g.*, DeDon v. DeDon, 390 So. 2d 937, 941 (La. Ct. App. 1980).

4. 101 S. Ct. at 2733-34.

California trial court, in making the property division incident to the divorce, declared the expected military retired pay to be "quasi-community property," which is treated the same as community property for marital dissolution purposes under California law.[5] The court retained jurisdiction over the case so as to be able to order distribution to Mrs. McCarty of her community interest in the retirement benefits when Colonel McCarty became eligible for them by retiring.[6] The court reasoned that because the expectation of retired pay was an interest that came into the marriage before dissolution, Mrs. McCarty had a community interest in the pay when it vested in the Colonel.

The California Court of Appeals, First District, affirmed the community property award, rejecting Colonel McCarty's contention that the federal military retirement scheme preempted state community property law. The appellate court not only noted that the California Supreme Court had rejected this same contention in *In re Marriage of Fithian*,[7] but also determined that the holding in *Fithian* had not been called into question by the later United States Supreme Court decision of *Hisquierdo v. Hisquierdo*.[8]

After the California Supreme Court denied Colonel McCarty's petition for a hearing, the appellate court's decision was appealed to the United States Supreme Court on the federal preemption question. The Supreme Court decided that the case was within its appellate jurisdiction and reversed the California appellate court, holding that under the supremacy clause the federal military retirement laws preempted California community property law, thus denying Mrs. McCarty a community interest in the military retired pay.[9]

Prior to *McCarty*, federal courts had avoided the preemption issue by taking postdivorce military retired pay out of the

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5. Under California law "quasi-community property" is "all real or personal property . . . acquired . . . [b]y either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in [California] at the time of its acquisition." CAL. CIV. CODE § 4803 (West Supp. 1981).

6. Mrs. McCarty's interest was calculated to be half of the retired pay, multiplied by a ratio equal to the number of years of her marriage to the Colonel while he was in the Army divided by the total number of years of his Army service at the anticipated time of retirement. Thus her interest came to 18/20 x 50%, or 45% of pay. 101 S. Ct. at 2733-34.

7. 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, *cert. denied*, 419 U.S. 825 (1974).

8. 439 U.S. 572 (1979). The lower court decisions in *McCarty*, though unreported, are summarized in the Supreme Court's opinion. *See* 101 S. Ct. at 2734.

9. *See* 101 S. Ct. at 2734 & n.12, 2742-43.

definition of community property.[10] However, the Supreme Court chose not to reason according to these precedents.[11] Rather, the Court saw the military retirement statutory scheme as manifesting Congress' intent that retired pay go to the retired service member without regard for the spouse's community property claims. The Court felt that the federal interest in having the retired pay go solely to the retiree substantially outweighed the state's interest in declaring the pay community property. Therefore, the Court held that federal military retirement law preempted state community property law.[12]

Justice Rehnquist dissented from the holding in an opinion joined by Justices Stewart and Brennan.[13] Justice Rehnquist noted that for all the Court's reliance on *Hisquierdo,* the Court had failed to quote or cite what he considered to be the critical language from that case: in cases in which state family law conflicts with a federal statute, the state law is to be applied unless Congress has " 'positively required by direct enactment' that state law be preempted."[14] He believed that nowhere had Congress required that state community property law be preempted by military retirement law. In his view, the most the Court could advance to support its holding were "vague implications" of preemption arising from Congress' failure to act or from enactments and legislative history having little or nothing to do with the instant case.[15] Justice Rehnquist stated that these supports were not "direct enactments" on the question of whether federal military retirement law preempted community property law. He also indicated that he was not certain whether the analysis was wrong in *Hisquierdo* or in *McCarty,* but it was clear that both

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10. *See, e.g.,* United States v. Tyler, 105 U.S. 244, 246 (1881); Costello v. United States, 587 F.2d 424, 427 (9th Cir. 1978), *cert. denied,* 442 U.S. 929 (1979). *See generally* Goldberg, *Is Armed Services Retired Pay Really Community Property?,* 48 CAL. ST. B.J. 12, 17 (1973).

Under federal law, military retired pay is defined as current compensation for current services. 101 S. Ct. at 2735-36. This definition, if accepted at face value, takes military retired pay out of the scope of community property when it is paid after divorce because the right to the pay does not arise during the marriage. *See Costello,* 587 F.2d at 427.

11. *See* 101 S. Ct. at 2736. The Court conceivably had power to declare the retired pay to be present pay for present services by identifying the important federal interest present and treating the issue as a federal question. *See* United States v. Yazell, 382 U.S. 341, 352-53 (1966).

12. 101 S. Ct. at 2743.

13. *Id.* at 2743.

14. *Id.* (quoting *Hisquierdo,* 439 U.S. at 581).

15. *Id.*

could not be correct.[16]

II. ANALYSIS

This Case Note analyzes the *McCarty* decision in light of the federal preemption doctrine and asserts that the areas of law governed by conflicting federal and state statutes largely define the manner in which general preemption standards are applied, thus ultimately determining whether preemption is required. *McCarty* was incorrectly decided because it was not in accord with other Court decisions in the same area of law.

A. The Preemption Doctrine

Federal preemption of state law is a question to be decided under the supremacy clause of the Constitution.[17] However, analysis of preemption issues consists primarily of comparing the scope of federal and state statutes to see whether the statutes interfere with each other and does not rest on interpretation of the federal constitution.[18]

The Supreme Court seems to take an ad hoc approach in analyzing preemption cases, especially in interpreting the federal statute in question.[19] However, two standards are often mentioned as tests for application of the preemption doctrine: the

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16. *Id.* at 2747.

