COMMUNITY AND SEPARATE INTERESTS IN PENSIONS AND SOCIAL SECURITY BENEFITS AFTER MARRIAGE OF BROWN AND ERISA

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INTRODUCTION

In a 1941 case, French v. French,¹ the Supreme Court of California reversed a judgment that held a husband's future retirement pay under a federal naval reserve pension program to be community property divisible between husband (H) and wife (W) at the dissolution of their marriage. By the terms of the pension program the husband would "not be entitled to such pay"² until he had served additional years in the fleet reserve. Accordingly, the court said that the husband's right to retirement pay at the time of divorce "is an expectancy which is not subject to division as community property."³

French introduced into California divorce law the rule that a married employee's rights in a pension plan were not community

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² Id. at 778, 112 P.2d at 236.

³ Id. at 778, 112 P.2d at 237. The trial court had divided the retirement pay equally between H and W. Id. at 776, 112 P.2d at 236. Even if there had been some community interest in the retirement-benefit program, the division was erroneous. Post-divorce labor—we would now look to post-separation labor due to the 1971 amendment to CAL. CIV. CODE §§ 5118-5119 (West Supp. 1977)—by H or contribution of separate funds necessary to qualify H for receipt of any benefits builds up an interest not shared by the divorced W; only contributions of labor or community funds during the dissolved marriage create a community interest. At the time of French, the court would make an unequal division of the property to benefit the "innocent" party. In re Marriage of Juick, 21 Cal. App. 3d 421, 98 Cal. Rptr. 324 (2d Dist. 1971); former CAL. CIV. CODE § 146, as amended by 1873-74 Cal. Stats. ch. 612, repealed 1969 Cal. Stats. ch. 1609 (effective 1970); Comment, The End of Innocence: Elimination of Fault in California Divorce Law, 17 UCLA L. REV. 1306, 1309 (1970). Nevertheless, 50% of all future retirement paychecks received by H might, given the substantial separate labor input to the pension in French, have exceeded the value of all community property existing at divorce and subject to unequal division, so that the trial court order in French probably invaded H's separate property. California, unlike some other community property states such as Texas and Washington, see W. Reppy & W. de Funia, COMMUNITY PROPERTY IN THE UNITED STATES 465 n.1 (1975) [hereinafter cited as Reppy & de Funia],

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property if such rights had not vested at the date of divorce. Rights were nonvested under the French rule if, under the pension plan, the employee’s death or termination at the time of the divorce would eliminate his rights in the program due to failure to meet the condition precedent of working a specified time for the employer. However, post-French cases established that conditions to enjoyment of benefits other than working for the specified period or earning the specified credits (for example, the participant’s survival to a specified age) were not conditions precedent to vesting but conditions subsequent. While occurrence of a condition subsequent could result in divestiture of proprietary rights, the presence of such a condition in a pension plan did not prevent earlier vesting of community property interests in the plan. Likewise, provisions stating that benefits would not be paid to employees who entered into businesses competing with the employer operating the pension plan, or who disclosed the employer’s trade secrets, would be treated as conditions subsequent.

prohibits an award at divorce of any of one spouse’s separate property to the other. Thus, it should be clear that the reversal of the trial judge in French was correct. It was the court’s instructions to the judge on remand that were erroneous.


5. See, e.g., In re Marriage of Martin, 50 Cal. App. 3d 581, 123 Cal. Rptr. 634 (3d Dist. 1975); In re Marriage of Ward, 50 Cal. App. 3d 150, 123 Cal. Rptr. 234 (1st Dist. 1975); In re Marriage of Brueg, 47 Cal. App. 3d 201, 120 Cal. Rptr. 597 (4th Dist. 1975); Bensing v. Bensing, 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1st Dist. 1972); Thiede, supra note 4, at 653. These cases were all overruled in In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). With respect to the extent to which the federal Employee Retirement Income Security Act (ERISA) now prohibits such conditions, see note 26; text accompanying note 325 infra.


In re Marriage of Brown, decided in 1976, overruled French. Brown holds that any contractual rights of the employed spouse to participate in a pension program are community property if earned during marriage by labor or community property contributions. Moreover, a requirement that the participant continue to render services after the divorce in order to receive benefits is no longer to be treated as a condition precedent to community ownership of proprietary rights. Like conditions of survival to a fixed age or conditions against revealing trade secrets under pre-Brown law, a condition of continued service is now, in effect, a condition subsequent. The termination of employment before the minimum period will forfeit the proprietary rights previously earned. Thus, while such a condition is quite significant in assessing the value of the community's interests in the pension program, Brown holds that it does not preclude the existence of such community rights.

This Article investigates the extent to which, after Brown, various types of pension and retirement plan rights generated by a married person's employment or by contributions from community funds can and should be treated as community property. The problem of classifying property as separate or community can arise in the contexts of divorce, death of the participant or nonparticipant.


Louisiana's response to Brown is uncertain. Some decisions appear to give the community an interest in contingent contract rights. See Due v. Due, 342 So. 2d 161 (La. 1977); T.L. James & Co. v. Montgomery, 332 So. 2d 834, 851 n.2 (La. 1976); Messersmith v. Messersmith, 229 La. 495, 86 So. 2d 169 (1956). The Due case is analyzed in Note, 37 La. L. Rev. 1190 (1977).


9. ERISA, with which most nongovernmental pensions must comply, limits the possibility of such forfeits in some cases. See notes 14, 26 infra.

10. Community property existing at divorce must usually be divided equally between the spouses. CAL. CIV. CODE § 4800(a) (West Supp. 1977); but see id. § 4800(b)(3).

11. The survivor has the right to retain ownership of half the community property free of testamentary or other disposition made by the decedent. CAL. PROB. CODE § 201 (West 1956).
spouse, and determinations of the validity of management and control decisions during the marriage. The legal problems involved in each of these situations may also differ depending on whether the pension or retirement program is the creation of Congress, the state, or a private employer.

This Article will discuss four areas relating to community property interests in retirement benefits and similar payments of funds in California after the Brown decision. The first inquiry is whether Brown requires an enforceable contract right for a finding of community interest in what the pre-Brown cases called "nonvested" pension or retirement benefits. The effect of the pension operator's reservation of the right to terminate the benefit plan will be considered, as will the effect of the "wholly noncontractual" nature of the Social Security Act. My conclusion with respect to revocable private retirement plan contracts is that the employer's power of termination usually will not eliminate all contractually based property rights that can be community owned. Social Security Act benefits involve rights which are not expressly contractual, but can be earned by a married person's labors. These can also be treated as community property rights, classifiable as "earned expectations."

The second inquiry is whether the "terminable interest" rule remains viable after Brown. Under this judicially created rule the nonemployee spouse's interest in pension benefits does not extend to benefits payable after either his or her own death or the death of the employee spouse. I conclude that the Brown opinion repudiates one of the rule's two theoretical bases. Its second basis is likely to be re-examined soon and the rule itself either rejected or narrowed by the state supreme court.

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12. The nonparticipant spouse is entitled to bequest to the legatee of her choice her half of the community property. Id.