17. City of Philadelphia v. New Jersey, 430 U.S. 141, 142 (1977); Swift & Co. v. Wickham, 382 U.S. 111, 120-21 (1965). The supremacy clause is contained in U.S. CONST. art. VI, cl. 2.

18. City of Philadelpha v. New Jersey, 430 U.S. 141, 142 (1977); Swift & Co. v. Wickham, 382 U.S. 111, 120-21 (1965).

19. *Compare* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963) *with* Perez v. Campbell, 402 U.S. 637, 644 (1971). *See also* Hirsch, *Toward a New View of Federal Preemption,* 1972 ILL. L.F. 515, 520-21; Huchinson & Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974,* 46 U. CHI. L. REV. 23, 36 (1978).

This ad hoc procedure has impeded the development of well-defined constitutional standards of preemption. Hirsch, *supra,* at 521. A Justice often has only his own notions of the proper method of statutory interpretation and of the proper roles of state and national government to guide his application of preemption doctrine. *Id.* at 536. The large number of separate opinions written by members of the Burger Court is but one example of the reality of personal judicial value preferences. *See* Wiggins, *Federalism Balancing and the Burger Court: California's Nuclear Law as a Preemption Case Study,* 13 U.C.D. L. REV. 1, 9 (1979). One reason for the inability to develop a more uniform approach to preemption issues may be that there are relatively few preemption cases covering a broad range of subject matter and few recurring fact patterns, except in isolated areas like labor law, in which there has been a relatively large volume of cases. *Id.* at 25.

extent to which federal law has "occupied the field" of law, and the presence of "conflict" between state and federal law.[20] In a case involving the "occupation" standard, the question is basically whether Congress has manifested an intent to prohibit states from regulating a given field of law.[21] The "conflict" standard appears to apply when federal and state laws require persons or institutions to act in contrary ways or when the state law interferes with the operation of a federal act.[22]

Because they are designed to apply to all possible interactions of federal and state law, the standards of occupation and conflict are necessarily general and conclusory. These characteristics prevent the standards from clearly guiding the Court in deciding, for example, how much conflict is too much or whether conflict even exists.[23] Thus, the application of these general preemption standards is subject to molding by various external in-

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20. *See, e.g.,* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Morseburg v. Balyon, 621 F.2d 972, 976 (9th Cir. 1980). *See generally* Hirsch, *supra* note 19, at 525-29. Because of the general nature of these basic standards, it is sometimes difficult to tell which standard the Court is applying. The *McCarty* Court appeared to apply a "conflict" standard. *See* 101 S. Ct. at 2741.

21. An example of such a field is oil tanker operation and design, which is governed by the Federal Ports and Waterways Safety Act, 33 U.S.C. §§ 1221-1227 (1976). Ray v. Atlantic-Richfield Co., 435 U.S. 151, 157 (1978). The subject matter of such areas of occupation will often be of a nature demanding exclusive federal legislation to promote a goal of national uniformity. Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 143-44 (1963). An implied intent to occupy the field may arise in areas in which the scheme of federal regulation is so comprehensive that it leaves little or no room for the states to supplement it. *See* San Diego Unions v. Garmon, 359 U.S. 236, 244-46 (1959). Such an intent may also be implied in areas in which the federal interest is so dominant that it is assumed to preclude state regulation on the same subject. *See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). An express statement in a statute may demonstrate Congress' intent to occupy the field, such as: "[N]o State shall adopt or enforce any rule or regulation relating to any activity regulated by this [Act]." 33 U.S.C. § 1416(d) (1976). Because every act of Congress occupies some field, a court must know the boundaries of that field before it can say that a state has been excluded from exercising control over it. Hines v. Davidowitz, 312 U.S. 52, 78-79 (1941) (Stone, J., dissenting). *See* Hirsch, *supra* note 19, at 529-30.

22. Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977). *See* Hirsch, *supra* note 19, at 526-28. An example of such conflict is the conflict between state enforcement of a contractual gas price and a federal statute allowing no rate to be charged which has not been filed with the Federal Power Commission. The state contract law is preempted to the extent that it interferes with the federal requirement to charge a filed rate. *See* Arkansas La. Gas Co. v. Hall, 101 S. Ct. 2925, 2932-33 (1981).

23. Hirsch, *supra* note 19, at 525. Hirsch gives a detailed explanation of these standards and indicates that the Court has developed several alternative phrasings of the conflict and occupation standards, *id.* at 526, but these tend to be of an evanescent nature.

fluences. One of these influences has been the Supreme Court's varying preference for upholding state or federal law, caused by the changing composition of the Court.[24] This preference creates a presumption of validity for either state or federal law in the face of possible conflict with its federal or state counterpart. The nature of the presumption can greatly influence whether conflict or occupation of the field are easily found to exist.[25] Perhaps a heavier influence on the preemption standards is the area of substantive law in which the preemption issue arises and whether the federal or state interest in that area predominates.[26] Thus, when a field such as foreign affairs is involved, it is not surprising that the federal interest is emphasized,[27] while when the area of law concerns protection of consumers,[28] the emphasis is on the state's concerns.[29] Since the substantive area of law influences interpretation of the statute, it also affects application of the preemption standards. This is because the interpretation problem inherently includes the question of the extent to which the Court must stay within the four corners of the statute to find evidence of legislative intent to preempt the state law. The stronger the state interest in the area of law, the more explicit

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24. *See* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 *passim* (1975). The Burger Court's emphasis appears to favor state law. *Id.* at 651.