13. California generally follows, with respect to contract liability, the "managerial system" of creditors' rights under which, since either H or W has control of the community property, Cal. Civ. Code §§ 5125, 5127 (West Supp. 1977), the creditor of either spouse can reach the community property. See Cal. Civ. Code § 5116 (West Supp. 1977). Within the realm of management and control decisions are cases involving the satisfaction of creditors' claims incurred by either spouse in carrying on management functions. In terms of management decisions relating to pension laws, any controlling anti-assignment or "spendthrift" statutes applicable to the funds paid or anticipated would of course be relevant to the determination of creditors' rights.


15. See text accompanying notes 46-52 infra.
The third inquiry is the extent to which federal law preempts recent California law favoring the finding of community interests in retirement benefits. I conclude that California community property law is in harmony with almost all federal provisions suggested as preemptive. However, a few provisions of the Social Security Act and of the Employee Retirement Income Security Act of 1974 (ERISA) are in direct conflict with rules of California law that restrict a spouse's power to make gifts of community property without consent and that grant a spouse testamentary power over half the community property. The Article considers whether the federal attempt to displace state law is unconstitutional. At least, substantial doubts exist concerning the constitutionality of the federal provisions, especially ERISA.

The final portion of the Article focuses on serious problems attendant to fashioning an appropriate remedy if a community interest in Social Security Act and related benefits is to be recognized. One problem is apportionment between the community and separate interests when an employee gains part of his qualification for insured status while married to his present wife and part while not married to her. The problem of apportionment becomes more complex when the issue arises at divorce and the employee is likely to continue work that qualifies him for insured status. A rough justice approach that gives each calendar quarter equal weight in obtaining insured status is one solution; a reimbursement based on Federal Insurance Contributions Act (FICA) taxes (popularly known as social security taxes) paid is another. Any other approach to the valuation problem becomes highly complex and unrealistic due to the variables such as possible congressional change in the level of benefits, uncertainty as to what family members of the insured employee will in the future qualify as derivative beneficiaries, and uncertainty as to how the employee's post-divorce work experience will affect the amount of benefits payable.

I. Applicability of Brown to Pension Plans Subject to Being Terminated by the Employer

The essence of the Brown holding was that contractual rights earned during marriage could not be defeated by the employer's decision to cancel the pension program. While the Brown opinion is unclear as to whether the employer, General Telephone, and the employee husband, H, had a formal contract in which H was promised participation in the pension program, it is stated that

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16. California Civil Code § 5125(b) (West Supp. 1977), as amended by 1977 Cal. Stats. ch. 692, § 1 (adding a written consent requirement) provides: "A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideraton, without the written consent of the other spouse."

17. See notes 11, 12 supra.
during H's employment, General Telephone maintained a noncontributory pension plan and had made it clear that employees such as H were covered. Under the plan, the employee earned "points" over time. Upon obtaining a certain total of points, some pension rights became nonforfeitable even if the employee quit his job. It can be assumed that General Telephone did not reserve in any pension plan documents the right to terminate the program at any time and for any reason. Thus, the court was able to hold that the employee, although not having gained enough "points" to quit and still retain nonforfeitable rights, did have enforceable rights if General Telephone attempted to terminate the program:

[O]nce the employee performed services in reliance upon the promised pension, he could enforce his right to a pension either under traditional contract principles of offer, acceptance and consideration or under the doctrine of promissory estoppel. . . . [T]he courts have repeatedly reaffirmed that a nonvested pension right [in the French sense, i.e., a plan which provides for the forfeiture of all rights if the employee quits work] is nonetheless a contractual right, and thus a property right.

Since that property right was acquired by H during marriage and could not be traced to any of his separate property, it necessarily

18. 15 Cal. 3d at 843, 544 P.2d at 563, 126 Cal. Rptr. at 635.
19. Had there been such a provision the court would surely have had to consider whether it precluded a promissory estoppel and whether it was void as against public policy. Compare Brown with Taylor v. General Tel. of Cal., 20 Cal. App. 3d 70, 97 Cal. Rptr. 349 (1st Dist. 1971) (upholding a provision which reserved to the employer discretion to continue or terminate pension benefits of an employee hired for cause).
20. 15 Cal. 3d at 846, 544 P.2d at 566, 126 Cal. Rptr. at 638. See In re Marriage of Judd, 68 Cal. App. 3d 515, 137 Cal. Rptr. 318 (2d Dist. 1977) (bonus in form of contingent stock account held community property under Brown because a contract right existed).
See also Newberger v. Rifkind, 28 Cal. App. 3d 1070, 104 Cal. Rptr. 663 (2d Dist. 1972) (stock option bonus promised by shareholder of employer); Taylor v. General Tel. of Cal., 20 Cal. App. 3d 70, 97 Cal. Rptr. 349 (2d Dist. 1971); West v. Hunt Foods, Inc., 101 Cal. App. 597, 225 P.2d 978 (1st Dist. 1951); Hunter v. Sparling, 87 Cal. App. 2d 711, 197 P.2d 807 (1st Dist. 1948) (rejecting the contention of a bank that the promises of a pension it held out to an employee were not contractually binding); 1 S. WILLISTON, CONTRACTS § 130B, at 546 (3d ed. 1957).
In addition to promissory estoppel cases involving private pensions, the Brown court relied heavily on cases concerning enforceability of state government pensions, primarily Kern v. City of Long Beach, 29 Cal. 2d 848, 179 P.2d 799 (1947). Kern and other state government pension cases such as Adler v. City of Pasadena, 57 Cal. 2d 609, 371 P.2d 315, 21 Cal. Rptr. 379 (1962), and Allen v. City of Long Beach, 45 Cal. 2d 128, 287 P.2d 765 (1955), are cited in Brown indiscriminately with private pension cases (see, e.g., 15 Cal. 3d at 846 n.7, 544 P.2d at 566 n.7, 126 Cal. Rptr. at 638 n.7). This suggests that perhaps private employers will have—promissory estoppel notwithstanding—the same freedom accorded to government pension operators to make reasonable changes in the provisions of the plan so long as the overall benefits to the employee are not materially reduced and even to reduce benefits in a financial crisis. If so, the chosen in action recognized in Brown is not to enforce the pension plan according to its terms but to assure continuation of some sort of program roughly equal in value to the scheme originally announced by the employer.
followed that the chose in action to protect continuation of the pension program was community property. 21

In most respects, Brown was a relatively simple case. In failing to recognize that a chose in action against the employer, a valuable property right, could be community owned if acquired during marriage, the pre-Brown law was patently erroneous and merited overruling. 22 However, even though Brown overruled French by noting that nonvested pension "rights" could constitute community property subject to division upon divorce, 23 it does not necessarily follow that all nonvested pension "rights" would be community property. In contrast to the pension in Brown, the program in French was created by Congress and subject to federal law. If federal law provides no contract right to enforce pension payments prior to "vesting" in the French sense (because it rejects promissory estoppel against the government, for example), a chose in action may be lacking in French. Thus, in determining the applicability of Brown, the initial inquiry must be into the precise rights of the participant in the particular pension plan.

With respect to private pension plans and rights which ERISA permits to be nonvested in the French sense, consideration must be given to whether the law permits an employer to reserve a power to terminate, the breadth of such a power and whether the employer is estopped from invoking the power. As to pension plans created by California law, there has never been any attempt by the legislature to reserve a power to wholly revoke the pension plan. Accordingly, the courts have developed a strong vested rights doctrine which permits retroactive modifications only if they do not materially reduce the overall value of the pension package. 24 Thus, under state created plans there will apparently always be contract rights deemed to be community property under Brown. Under federally created benefit plans the converse is true. Congress sometimes has expressly reserved the right not only to modify but to wholly terminate a retirement plan, including one to which the employee has contributed. Additionally, the courts have inferred such a power when the legislation is silent. 25 The fifth amendment, however, limits exer-

22. For cases expressly disapproved, see 15 Cal. 3d at 851 n.14, 544 P.2d at 569 n.14, 126 Cal. Rptr. at 641 n.14.

Brown also overrules by implication a series of divorce cases dealing with contracts other than pension plans where no community interest was found to exist because the contractual rights had not fully "vested" in some respect. See, e.g., Lakenan v. Lakenan, 256 Cal. App. 2d 615, 64 Cal. Rptr. 166 (2d Dist. 1967); Hill v. Hill, 82 Cal. App. 2d 682, 187 P.2d 28 (2d Dist. 1947), overruled on other grounds, See v. See, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966).

See also In re Marriage of Bodle, 76 Cal. App. 3d 758, 143 Cal. Rptr. 115 (4th Dist. 1978).
23. 15 Cal. 3d at 851, 544 P.2d at 569, 126 Cal. Rptr. at 641.
24. See note 20 supra.
25. See, e.g., Stouper v. Jones, 284 F.2d 240 (D.C. Cir. 1960); note 75 infra.
exercise of the power of termination. Whether rights so created by federal statute can be community property will be examined.

A. The Effect of a Reservation of the Right to Terminate Benefits in a Private Pension Plan

In some circumstances an employee spouse will object to a court's treatment of future benefits as community property on the ground that the employee has no contractual rights to the benefits. Suppose for example that the terms of a benefit plan include the employer's reservation of the right to cancel the provision for the benefit.26 Presumably, if the employer had notified the employees of the reserved power, the employer could not be estopped from invoking it. As a result there apparently would be no chose in action which could qualify as community property under Brown.

However, the courts might construe the right-to-terminate provision as subject to a rule of reason. The right to terminate might be reserved solely for the purpose of giving the employer access to the corpus of the pension fund in the event of financial crisis or perhaps for exercising an opportunity to acquire more assets at bargain prices. But if the employer had no reasonable basis for the termination, the courts would not permit invoking the right-to-terminate clause. With such a construction, the employee spouse does have a chose in action acquired by his labor during marriage—the right to prevent an unreasonable exercise of the power.

If the publicized terms of the pension plan make it clear that the pension operator reserves the right to terminate, and also that the right can be exercised for any reason at all (or for no reason), the participant spouse may still have contractual rights. The courts may construe the power to terminate as directed to the program as a whole but not to individual employees. The employee spouse would then earn by his labors during marriage a chose in action, based on promissory estoppel or, perhaps, bargained-for consideration for services rendered, to prevent discrimination against him in the administration of the plan.

Recognition of a community interest in a right to prevent termination apparently means, in California, a finding of community ownership of the nonvested future benefits that the chose in action protects.27 For a court wishing to make a lump sum award of

26. ERISA limits the employer's ability to terminate by requiring French-vesting within 5 to 15 years of employer contributions to the retirement plan. 29 U.S.C. § 1053(a)(2)(B) (Supp. V 1975). Employee contributions must be at once vested. Additionally, termination provisions would be lawful with respect to retirement plans exempt from ERISA. See note 14 supra. Such a provision would also be lawful as to nonretirement benefits, such as year-end bonuses or periodic payments of fringe benefits, which are not governed by ERISA. For the scope of benefits governed by ERISA, see 29 U.S.C. § 1002(1)-(3) (Supp. V 1975).

27. This is implicit in that portion of Brown concerned with valuing the
one spouse's share of the benefits and still effect the mandatory
equal division of community property, valuation of such future
benefits will be a serious, perhaps insoluble, problem. The lump
sum approach calls for discounting the value of the pension by the
percentage chance of its nonvesting as well as by the mortality
factor. The pension is then awarded to the employee while com-
community property equal in value to the community interest in it is
awarded to the nonemployee spouse.

The Brown court, while using lump sum valuation, recognized
that the chance of nonvesting is often too uncertain to evaluate
and, thus, encouraged the pro rata formula as an alternative remedy.
Under this approach the divorce court awards each of the spouses a

community interest in the nonvested pension rights. The court did not pause to
consider valuation of the community chose of action to protect against termination
of the pension contract but jumped to once at an attempt to value the benefit
payments themselves that might accrue in the future.

encouraged to achieve the equal division by awarding entire specific assets to H
and to W, with the total package awarded to each aggregating the same value,
rather than decreeing the divorcing spouses tenants in common of the assets. See,
e.g., In re Marriage of Knickerbocker, 43 Cal. App. 3d 1039, 1048, 118 Cal. Rptr.
232, 238 (1st Dist. 1974). The particular problem of valuing nonvested pension
interests after Brown is ably analyzed in Note, Dividing the Community Property
Interests in Nonvested Pension Rights, in Survey, The Supreme Court of California
Property Interests in Nonvested Pension Rights).

29. 15 Cal. 3d at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639, citing with
apparent approval DeRevere v. DeRevere, 5 Wash. App. 741, 491 P.2d 249 (1971),
the first American decision to squarely reject the French vestedness test. The court
there placed a lump sum value on the community interest in H's pension. But the
facts were somewhat unusual. H had worked for the company for over 40 years. He
was 58 at the time of divorce and his pension rights would "vest" at age 60. Perhaps
in DeRevere it was fair to value the risk that H would quit work or be fired for cause
before age 60 at zero, thereby using only mortality tables to discount the value due
to the risk of nonvesting. See Hughes, Community-Property Aspects of Profit-
Sharing and Pension Plans in Texas—Recent Developments and Proposed

Some possible adverse tax law aspects of a DeRevere lump sum division are
discussed in Victor, supra note 6, at 482-86.