25. Morseburg v. Balyon, 621 F.2d 972, 976 (9th Cir. 1980). *See* Kilberg and Heron, *The Preemption of State Law Under Erisa*, 1979 DUKE L.J. 383, 385. Occupation can require no more than the existence of a federal law generally applicable to a major portion of the subject field of law or no less than an express statement in an enactment that Congress intended to occupy the field. *See* 621 F.2d at 976. Similarly, conflict can require no more than a showing of possible interference by state law with the federal statute or no less than a conflict between the express terms of the respective enactments. *Id.* Additionally, a showing of substantial frustration of federal purposes by the state law may be required to supplement a showing of conflict or occupation before preemption will be found. Hisquierdo v. Hisquierdo, 439 U.S. 572, 583 (1979); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 137 (1973). Of course, a court will at times try to reconcile the federal and state laws to accommodate both entities' interests. *See* Goldstein v. California, 412 U.S. 546, 559 (1973); Silver v. New York Stock Exch. 373 U.S. 341, 357 (1963). Occasionally the Supreme Court has maintained that the preemption cases involve mere problems of statutory construction so that no balancing of state and federal interests is necessary. *See, e.g.*, Perez v. Campbell, 402 U.S. 637, 644 (1971). In the majority of situations, however, this description is oversimplified. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977).

26. Morseburg v. Balyon, 621 F.2d 972, 976-77 (9th Cir. 1980).

27. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 66 (1941); Morseburg v. Balyon, 621 F.2d 972, 976-77 (9th Cir. 1980).

28. *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 145 (1963).

29. Morseburg v. Balyon, 621 F.2d 972, 976-77 (9th Cir. 1980).

must be the terms in the federal statute declaring preemption of state law before the Court will find preemption.[30] Furthermore, the greater the state interest in the area of law at issue, the more likely it seems that the Court will balance the competing state and federal interests.[31]

In conducting this analysis, the Court sometimes finds that the important interest in an area of law is not concentrated on one side only. In a "conflict" type analysis, there are times when a statute covering an area of strong state interest interferes with the terms or purpose of a federal act that deals with a subject in which there is a strong national interest. In such cases, which interest to emphasize in interpreting the statute becomes a difficult question. The difficulty in a showdown between two such diverse areas of law arises in the choice of how to apply the preemption principle—whether to emphasize state or federal interests, and thus, whether to require a high or low degree of specificity of statutory language to find conflict.[32] Such a conflict of statutes governing different domains of law occurred in the *McCarty* case, in which a state family property law was held to interfere with a federal law involving Congress' power to regulate the military forces.[33]

The application of preemption standards can be influenced by another aspect of the areas of law involved. Because the Court interprets the statutes in question and then evaluates their relation to each other against a background of prior case law, the areas of law can clarify the preemption standards if there are prior cases dealing with the same areas of substantive law. To be useful, the factual patterns in precedent cases should be fairly similar to each other and to the instant case, or else the standards gleaned from the cases will remain general and of little direct help. Furthermore, the precedents will be more de-

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30. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (citing Wetmore v. Markoe, 196 U.S. 68, 77 (1904)). The state's interest is favored when the Court restricts its analysis to whether the statute's language itself indicates Congressional intent to preeempt state law because Congress rarely preempts explicitly. *See* Wiggins, *supra* note 19, at 23.

31. *See* Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (citing United States v. Yazell, 382 U.S. 341, 352 (1966)).

32. Congressional intent with regard to the status of conflicting state law is difficult to determine since in enacting laws on the federal subject, Congress may have given little or no consideration to the impact on the state area of law. *See* Hirsch, *supra* note 19, at 542. It has been suggested, however, that Congress enacts legislation against a background of the total corpus juris of the states. *See* Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966).

33. 101 S. Ct. at 2742-43.

lineating if the respective state and federal statutes at issue in them are similar to those in the instant case.

Often the Court does not have enough precedents with the above qualifications to aid it in applying the general preemption standards to the inconsistent laws before it.[34] However, in the area of federal preemption of state community property law dealt with in *McCarty*, there have been at least six Supreme Court cases that have similar factual patterns and that clarify the preemption standards in this area. The six cases are: *Hisquierdo v. Hisquierdo*,[35] *Yiatchos v. Yiatchos*,[36] *Free v. Bland*,[37] *Wissner v. Wissner*,[38] *Buchser v. Buchser*,[39] and *McCune v. Essig*.[40] These cases will be referred to collectively as the "precedent cases."

B. The Precedent Cases

The six precedent cases possess the qualifications required to give specific guidance to the Court in its application of the preemption doctrine to the facts in *McCarty*. Each precedent case involved a state community property right that conflicted with a federal benefit plan. Also, the Federal Government in each case had a strong interest in the functioning of its benefit plan and the state had an interest in seeing its community property law given effect. These six precedent cases establish the following principle: A federal law that confers benefits does not preempt a state community property law unless the right asserted under the state law conflicts with the *clear and express meaning* of the terms in the federal statute or regulation.[41]

This principle is illustrated in *Buchser v. Buchser*.[42] In *Buchser*, a homestead entryman had been given a land patent by the Federal Government. State community property law gave

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34. *See supra* note 19.
35. 439 U.S. 572 (1979).
36. 376 U.S. 306 (1964).
37. 369 U.S. 663 (1962).
38. 338 U.S. 655 (1950).
39. 231 U.S. 157 (1913).
40. 199 U.S. 382 (1905).
41. The Court in these cases, after examining the statutes in question, made statements to the effect that the meaning of the statutes was clear. *E.g.*, Free v. Bland, 369 U.S. at 668 (construing 31 U.S.C. § 757c(a) (1976), 31 C.F.R. § 315.70 (1981)); *Wissner*, 338 U.S. at 658 (construing the National Service Life Insurance Act, ch. 757, § 602(g), 54 Stat. 1010 (1940) (current version at 38 U.S.C. § 717(a) (1976))); McCune v. Essig, 199 U.S. at 389 (construing the Homestead Act, ch. 75, § 2, 12 Stat. 392 (1862)).
42. 231 U.S. 157 (1913).