30. I am in complete agreement with Community Property Interests in Non-
vested Pension Rights, supra note 28, at 283-84, that the divorcing spouses must
share the risk that benefits will never be paid and that the fair way to achieve such
shared risk is to make the spouses tenants in common owners of the pension.
Brown calls for this remedy when the court "because of uncertainties affecting the
vesting or maturation of the pension [i.e., the commencement of payments] . . .
should not attempt to divide the present value of the pension rights." 15 Cal. 3d at
3d 515, 520, 137 Cal. Rptr. 318, 320 (1st Dist. 1977); McKnight, Division of Texas
Martial Property on Divorce, 8 St. Mary's L.J. 413, 429 (1976); Note, Pension
Rights and Community Property: From French to Brown, 4 W. St. L. Rev. 91, 99-
100 (1976), revised & reprinted as Doyle, ERISA and the Non-Employee Spouse's
Community Interest in Retirement Pay, 4 COMMUNITY PROP. J. 3 (1977). See also
overruled, In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633
(1976), where the trial court apparently ordered a lump sum division payable in
installments out of pension funds H might subsequently receive, a hybrid remedy
part way between DeRevere and the contingency pro rata formula. The appellate
court revised the order to make typical fractional-sharing provisions based on what
fraction of benefits actually paid,\textsuperscript{31} based usually on the amount of time the employee worked to earn pension benefits while married to the divorcing spouse as compared to the time worked while not married\textsuperscript{32} or separated from\textsuperscript{33} that spouse.


31. In cases where the participant is entitled to but does not demand his pension benefits, electing instead to continue on the job and increase by additional contributions the level of pension payments at subsequent retirement, some courts will nevertheless compel the employee to pay the nonparticipant former spouse a fraction of the value of the benefits which the former could have obtained had he retired. \textit{See In re Marriage of Smith, 56 Cal. App. 3d 247, 128 Cal. Rptr. 410 (3d Dist. 1976); In re Marriage of Martin, 50 Cal. App. 3d 581, 123 Cal. Rptr. 634 (3d Dist. 1975), overruled on other grounds, In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); Taylor v. Taylor, 449 S.W.2d 368 (Tex. Civ. App. 1969), no writ; Wilder v. Wilder, 85 Wash. 2d 364, 534 P.2d 1355 (1975)}. These cases seem quite inconsistent with the \textit{Brown} court's statement that management and control of the community property pension rights belong solely to the employed spouse, even after divorce (at which time technically the former spouse becomes tenants in common), who is free to change or terminate his employment, agree to modification of the terms of the retirement program, elect retirement program alternatives, and generally, "by his decision define, the nature of the retirement benefits owned by the community." \textit{In re Marriage of Brown, 15 Cal. 3d 838, 850, 544 P.2d 561, 568, 126 Cal. Rptr. 633, 640 (1976). See In re Marriage of Freiberg, 57 Cal. App. 3d 304, 311, 127 Cal. Rptr. 792, 797 (4th Dist. 1976)}, approving a decree awarding \textit{W} a fractional share of benefits when payments begin because this "did not interfere with the right of the husband to determine when he might retire and thus determine when his retirement rights would mature." \textit{See also In re Marriage of Fonstein, 17 Cal. 3d 738, 751, 552 P.2d 1169, 1177, 131 Cal. Rptr. 873, 881 (1976)}: "Both parties obviously should bear the risk that a pension will not vest and contingent community property will not be realized at all." \textit{Cf. Warren v. Warren, 2 Ariz. App. 206, 407 P.2d 395 (1965)}, where the lower court had ordered \textit{H} to remain on the job until certain stock options awarded to him during marriage became non-forfeitable. \textit{H}'s appeal contended, \textit{inter alia}, that the decree violated the thirteenth amendment, \textit{see Victor, supra note 6,} at 474 n.16, but the appellate court avoided this issue, reversing on the ground that in effect \textit{H} had been ordered to pay alimony to a third party, an order the divorce court had no jurisdiction to enter.

In sum, the \textit{Brown} court appears to recognize that notwithstanding the general rule of equal management of community assets by both spouses, the employer-employee relationship requires exclusive management of the pension rights by the employed spouse, by his contract, can seize exclusive control of certain types of community properties. \textit{See Reppy, \textit{Retroactivity of the 1975 California Community Property Reforms,} 48 S. Cal. L. Rev. 977, 1014-22 (1975)} [hereinafter cited as \textit{Reppy, \textit{Retroactivity}}]. If the employed spouse is \textit{H}, the pension operator can disregard a notice by \textit{W} purporting to elect certain retirement options. Because \textit{W}'s interest was subject to \textit{H}'s management decisions during marriage there is little basis for concluding that divorce and the conversion of the community interest to tenancy in common removes this "risk" (\textit{see Community Property Interests in Nonvested Pension Rights, supra note 28,} at 285-86) and gives \textit{W} management powers. Divorce cannot rewrite the contractual undertaking of the employer to abide solely by the employee's directions concerning retirement options. Thus, cases granting a fraction of the benefits to the nonparticipating spouse prior to the retirement (or satisfaction of other conditions which must occur before the employer is bound to pay benefits) by the participating spouse are erroneous. \textit{H} should be entitled to continue to build up the value of the pension by continued employment.

32. Dividing ownership of future benefits paid between community and separate property based on the \textit{duration} of participation in the plan while married to the
With the existence at divorce of a chose in action to prevent

divorced spouse compared to the balance of the time when pension rights were being earned will ordinarily achieve a roughly just result. Paycheck deductions and employer contributions are usually a percentage of total salary, with the latter increasing as the employee’s tenure with the employer lengthens. Thus, the earliest contributions to the plan are going to be smaller than those paid in subsequent years in most cases. On the other hand the administrators of the plan will have had the smaller, earlier payments for investment purposes for more years than the later payments, and the greater profits generated by the earlier payments will tend to offset the greater size of later contributions. See In re Marriage of Judd, 68 Cal. App. 3d 515, 523, 137 Cal. Rptr. 318, 322 (1st Dist. 1977), as well as dictum in In re Marriage of Andreeen, 76 Cal. App. 3d 667, 675, 143 Cal. Rptr. 94, 99 (3d Dist. 1978). Almost all of the cases thus use the apportionment-by-time formula. See, e.g., Neal v. Neal, 700 P.2d 758 (Ariz. 1977); Van Loan v. Van Loan, 569 P.2d 214, 217 (Ariz. 1977) (dissenting opinion); In re Marriage of Wilson, 10 Cal. 3d 851, 854, 519 P.2d 165, 167, 112 Cal. Rptr. 405, 407 (1974); Waite v. Waite, 6 Cal. 3d 461, 469, 492 P.2d 13, 18, 99 Cal. Rptr. 325, 330 (1972); In re Marriage of Judd, 68 Cal. App. 2d 515, 37 Cal. Rptr. 318 (1st Dist. 1977); Patillo v. Norris, 65 Cal. App. 3d 209, 135 Cal. Rptr. 210 (2d Dist. 1976); In re Marriage of Martin, 50 Cal. App. 3d 581, 123 Cal. Rptr. 634 (3d Dist. 1975); In re Marriage of Ward, 50 Cal. App. 3d 150, 154 n.1, 123 Cal. Rptr. 234, 236 n.1 (1st Dist. 1975); In re Marriage of Imperato, 45 Cal. App. 3d 432, 437, 119 Cal. Rptr. 590, 593 (2d Dist. 1975); Bensing v. Bensing, 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1st Dist. 1972); Moon v. Moon, 345 So.2d 168 (La. App.); appeal dismissed, 347 So. 2d 250 (1977); LeClerc v. LeClerc, 26 N.W. 335, 453 P.2d 755 (1969); In re Marriage of Pea, 17 Wash. App. 728, 566 P.2d 212 (1977); Cross, The Community Property Law in Washington, 49 WASH. L. REV. 729, 765 (1974). Bensing, Martin, Waite & Ward were overruled on other grounds in In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