the wife an interest in the property. When the wife died, under state community property law her interest in the property descended to her children. The federal statute, on the other hand, seemed to indicate that title had vested solely in the husband. The United States Supreme Court, in resolving the conflict, held that the state law was not preempted by the federal law, and thus state law would control the disposition of the property. In reaching this conclusion, the Court noted that the terms of the federal homestead law did not cover the disposition of the property once the United States had parted with title to it. The Court stated, "If the United States could impress a peculiar character upon land within a state after parting with all title to it, at least the clearest expression would be necessary before such a result could be reached. . . . But it has not tried to do anything of the sort."[43] From this language it appears that the Court was unwilling to go beyond the statute's language in search of an expression that federal law regulated the disposition of the homesteaded land after the entryman had received a patent. Rather, the Court insisted that a clear expression to that effect must be found in the federal statute itself in order to preempt the state law.

Hisquierdo v. Hisquierdo[44] also set forth this principle of preemption when state community property law conflicts with federal law.[45] In that case the California Supreme Court, in a divorce proceeding, awarded the wife of a retired railroad worker a community share of her husband's expected Railroad Retirement Act[46] benefits. The United States Supreme Court reversed, stating that critical language in the Act made it clear that the

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43. *Id.* at 161.

44. 439 U.S. 572 (1979).

45. In stating the preemption principle (*see infra* note 49 and accompanying text) the Court cited United States v. Yazell, 382 U.S. 341 (1966), and Wetmore v. Markoe, 196 U.S. 68 (1904), which were cases dealing with family property rights other than community rights. These citations would seem to make the specific principle announced by the *Hisquierdo* Court applicable not only when the state right that is alleged to conflict with federal law relates to community property, but also when division of any other marital property is in issue. The vacating of *In re* Marriage of Miller, 609 P.2d 1185 (Mont. 1980), *vacated sub nom.* Miller v. Miller, 101 S. Ct. 3152 (1982), on the same day that *McCarty* was decided would support this conclusion, since *Miller* involved the award of marital rights in noncommunity property to the retiree's spouse, and *McCarty* was cited as controlling.

46. Railroad Retirement Act of 1974, Pub. L. No. 93-445,88 Stat. 1305 (1974) (current version at 45 U.S.C. § 231 (Supp. III 1979)). One of the sections of the Act awards a separate annuity to the nonworker spouse, which annuity ends on divorce. *Id.* § 231d(c)(3).

retirement benefits were not subject to community division; so the state law was preempted. The statute read:

> Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.[47]

The Court saw the statute as clear and in line with the precedents of *McCune, Wissner, Free,* and *Yiatchos* when it held that the terms of the statute "make no exception for a spouse" to have a right in the pension other than any right provided in the Act.[48] The Court synthesized the test for preemption in this area of law: "The pertinent questions are whether the [state community property] right as asserted conflicts with the *express* terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition."[49]

This test is in accordance with the other precedent cases; each of them also required a high degree of specificity and clarity in the language of the federal statute before finding a conflict that resulted in preemption. The reason for requiring a high level of explicitness was due mainly to the areas of law of the subject statutes.[50] The Supreme Court in *United States v. Yazell*[51] declared that when areas of family property law and federal benefits law converge, then in the absence of specific congressional action it should not be found that the federal interest overrides state family and property laws. There is a "solicitude" for state law in the area of family property.[52] The state

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47. *Id.* § 231m.

48. 439 U.S. at 586.

49. *Id.* at 583 (emphasis added). In *Hisquierdo* the test was initially explained:

> On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be preempted. Wetmore v. Markoe, 196 U.S. 68, 77 . . . (1904). A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden. United States v. Yazell, 382 U.S. 341, 352 . . . (1966).

439 U.S. at 581.

50. *Id.*

51. United States v. Yazell, 382 U.S. 341, 352 (1966).

52. *Id. See also In re* Burrus, 136 U.S. 586, 593-94 (1890).

law covers important state interests that the test doubly protects by requiring conflict with the express terms of the federal statute and substantial harm to federal interests before the state law will be preempted. Thus, the policy behind the preemption test is the desire to protect important state interests.[53]

C. *Application of the Preemption Test to McCarty*

The *McCarty* Court seemed to apply a "conflict" analysis to the facts before it.[54] At the beginning of the rationale portion of its opinion, the Court quoted the narrow preemption standard that *Hisquierdo* had synthesized in light of precedent and area of law.[55] The Court stated that "[t]he pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition."[56]

After finding conflict, the Court weighed the interests involved and found that the state law did sufficiently injure the federal program to meet the second part of the preemption test. Although there is no quarrel with this finding of sufficient injury,[57] the Court never should have reached the second part of the test because the federal military retired pay statutes did not have express terms with which the state community property law conflicted.[58]

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53. In other areas of substantive law the policy of protecting important state interests has led the Supreme Court to require Congress to explicitly set forth its intent in its statutes. In the area of the state's eleventh amendment sovereign immunity right, this requirement is known as the clear statement doctrine. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976). The theory behind the requirement is that by refusing to construe uncertain statutes expansively, the Court can prevent Congress from skirting tough federal-state relations issues, increasing the likelihood that Congress will give attention to state interests. In form the doctrine is a rule of statutory construction. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 304-05 (1978).

54. *See* 101 S. Ct. at 2735, 2741.

55. Justice Blackmun wrote the opinions in both *McCarty* and *Hisquierdo*. The dissent in *Hisquierdo* was written by Justice Stewart and joined by Justice Rehnquist. *See* 439 U.S. at 591. In *McCarty* Justice Rehnquist was joined by Justices Stewart and Brennan in dissent. *See* 101 S. Ct. at 2743.

56. 101 S. Ct. 2735 (quoting *Hisquierdo*, 439 U.S. at 583).

57. The Court found the objectives of the military retirement pay system to be (1) to provide for the retiree's welfare, (2) to encourage service members to retire before they became too old to endure efficiently the rigors of war, and (3) to act as a recruiting and reenlistment incentive. *See* 101 S. Ct. at 2742. These objectives were seen as important to the national defense. Community property claims would thus imperil the national defense by removing some of the retired pay system's ability to meet these objectives.

58. Both parts of the test must be met before preemption can be found. *See* 101 S. Ct. at 2741. The purpose of the two-step test is to provide added protection for impor-

The Court's process of finding a conflict was not in compliance with the first part of the specific preemption test cited by the Court. The conflict found by the Court could be phrased this way: (1) the terms of the federal statutes direct that military retired pay go directly to the retiree without being subject to divestment; (2) therefore, an award by California of a community interest in the pay to the retiree spouse interferes with the federal law by divesting the retiree of the pay. However, the Court was not able to arrive at this interpretation of the federal law from the express language contained in the statutes. Instead, the Court determined this alleged purpose of the retired pay law through a process of examining legislative history and of induction and inference.

1. *The first analytical step in* McCarty

The Court found the language of the Army pay law to be forthright: "A member of the Army retired under this chapter is entitled to retired pay."[59] This enactment was compared to a provision in the Railroad Retirement Act that entitled the retired worker's spouse to an annuity that ended on divorce.[60] The Court observed that unlike the Railroad Act, relied on in *Hisquierdo,* the military retirement system "does not embody even a limited 'community property concept.' "[61] Legislative history in the form of a Senate Report was then quoted, which stated that military retired pay "has been a personal entitlement payable to the retired member himself so long as he lives."[62]

The language of the Army retirement law does not rise to the level of expressness found in the statutes and regulations considered in the precedent cases. In the precedent cases, the statutes and regulations supporting the Court's finding of pre-

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tant state interests in family property law. If a state interest is not deemed to be particularly important, a mere conflict in terms between the federal and state statutes without any weighing of interests may be sufficient to find preemption. *See* Perez v. Campbell, 402 U.S. 637, 644 (1971); Morseburg v. Balyon, 621 F.2d 972, 976 (9th Cir. 1980). In *McCarty* the Court stated that a showing of conflict was not enough to find preemption without a showing of substantial harm to federal interests. 101 S. Ct. at 2741. It seems reasonable, therefore, to conclude that the inverse is also true: a showing of harm to federal interests would not be enough to support a preemption finding without a showing of conflict in the terms of the state and federal laws.

59. 101 S. Ct. at 2736-37 (construing 10 U.S.C. § 3929 (1976)).

60. The provision is codified at 45 U.S.C. § 231d(c)(3) (Supp. III 1979).

61. 101 S. Ct. at 2737.

62. 101 S. Ct. at 2737 (quoting S. REP. No. 1480, 90th Cong., 2d Sess. 6, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 3294, 3300).

emption explicitly provided that the recipient of the federal benefits was the sole owner and that no one under state law could take the benefits from the beneficiary by legal process or other means.[63] Consequently, regardless of whether a spouse in the prior cases claimed a community interest in the benefits as an absolute owner or a creditor, his or her claim was precluded by the express language of the law at hand. The same cannot be said for the military retired pay language stating that the retiree is "entitled to retired pay."[64] This language contains neither terms designating sole ownership nor terms exempting the pay from state processes. To reason that the military retirement statutes did not contain even a limited community property concept, as did the Railroad Retirement Act, and therefore that no community right could be enforced against military retired pay is to negatively infer that because there is no express provision for a private community property right in the statute, Congress intended not to recognize the right.[65] While negative inference may be gaining acceptability in some areas of law as a means of statutory interpretation,[66] it does not meet the test in this area that the state right must conflict with the express terms of the federal law in order to be preempted.

Also, the Court's use of legislative history as a means of statutory interpretation in an area of law that requires express statutory language does not meet the preemption test.[67] The

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63. For example, in Wissner v. Wissner, 338 U.S. 655 (1960), a section of the relevant federal law stated that the policyholder of National Service Life Insurance "shall have the right to designate the beneficiary . . . of the insurance . . . and shall . . . at all times have the right to change the beneficiary." National Service Life Insurance Act, ch. 757, § 602(g), 54 Stat. 1010 (1940)(current version at 38 U.S.C. § 717(a) (1976)). Another section provided that the payments to the named beneficiary "shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." *Id.*, Ch. 510, § 3, 49 Stat. 609 (1934), made part of the Act by ch. 757, § 616, 54 Stat. 1014 (1940)(current version at 38 U.S.C. § 3101(a) (1976)). The Court in the *Wissner* case held that Congress had spoken with "force and clarity in directing that the proceeds belong to the named beneficiary and no other." 338 U.S. at 658-59.

64. 10 U.S.C. § 3929 (1976).

65. The process of negative inference (written "negative implication" by some writers) is to presume from the congressional failure to recognize an express private right, such as a community property right, an unwillingness to recognize one. It is usually coupled with the citing of legislative history regarding circumstantial factors to support the court's finding. *See* Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. CIN. L. REV. 1, 3 (1978).