The time formula is also used in Texas. See Taggart v. Taggart, 552 S.W.2d 422 (Tex. 1977); Cearley v. Cearley, 544 S.W.2d 661, 665-66 (Tex. 1976); In re Marriage of Gongwer, 554 S.W.2d 49 (Tex. Civ. App. 1977), no writ; Troutenko v. Troutenko, 503 S.W.2d 686 (Tex. Civ. App. 1973), no writ; Miser v. Miser, 275 S.W.2d 597 (Tex. Civ. App. 1971), writ dismissed; Mora v. Mora, 429 S.W.2d 660 (Tex. Civ. App. 1968), writ dismissed; Kirkham v. Kirkham, 335 S.W.2d 393 (Tex. Civ. App. 1960), no writ; Comment, Apportionment of Community Property Interests in Prospective Military Retirement Benefits Upon Divorce, 9 ST. MARY’S L.J. 72 (1977). This pro rata approach is contrary to the general inception of title theory of Texas law applied in cases of the acquisition of rights over time. See Mitchum v. Mitchum, 509 S.W.2d 720, 725 (Tex. Civ. App. 1974), rev’d on other grounds, 518 S.W.2d 362 (Tex. 1975); McCurdy v. McCurdy, 372 S.W.2d 381 (Tex. Civ. App. 1963), writ refused; Comment, The Wife’s Community Interest in Her Husband’s Qualified Pension or Profit-Sharing Plan, 50 Tex. L. REV. 334, 337-38 341 (1972). The time formula would seem to undervalue the community interest in cases where the earlier, smaller payments are made before the marriage because, in Texas, the investment return during marriage from separate property is community owned. 11 TEx. FAM. CODE ANN. tit. 1, §§ 5.01, .22 (Vernon 1975); 1 E. OAKES, SPEE’S Marital Rights in Texas §§ 416-417 (4th ed. 1961); REPPY & DE FUNKA, supra note 3, at 247. The offset noted above that leads to the “rough” justice is thus not available in such Texas cases. The same is true in Idaho and, with respect to husbands’ pensions, in Louisiana.

If a spouse can establish that apportionment based on time distorts the community or separate interests (e.g., if early separate contributions were much bigger than later community contributions), certainly he or she must be entitled to establish the actual interests by tracing to specific contributions and earnings generated therefrom by the plan administrator and should not be bound by the rough-justice logic of the time apportionment approach. See In re Marriage of Adams, 64 Cal. App. 3d 181, 187 n.8, 134 Cal. Rptr. 298, 302 n.8 (2d Dist. 1976) (court can apportion based on money); Gettman v. Los Angeles Dept. of Water & Power, 87 Cal. App. 2d 862, 197 P.2d 817 (2d Dist. 1948) (making an apportionment based on money); T.L. James & Co. v. Montgomery, 322 So. 2d 834, 846, 851-52 (La. 1976) (court should apportion based on money contributions); In re Marriage of Anderson, 64 Cal. App. 3d 36, 39, 134 Cal. Rptr. 252, 253 (2d Dist. 1976), declaring that “the first
exercise of the employer's power of termination, both of the Brown remedies seem theoretically available. In most cases, however, uncertainty will preclude the lump sum approach.\textsuperscript{34} The pro rata formula is the far more desirable remedy in that it avoids the difficulties of present valuation and allows the spouses to share both in sums subsequently paid under the pension plan and in the risk of termination.

It is only in cases in which private pension provisions are so structured that the employer has kept "unrestricted discretion"\textsuperscript{35} to few years of service (during the marriage) must be given just as much weight in computing total service as the last few years—after separation,\textsuperscript{1} is erroneous if it suggests apportionment in time is always required; Victor, supra note 6, at 478. Anderson and In re Marriage of Judd, 68 Cal. App. 3d 515, 522, 137 Cal. Rptr. 318, 321 (1st Dist. 1977), should be overruled as inconsistent with the equal division mandate of CAL. CIV. CODE § 4800 (West Supp. 1977). See also In re Marriage of Freiberg, 57 Cal. App. 3d 304, 127 Cal. Rptr. 792 (4th Dist. 1976); Dessomes v. Dessomes, 543 S.W.2d 165 (Tex. Civ. App. 1976), writ refused n.r.e.; In re Marriage of Rister, 512 S.W.2d 72 (Tex. Civ. App. 1974), no writ; Cohan & Fink, supra note 4, at 9; Thiede, supra note 4, at 654-55; Comment, Retirement Benefits and the Right to Reimbursement, 11 Hous. L. Rev. 960 (1974); Comment, The Community Property Status of the Pension and the Widow's Death Benefits, 37 S. CALIF. L. REV. 594, 606-07 (1964) (citing McBride v. McBride, 11 Cal. App. 2d 521, 54 P.2d 480 (2d Dist. 1936)) a non-pension life insurance case where apportionment was based on money rather than time (hereinafter cited as Pension & Widow's Death Benefits); Note, Community Property—Deferred Compensation: Disposition of Military Retired Pay upon Dissolution of Marriage, 50 Wash. L. Rev. 505 (1975); cf. Relation of Community Property and Forced Heirship, supra note 8, at 652-53 (noting the extreme difficulty of making a "money" apportionment when, in addition to the funds contributed, the earnings history of the pension plan operator is considered in determining benefits). Another possible method of division where rights are fully vested at divorce but \(H\) does not then retire is to limit the community share to that which \(W\) would have received had \(H\) retired at dissolution. Kent, supra note 4, at 465. This denies the community the benefit of subsequent investment income from the community property.

With respect to valuation problems see generally Projector, Valuation of Retirement Benefits in Marriage Dissolutions, 30 L.A.B. Bul. 229 (1975).


34. In a different context, the California Supreme Court has recognized that a contingent right to obtain a known sum of money if specified events transpire cannot, while the contingency is unresolved, be said to have the face value of the sum that hopefully will be paid in the future. See Jovorek v. Superior Court, 17 Cal. 3d 629, 522 P.2d 728, 131 Cal. Rptr. 768 (1976).

discontinue the plan, thereby precluding any cause of action by the employee, that there is no "property," in the *Brown* sense of a contract right, for the divorce court to value or divide. While the chances of the employer exercising his unlimited right to terminate the employee’s participation may be small and while the potential benefits may have great value in the eyes of the divorcing spouses, still no property exists—at least not the type found in *Brown*.