66. *See, e.g.*, Piper v. Chriscraft Indus., Inc., 430 U.S. 1, 37 (1977); Cort v. Ash, 422 U.S. 66, 78 (1975). *See generally* Pillai, *supra* note 65, at 13-19.

67. The Constitution does not require the Court to give the same deference to state-

narrow preemption test was designed to protect critical state interests,[68] and under the test, reliance on legislative history is misplaced because it does not constitute that which Congress has provided by "direct enactment."[69] Consequently, relying on legislative history does not protect the state interests involved.

2. *The second analytical step in* McCarty

The Court looked next to a retired pay provision which explicitly provided that retired service members could designate a beneficiary to receive any arrearages in retired pay that remained unpaid on the retiree's death.[70] The statute also banned recovery by any other person of the arrearages so paid.[71] The Court compared this provision with the provision in *Wissner* which allowed a member of the armed services to designate a beneficiary of his National Service Life Insurance.[72] In that case the express language of the statute was held to bar payment of the insurance proceeds as community property to anyone who was not the named beneficiary.[73] The *McCarty* Court reasoned that just as the statute in *Wissner* exempted the insurance proceeds from community property laws, so also the arrearages statute exempted arrearages. The Court then went on to conclude that since the arrearages statute exempted arrearages, it must also exempt military retired pay as a whole. This final step was made by reasoning that "if retired pay were community property, the retiree could not thus summarily deprive his wife of her interest in the arrearage."[74]

In this analysis the Court did not cite any express language from the statute to show that a conflict existed between an interest in retired pay as a whole and a community property right. The express statutory language applied only to arrearages, which

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ments in legislative history as to statements embodied in congressional enactments. *See* Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A. J. 535, 538 (1948). It is a poor cause that cannot find some support in legislative history, which often includes tentative views of legislators or is deliberately vague lest more definite statements endanger the law's chance of passage. *Id.*

68. U.S. v. Yazell, 382 U.S. 341, 352 (1966).

69. *See Hisquierdo*, 439 U.S. at 581.

70. *See* 101 S. Ct. at 2737. The provision referred to is codified at 10 U.S.C. § 2771 (1976).

71. *See* 10 U.S.C. § 2771 (1976).

72. *See Wissner*, 338 U.S. at 658.

73. *See id.*

74. 101 S. Ct. at 2737-38.

generally are only a small fraction of the retired pay. So instead of being able to look at the express statutory language and draw a direct conclusion as to the statute's meaning, the Court had to make a dubious[75] extra step of induction[76] and apply the arrearages statute to the whole amount of retired pay. Based on this inductive reasoning and not on the express language of any statute, the Court concluded that retired pay was to go only to the retiree to the exclusion of any community proterty claims. This process differs from the analysis in *Wissner*. In *Wissner* the Court found preemption of the state law from the express language of statutes that exempted the whole amount of insurance proceeds in question from any state legal processes.

3. *The third analytical step in* McCarty

In its third analytical step the Court looked to the language and legislative history of the two survivor benefit plans under the military retired pay law.[77] These plans allow the retiree to contribute part of his retired pay to a plan that provides an annuity after his death for a surviving spouse or children. An ex-spouse cannot receive annuities under either plan.[78] The Court found that the statutory language and practical application of these plans made it clear that the decision of whether to leave part of the retired pay to a survivor belonged solely to the retired service member. There was also language in one of the plans[79] and some legislative history[80] that stated that the retiree

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75. The Court's reasoning is based on the underlying assumption that the Court's only alternative to holding that no military retired pay is subject to state community property law is to hold that all military retired pay, including arrearages, is subject to community property law. This assumption is not correct; the Court could have held that all retired pay is subject to community property law *except* when Congress expressly provides otherwise. This holding would allow the retiree to deprive his wife of her community interest in the arrearages, in keeping with Congress' express intention, yet still allow the community property law to apply to other areas of military retired pay.

76. "Induction" is used in this context in the same way it is used in "mathematical induction." It is a method of proving that a property is true for a whole set of numbers (a whole set of statutes in this case) because it is true for one of them.

77. *See* 101 S. Ct. at 2738-39. The survivor benefits plans are set out in 10 U.S.C. §§ 1434-1446, 1447-1455 (1976 & Supp. IV 1980).

78. *See* 10 U.S.C. §§ 1434(c), 1447(3), & 1450(a) (1976 & Supp. IV 1980). Sections 1447(3) and 1450(a), covering the more modern survivor benefit plan, are not as explicit on this point as is § 1434(c), which covers the older "retired serviceman's family protection plan."

79. "[A retired service member] may elect to receive a reduced amount of the retired pay or retainer pay *to which he may become entitled* as a result of service in his armed force." 101 S. Ct. at 2728 n.19 (quoting 10 U.S.C. § 1431(b) (Supp. IV 1980))

was to receive the rights in the retired pay and that the decision whether to leave part of it as an annuity was ultimately the retiree's. The Court felt this showed that the rights in the retired pay accrued to the retiree without present or future exceptions, making community property law inconsistent with Congress' intent.

The Court's analysis here mirrored its analysis of the arrearages statute: the application of a statute covering only a portion of the retired pay to the entire amount of the pay.[81] Thus, a questionable step of induction was again required to extend the express language of the statute to the whole amount of retired pay.[82] The rest of the language on which the Court relied was in a House Report and not in a statute. In the precedent cases, the express language of the statutes themselves was sufficient to support a finding of conflict and preemption without resort to legislative history. In the one precedent case in which the express language of the subject statute was not sufficient to support a finding of conflict, the Court did not go to legislative history surrounding the statute to see whether Congress intended to preempt community property law.[83] Instead, the Court relied on the express language of the statute, and because it could find no conflict as a result of that reliance, it found that the statute did not preempt the state law.[84] Legislative history does not satisfy the expression of Congress' intent required by the first part of the preemption test.