B. The Effect of Noncontractual Retirement Plans

*Brown* has been interpreted in two court of appeal decisions as not giving the community any interest in "nonvested" rights when such rights arise not by contract but by modifiable statute. Both cases involved Old Age, Survivors, and Disability Insurance (OASDI) benefits under the federal Social Security Act. An analysis of *Brown*’s application to such benefits and of the correctness of the two post-*Brown* decisions initially requires a consideration of what it means to label OASDI benefits noncontractual in nature. The precise limits (if any) of the power of Congress to modify or terminate OASDI benefits must also be explored. The analysis is undertaken with the belief that the supreme court will be eager to find a basis for a community interest in OASDI benefits (or other remedy to an aggrieved spouse), since whatever authority Congress may have to terminate social security benefits, no one expects it to be exercised.

While the social security system is popularly thought to be funded by what are known as social security taxes, under the technical terms of the Act the eligibility for benefits turns not on having paid the taxes, but on having worked at wage paying jobs or having earned self employment income for the specified number of calendar quarters (usually forty). 36 It will be shown that since the Social Security Act apparently precludes the conclusion that a worker "buys in" to an insurance system with his social security taxes, the courts have repeatedly held that social security benefits are noncontractual in nature and that Congress is, thus, free to alter or even terminate benefits. And, while the participant does have a right to be free from discrimination in the administration of the program, 37 this right, which has its source in the equal protection aspects of the fifth amendment of the federal Constitution, is also considered noncontractual. 38

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37. See notes 50-62 & accompanying text infra.
1. Origins of the Social Security System

The original federal social security legislation deliberately created a noncontractual program without vested rights. The intent of Congress was not to protect the federal treasury by reserving the power to terminate the program in the event it became financially unsound, but to prevent the legislation from being declared unconstitutional.\(^{39}\)

The social security system was accordingly designed as a system of taxing and spending by the federal government: Taxes were imposed on both employees\(^{40}\) and employers,\(^{41}\) and a trust fund known as the Federal Old Age, Survivors, and Disability Insurance Trust Fund\(^{42}\) was created from which benefits would be drawn.\(^{43}\) FICA taxes became part of general revenue, but unappropriated revenue equal to the FICA taxes collected would be appropriated into the Trust Fund.\(^{44}\) This formalistic separation of the taxing and spending features of the social security legislation was probably intended to undermine a charge that the federal government was unconstitutionally engaging in the pension business by forcing workers to enter into pension contracts with the government.\(^{45}\)

\(^{39}\) Had the program been patterned on a contractual model there was a serious risk of its being held violative of the tenth amendment, for the federal Constitution does not expressly authorize the federal government to enter into pension contracts with its citizens. Reliance on the commerce clause, of course, was not an unquestioned predicate for legislation in 1933. The proper entity would thus have been the state, by virtue of its reserved powers under the tenth amendment. Moreover, since participation was not to be voluntary, the "contribution" must be labeled a tax so that it can be compulsorily collected.

\(^{40}\) The Federal Insurance Contributions Act (FICA), I.R.C. §§ 3101-3126, imposes a tax on the income of every employee equal to a percentage of his wages. I.R.C. § 3101(a). I.R.C. § 1401 imposes a similar tax on the self-employed.

\(^{41}\) A tax at the same rate as that imposed on employees was imposed on employers as an "excise tax" on the privilege of, or activity of, hiring employees. I.R.C. § 3111. In Charles M. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937), the FICA employers' tax was upheld as an "excise tax" despite claims that it was not an "excise tax" in the constitutional sense.


\(^{44}\) Like any other "Federal income tax," FICA taxes became part of the general funds of the internal revenue. I.R.C. § 3101. See also Charles H. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (similar scheme for unemployment insurance tax revenues). But the statutory provisions creating the trust fund proceeded to appropriate "to the Federal Old-Age & Survivors Insurance Trust Fund . . . for each fiscal year . . . out of any moneys in the Treasury not otherwise appropriated, amounts equivalent to 100 per centum of" all FICA taxes collected. 42 U.S.C. § 401(a) (Supp. V 1975).

\(^{45}\) The separation of taxing and spending, combined with the anti-vesting provisions of the Act, 42 U.S.C. § 1304 (1970), see text accompanying note 53 infra, probably saved social security from the fate suffered by the Agricultural Adjustment Act of 1933 in United States v. Butler, 297 U.S. 1 (1936). There, a "processing tax" on the manufacture of agricultural produce declared to be in excess supply was placed in a fund from which payments would be made to farmers who refrained
In *Helvering v. Davis* the constitutionality of the 1935 social security legislation was upheld, the Court observing that "[t]he proceeds of both taxes [on employee and employer] are to be paid into the Treasury like internal revenue taxes generally, and are not earmarked in any way." Thus, it was a lawful tax. With respect to the provision for paying old age ""insurance"" benefits, the court noted that ""Congress may spend money in aid of the 'general welfare.'" Finally, the Court held that ""how to spend"" was a question left to the discretion of Congress; the Court would not second guess Congress unless the power to spend for the general welfare was exercised in a "'clearly arbitrary'" manner. That is, the FICA ""taxes"" were not treated like pension contributions: The sums paid were not traceable to the Trust Fund; OASDI benefits were not returns on any investment.

2. **Equal Protection as the Sole Basis for "Enforcement"**

In *Fleming v. Nestor* the Court again applied the theory that OASDI benefits are governmental largesse and not something "'purchased'" by FICA taxes. The case involved constitutionality of a Social Security Act amendment cutting off OASDI benefits to certain deported aliens who were otherwise eligible to receive benefits. On the nature of the insured's "'rights'" that were lost by his deportation, the Court observed:

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from planting such crops. The Government's insistence that the Act involved a lawful excise tax and expenditures made for the public welfare did not impress the Court. The tax and benefit provisions, the court held, were "'part of a single scheme'" because "'the whole revenue from the levy is appropriated in aid of crop control; none of it is made available for general governmental use.'" *Id.* at 58-59.

Accordingly, the constitutional issue was whether, in view of the tenth amendment, the federal government had the authority to regulate agricultural production. *Id.* at 70. The *Butler* court held that the federal government could not constitutionally regulate agricultural quantities, at least not under a scheme whereby processors were to pay the cost.

Certainly the same result would not occur today. See *Wickard v. Filburn*, 317 U.S. 111 (1942). *Butler* has been limited to cases where regulatory costs are not appropriated from general funds. See Charles M. Steward Mach. Co. v. Davis, 301 U.S. 548, 592 (1937); Cincinnati Soap Co. v. United States, 301 U.S. 308, 312 (1937).

49. 301 U.S. at 640-41. No specific mention was made by the Court of other sources of power beyond taxing and spending which could uphold the Act. However, it was observed that the states lacked the financial resources to combat unemployment alone; including unemployment of the elderly, the evil that Congress perceived the social security legislation to address. Conceivably the Court had the commerce clause in mind at this point of its opinion.
[E]ach worker’s benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation. It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.\textsuperscript{32}

The Court also stressed that the anti-vesting provision of the Social Security Act itself provided that the "right to alter, amend, or repeal any provision"\textsuperscript{53} was reserved. Thus, future benefits that even a "fully insured"\textsuperscript{54} participant might receive were not proprietary or vested rights, and cutting off the benefits to the deported persons involved no "taking" of property as prohibited by the due process and just compensation clauses of the fifth amendment. The constitutional question was limited to that arising under the implied equal protection prong of the fifth amendment: whether an "arbitrary classification, utterly lacking in rational justification"\textsuperscript{56} had been imposed on the deported participant.