(emphasis added by the Court).

80. "The rights in retirement pay accrue to the retiree and, ultimately, the decision is his as to whether or not to leave part [of it] as an annuity to his survivors." H.R. REP. No. 481, 92d Cong., 1st Sess. 9 (1971).

81. *See supra* notes 72-74 and accompanying text.

82. However, the amount contributed to the survivor benefit plans would seem to be generally a greater fraction of the retirement pay than the amount of arrearages. This fact concededly makes the step of induction more sound by relating a larger part of the retired pay to the whole amount.

83. *See* Buchser v. Buchser, 231 U.S. 157 (1913). Although there was legislative history directly supporting the Court's finding that, under the Homestead Act of 1862, the homesteaded land was subject to execution under the laws of the states the moment title was vested in the entryman, *see, e.g.*, CONG. GLOBE, 36th Cong., 1st Sess. 1534-35 (1860) (remarks of Sens. Pugh and Green concerning H.R. 280, 36th Cong., 1st Sess. (1860), a homestead bill with descent provisions identical to the Homestead Act of 1862), the Court did not go to the legislative history to interpret the statute.

84. *See* Buchser v. Buchser, 231 U.S. 157, 161 (1913).

4. The fourth analytical step in McCarty

The Court stated that it was clear from other statutes and history that military retired pay was to "actually reach the beneficiary."[85] In enacting the more modern survivor benefit plan,[86] Congress had rejected a provision that would have in part allowed attachment of military retired pay to comply with a court order in favor of a spouse or former spouse.[87] Later, however, Congress made all federal benefits, including those owed to members of the armed forces, subject to legal process to enforce alimony and child support payment.[88] But, not long after this, Congress provided that "alimony" does not include community property obligations.[89] The Court concluded, as was "noted in *Hisquierdo*,"[90] that Congress, in defining alimony, thought a family's need for support could justify garnishment, though it deflected the pay from the retiree. However, the Court reasoned that community property claims, which are not based on need, could not justify garnishment.[91] The Court also thought it significant that, while Congress had expressly made civil service retirement benefits subject to community property division by a state court[92] and establishing a limited federal community property concept in foreign service retired pay,[93] none of the similar legislation relating to military retired pay was reported out of committee.[94]

Once again, there is nothing in the way of express language provided by "direct enactment" to support the Court's decision, but rather only the negative implications of what Congress did not do. Even the statutes removing community property from

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85. 101 S. Ct. at 2739.

86. Codified at 10 U.S.C. §§ 1447-1455 (1976 & Supp. IV 1980).

87. 101 S. Ct. at 2739; *see* H.R. 10,670, 92nd Cong., 1st Sess., 118 CONG. REC. 30,148 (1972).

88. 101 S. Ct. at 2740. The legislation assuredly applies to military retired pay. *See* 5 C.F.R. § 581.103 (1981).

89. *See* 42 U.S.C. § 662(c) (Supp. III 1979).

90. 101 S. Ct. at 2740.

91. *See id.* (citing *Hisquierdo*, 439 U.S. at 587). The Court noted this argument even though it had pointed out the importance of the community interest in *Hisquierdo*. *See* 439 U.S. at 581.

92. 101 S. Ct. at 2740 (noting 5 U.S.C. § 8345(j)(1) (Supp. III 1979)).

93. *Id.* (noting 22 U.S.C.A. § 4046(b) (West Supp. 1981)).

94. *See* 101 S. Ct. at 2740 (discussing H.R. 2817, 96th Cong., 1st Sess. (1979)). For an example of similar military retirement legislation introduced in the Ninety-Seventh Congress, which would overrule the result in *McCarty*, see S. 1772, 97th Cong., 1st Sess. (1981), and H.R. 3039, 97th Cong., 1st Sess. (1981).

the definition of alimony, though impressive, cannot be said to expressly state anything other than the fact that retired pay can be attached to enforce some alimony obligations.[95] An additional step from reading and interpreting the statute's language is required to negatively imply that the statute forbids the spouse from obtaining a community interest.[96] Nor does this statute state that military retired pay is not subject to any legal process whatsoever by the state. The most that can be said for the express language of the statute is that by it the United States has waived immunity to being impleaded in garnishment actions for alimony, but it has not waived immunity to being impleaded in actions for community property. The anticommunity property provision appears to be for the government's convenience by limiting its being haled into court for a community property claim under the alimony provision. It does not mean that a community interest in the pay cannot be awarded to the nonmember spouse by means other than garnishment directly from the federal government.

D. An Attempt to Reconcile McCarty *with the Precedent Cases*

Several factors may have impelled the Court to depart from the first part of the *Hisquierdo* test by allowing a conflict to be found from less than express demonstrations of Congress' intent. First, some states had been applying their marital property laws to military retired pay in a potentially abusive fashion. The

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95. The rationale used in *McCarty*, 101 S. Ct. at 2710, and *Hisquierdo*, 439 U.S. at 587, was that because Congress has allowed retired benefits to be subject to alimony orders and has removed community property from the definition of alimony, retired pay is not subject to a community property division.

The relevant wording of the statute reads, "[T]he United States . . . shall be subject . . . to the same extent as if [it] were a private person, to legal process brought for the enforcement, against [a federal retiree's retired pay] to . . . make alimony payments." 42 U.S.C. § 659(a) (Supp. III 1979). The statute excluding community property claims from alimony reads in relevant part, " 'alimony' . . . does not include any payment . . . of property . . . by an individual to his spouse or former spouse in compliance with any community property settlement." *Id.* § 662(c).