While the Court has, subsequent to Flemming, generated dicta which could be read as undercuts its characterization of social security benefits as payments to which a recipient has no right,\textsuperscript{57} it defining "fully insured": 42 U.S.C. § 423(c) (Supp. V 1975) and 20 C.F.R. § 404.116 (1977) defining "insured for disability."


\textsuperscript{33} 42 U.S.C. § 1304 (1970), quoted at 363 U.S. at 611. See also Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 589 (1937) (unemployment insurance tax; Congress retained "undiminished freedom to spend the money as it pleased.").

\textsuperscript{34} The Act defines a fully insured individual as one having the specified numbers of quarters of coverage, generally meaning a quarter in which the individual earned $50 or more in wages or $100 or more in self-employment income. 42 U.S.C. § 414(a)(2) (Supp. V 1975); 20 C.F.R. § 404.103 (1977). Individuals not reaching these earning levels pay no FICA taxes. I.R.C. §§ 3121(a)(10), 1402(b)(2).


\textsuperscript{36} 363 U.S. at 611.

\textsuperscript{37} In a case in which the Court invalidated on a due process ground a provision denying benefits to an insured’s widow when a widow in the same circumstances would have received them, it nevertheless discussed payment of FICA taxes and suggested that those tax payments earned the statutory benefits. [I]n this case social security taxes were deducted from Paula’s [deceased]
has still consistently held that OASDI is noncontractual. In *Mathews v. De Castro*, by speaking of FICA taxes as "contributory," the Court approached an issue of classification of OASDI beneficiaries strictly as a matter of equal protection. Similarly, in its most recent statement, *Califano v. Goldfarb*, the Court held that only arbitrary line drawing in provisions governing OASDI benefits was prohibited.

3. The California Community Property Decisions: Resolution of Conflict

While the federal courts have consistently characterized OASDI benefits as noncontractual, no such consistency has emerg-

wife's] salary during the years in which she worked. Thus, she not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid. . . .

The fact remains that the statutory right to benefits is directly related to years worked and amount earned by a covered employee, and not to the need of the beneficiaries directly. Since OASDI benefits do depend significantly upon the participation in the work force of a covered employee, and since only covered employees and not others are required to pay taxes toward the system, benefits must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex.

59. 429 U.S. at 186 n.6.
60. The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general welfare in one way and not another are "not confined to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."

Id. at 185.
62. On the issue of the noncontractual nature of OASDI benefits, the four-justice plurality opinion stated only that it is generally the case that OASDI is noncontractual. Id. at 210. However, the four-justice dissenting opinion held the benefits noncontractual. Id. at 240. The pivotal separate opinion of Justice Stevens agreed, on this issue, with the dissent.

I agree with Mr. JUSTICE REHNQUIST that the constitutional question raised by this plaintiff requires us to focus on his [the widower's] claim for benefits rather than his deceased wife's tax obligation. She had no contractual right to receive benefits or to control their payment; moreover, the payments are not a form of compensation for her services. At the same salary level, all workers must pay the same tax, whether they are male or female, married or single, old or young, the head of a large family or a small one. The benefits which may ultimately become payable to them or to a wide variety of beneficiaries—including their families, their spouses, future spouses, and even their ex-wives—vary enormously, but such variations do not convert a uniform tax obligation into an unequal one. The discrimination against this plaintiff [the widower] would be the same if the benefits were funded from general revenues.

430 U.S. at 217-18 (footnote omitted).
ed from California decisions on whether OASDI and similar federally created, noncontractual benefits can qualify as community property under Brown. One line of authority holds that the community has no interest in future OASDI benefits expected to be paid after divorce, even though labor qualifying the employee for benefits and payment of FICA taxes occurred during the marriage. In re Marriage of Nizenkoff, the court of appeal, stressing the Flemming holding and the statutorily reserved power of Congress to repeal the Social Security Act, concluded that there was no proprietary interest. It characterized Brown as holding that "[a] pension right becomes a property interest when the employer cannot unilateral repudiate the right." The court also quoted from Richardson v. Belcher:

""The fact that social security benefits are financed in part by taxes on an employee’s wages does not in itself limit the power of Congress to fix the levels of benefits under the Act or the conditions upon which they may be paid. Nor does an expectation of public benefits confer a contractual right.""

In re Marriage of Kelly, a court of appeal decision, held that the Social Security Act scheme was not "one of deferred compensation for past labor." While the preceding cases have seized on the absence of any contractual right to deny the community an interest in future benefits, in a second line of California authority, absence of contractual rights has been held not to bar a community interest in cases involving other federally created benefits.

In re Marriage of Karlin concerned the treatment at divorce of the husband’s Air Force pension. The husband had served in the Air Force for twenty-two years, eleven while married to W. H had retired and became entitled to retirement pay while still married to W. The court awarded the community a fifty percent interest (using

63. In re Marriage of Nizenkoff, 65 Cal. App. 3d 136, 135 Cal. Rptr. 189 (1st Dist. 1976); In re Marriage of Kelley, 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (2d Dist. 1976). Rev. Rul. 63-167, 1963-2 C.B. 17, citing Flemming, holds that OASDI benefits cannot be traced to community-paid FICA taxes or to labors that make a working person insured. Rather, the ownership of OASDI must be characterized at the time of receipt. If a recipient is then married, the benefit is community property of him and his spouse at that time. The ruling is discussed in Lay, supra note 35, at 320.