96. Congress expressly provided that military retired pay is subject to garnishment to meet alimony obligations. Congress has not expressly provided that military retired pay is subject to community property claims. It has only stated that community property is not within the definition of alimony. This is separate from the concept that retired pay cannot be subject to a community property claim at all. Therefore, the Court has negatively inferred that because Congress has failed to state that military retired pay is subject to community property rights, there is no community property right in the pay. *See* 101 S. Ct. at 2748 (Rehnquist, J., dissenting).

Court cited *In re Marriage of Miller*[97] as an example, stating that the Montana courts had "gone so far as to hold that the heirs of the ex-spouse may even inherit her interest in military retired pay."[98] The Court also had its attention drawn to *In re Marriage of Luciano*,[99] in which a California appellate court held that the non-service-member ex-spouse could start receiving her estimated community share of retirement pay as soon as the service member became eligible for retirement regardless of whether the member had retired or not, because it was "unfair" not to allow it.[100] This resulted in the service member having to pay part of his active duty military pay to the ex-spouse in compliance with the community property order, even though the active duty pay was not community property when received for service after the divorce.

Next, the Court may have considered the federal interest involved to be so dominating that it was not congruent with the interest presented in the precedent cases. The military retirement system is an important tool for managing the manpower in the nation's armed forces.[101] The Court was unwilling to interfere unnecessarily with the scheme. It stated: "[W]e very recently have reemphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs."[102] After viewing this important federal interest, the Court may have noted that even though the state has an important interest in family property rights, the community property right is a subcategory of family property law that does not have as much importance attached to it as family property laws in general.[103] This is because community property rights are not based on need. On the other hand, family property rights such as child support and alimony *are* based on need, and to deprive a person of them may take away the person's sustenance and force the person to require public assistance.[104] This conclu-

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97. 609 P.2d 1185 (Mont. 1980), *vacated sub nom.* Miller v. Miller, 101 S. Ct. 3152 (1981).

98. *McCarty*, 101 S. Ct. at 2741-42.

99. 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980). The case was cited in Appellant's Reply Brief at 5, McCarty v. McCarty, 101 S. Ct. 2728 (1981).

100. *See* 104 Cal. App. 3d at 960, 164 Cal. Rptr. at 95.

101. 101 S. Ct. at 2742.

102. *Id.* at 2743 (citing Rostker v. Goldberg, 101 S. Ct. 2646, 2651 (1981)).

103. This feature of community property was also mentioned in *Hisquierdo*, 439 U.S. at 507, and *Wissner*, 338 U.S. at 660.

104. *See Hisquierdo*, 439 U.S. at 507; *Wissner*, 338 U.S. at 660.

sion with respect to community property rights is further supported by the fact that in all but one of the precedent cases it was the community property law, not the federal law, that fell to the preemption analysis.[105] Thus, the dominant federal military interest compared with the relatively weak state community property interest may have caused the Court to pay little attention to the test's requirement of explicit preemption.

The final factor contributing to the Court's decision may have been the substantial, though not conclusive, volume of circumstantial legislative history that the Court was able to find logically supporting its conclusion. Though this history did not meet the principle of explicitness set forth in the *Hisquierdo* test, the Court apparently viewed it to be sufficient evidence of Congress' intent to provide retired pay only to the retiree. Thus, the spirit, if not the letter, of the articulated test was met.

Despite these possible explanations for the Court's decision, this Case Note has advocated a contrary decision. It may be objected that this Case Note encourages an unduly rigid application of the preemption test, but there is a need for rigid application. The test is based in the policy recognized by the Supreme Court that the states have an important interest in protecting their control of family property laws. Rigid application is necessary to ensure that the states maintain control of this area of the law. Requiring that Congress expressly indicate that state community property law be overridden before the state law will be found to have been preempted by federal law resolves doubts as to Congress' intent to preempt in favor of state law. The Court applied the test in a strict manner in the precedent cases and should have made a similar application in *McCarty*.[106]

III. Conclusion

The application of the federal preemption doctrine is largely influenced by the areas of substantive law in which the

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105. Only in Buchser v. Buchser, 231 U.S. 157 (1913), was the state community property law upheld.

106. State courts may be able to circumvent *McCarty* by awarding the non-service-member spouse an immediate lump sum from existing community assets in lieu of future division of the retired pay itself. The lump-sum award would be based on the present value of the spouse's expected interest in the pay. *See, e.g.*, Ramsey v. Ramsey, 96 Idaho 672, 679, 535 P.2d 53, 60 (1975). *McCarty* did not address this issue. *But see Hisquierdo*, 439 U.S. at 588 (holding that such a lump-sum award is improper in the case of railroad retirement benefits).

preemption issue occurs. When state community and other family property laws have been in apparent conflict with a law pronouncing federal benefits or payments, the test of preemption has been that the state law will not be preempted unless (1) the right under state law conflicts with the express terms of the federal law and (2) the state law sufficiently injures the objectives of the federal program to require nonrecognition of the state law. This test should be applied even when the involved federal law ministers in an area of traditional federal interest, such as military affairs. The *McCarty* Court, though it quoted this test, did not follow the test's first prong in holding that federal military retirement laws preempted state community property laws and thus denied a non-service-member spouse a community interest in the other spouse's military retired pay. Rather, the Court reached its holding not by relying on the express language of the federal military retirement statutes, but by relying on interpretations of those statutes based on inference, induction, and statements in legislative history. The result was not in accordance with the preemption test.

Samuel D. McVey