64. 65 Cal. App. 3d at 139, 135 Cal. Rptr. at 190.
65. Id. at 138, 135 Cal. Rptr. at 190.
67. 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (2d Dist. 1976).
68. Id. at 98, 134 Cal. Rptr. at 268.
the division by time test\footnote{See note 32 supra.}) and directed $H$ to pay $W$ twenty-five percent of the payments as he received them in the future.\footnote{24 Cal. App. 3d at 29, 101 Cal. Rptr. at 242. Of course, if $H$ had returned to military service, thereby increasing the period of his participation while not married to $W$ (or separated from her), the $1/4$ fraction would have to be adjusted to decrease the percentage of $W$'s share in the event $H$ retired again and resumed receiving benefits.} On appeal, $H$ argued that because the military pension rights were noncontractual, the lower court had erred by treating such rights as community property. The court of appeal rejected this argument, reasoning that the pension payments were remuneration for services rendered during marriage. The reserved power of the federal government to abolish $H$'s retirement payments did not, the court said, alter the nature of the payments from community to separate property.\footnote{72. Appellant asserts his right to a military pension is a mere gratuity and, as such, is a conditional right and thus separate property. Accordingly, appellant contends, he has no vested rights, only an expectancy of future payments and not a property interest which could properly be divided by the trial court. Appellant's position finds support in the language of federal cases. "Pensions, compensation allowances and privileges are gratuities. They involve . . . no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress." [Lynch v. United States, 292 U.S. 571 (1934)]. . . . The Naval Reserve pay involved in French was held not to be community property (as retirement pay) since the husband had not yet completed sufficient years of service to qualify therefor. (17 Cal. 2d 775, 778.)} Likewise, in In re Marriage of Fithian,\footnote{74. [T]he principle that retirement benefits are community property has been held to apply whether the source of the retirement fund lies in a state, federal, military, or private employment relationship. . . . Although the retirement fund was noncontributory, husband's rights to the benefits} involving characterization of United States Marine Corps retirement pay, the state supreme court held that the reserved power of the federal government to terminate pension rights did not disrupt the state's characterization of pension rights as community property.\footnote{To so conclude in the case at bench, however, would be simply to exalt nomenclature over substance. Under 10 [U.S.C. §§] 8911, 8889 and 899, appellant is entitled to, and is receiving a pension based on his 22 years of military service; he is entitled to the pension because of services rendered, in part, during the marriage. As our high court pointed out, albeit in the context of the California Judge's Retirement Law, appellant's retirement pay flows in part from services rendered during the marriage. "[T]he basic point remains that the pension payment serves as a remuneration for services rendered by the employee; if these services were discharged during the marriage, that remuneration must compose a community asset." . . . The fact the Federal government may increase, diminish, or completely abolish appellant's retirement payments does not change the nature of those payments from community to separate property. Appellant became entitled to the retirement payments during the marriage (10 U.S.C. § 8889); the manner of the expression of the pension cannot alter its community property characteristics.}
Similar rulings have been made concerning federal civil service
vested during marriage and constituted an integral part of his compensation
for service in the military.

10 Cal. 3d at 596, 517 P.2d at 951, 111 Cal. Rptr. at 371.

In Lynch v. United States (1934) 292 U.S. 571, the court refers to
pensions as gratuities in the sense that, so long as they are not vested, the
federal government can redistribute or withdraw them at any time accord-
ing to the discretion of Congress. The reference has no impact on the
states' ability to characterize pension rights under local principles of pro-

erty law.

10 Cal. 3d at 602 n.14, 517 P.2d at 455 n.14, 111 Cal. Rptr. at 375 n.14 (citations
omitted). Rev. Rul. 63-169, 1963-2 C.B. 14, holds military retirement pay to be
community property to the extent the husband served in the military while married
and while domiciled in a community property state. In other words, the benefits are
traced to labors and there is a “time” apportionment. See note 32 supra.

Commissioner v. Willkerson, 44 T.C. 718 (1965), aff'd, 368 F.2d 352 (9th Cir.
1966), also holds retired pay to be community property but takes the extreme
position of attributing this court to Arizona law that, if the serviceman
is married and domiciled in a community property state on the date of “vesting” in
the French sense, all benefits are community property of the husband and the
woman then his wife. 44 T.C. at 723.

Lay, supra note 35, at 312-18, discusses these authorities in light of the
difficulty raised by the reserved power of Congress to terminate such benefits,
contending that the military retirement benefits should be traced to labors of the
serviceman for the government. Lay suggests that federal employees do have
rights—which seem to me almost contractual—to prevent the termination of retire-
ment programs. Id. at 316.

The cases in California and other jurisdictions recognizing a community inter-

est in yet-to-be-paid military retirement benefits were decided at a time when
federal case law unambiguously announced that Congress retained an unfettered
right to abolish the retirement program and cut off future payments. See Lynch v.
United States, 292 U.S. 571 (1934) (discussed infra); cases cited note 75 infra. This
federal obstacle (which state cases made an end run around) to recognizing a
community interest may have been eliminated by United States v. Larionoff, 431
U.S. 864 (1977). In Larionoff, certain Navy enlisted men agreed to re-enlist at a
time when re-enlistment entitled them to a special bonus due to "critical military
skill." Before they began serving their re-enlistment terms the statutes providing
for special bonuses were repealed and, in addition, the Navy eliminated their ratings
from the "critical skills" list. It was held that Congress intended the servicemen to
be able to rely on the promised special bonus; hence, the change in the law did not
diminish their rights. If Congressional intent were otherwise, held the Court,
serious constitutional questions would be presented. No one disputes that
Congress may prospectively reduce the pay of members of the Armed
Forces, even if that reduction deprived members of benefits they had
expected to be able to earn. It is quite a different matter, however, for
Congress to deprive a service member of pay due for services already
performed, but still owing. In that case, the congressional action would
appear in a different constitutional light. Cf. Lynch v. United States, 292
U.S. 571 (1934).

431 U.S. at 879 (citations omitted). Lynch, in dictum, declared veterans' pensions
to be "gratuities," 292 U.S. at 587, and it is one of the cornerstones of the line of
cases holding there is no contractual or other vested right to any federal pension
benefits. Nevertheless, where the federal pension is French-vested in that the full
consideration sought from the serviceman or employee for eligibility has been ren-
dered, it is still difficult to distinguish Larionoff simply as a re-enlistment case.
Social Security can, of course, be distinguished because § 407 of the Social Security
Act, see note 53 supra, has a specific anti-vesting clause reserving the power of
repeal. Apparently, no federal pension statute contains such a provision. Alabama
Power Co. v. Davis, 431 U.S. 581 (1977), held that pension rights are not earned by
labors performed for the employer but by the continuation of the employer-employ-
benefits. 75

This bizarre theory was formulated to apply the Selective Service Act provision concerning rights of returning veterans and would not be binding on the states in other contexts. Davis notwithstanding, the United States Supreme Court will likely repudiate the Lynch dictum on the basis of Larionoff, recognizing a contractual, proprietary right of servicemen to their future military retirement pay. This will allow courts recognizing a community interest in such future benefits to employ the contract right of theory of Brown.

75. In re Marriage of Peterson, 41 Cal. App. 3d 642, 115 Cal. Rptr. 184 (2d Dist. 1974), overruled on other grounds, In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 516, 126 Cal. Rptr. 633 (1976). See Rafferty v. United States, 210 F.2d 934 (3d Cir. 1954), which involved the validity of a 1950 congressional act that purported to void previously executed death benefit designations by civil service retirement participants. Rafferty held that the payroll deductions created no contractual or vested rights; the pre-amendment law merely declared a policy the federal government would follow until Congress declared otherwise.

There are numerous similar holdings with respect to other federally created retirement and pension programs. See Murray v. Railroad Retirement Bd., 289 F.2d 386 (4th Cir. 1961) (Railroad Retirement Act benefits wholly statutory—no contractual rights); Anderson v. United States, 205 F.2d 326 (9th Cir. 1953) (Panama Canal employees’ annuity) (dictum); MacLeod v. Fernandez, 101 F.2d 20 (1st Cir. 1938), cert. denied, 308 U.S. 561 (1939) (Puerto Rican civil service); In re Regan’s Estate, 185 N.Y. 3d 40 (Sur. Ct. 1959) (veteran’s pension funds). The Supreme Court has also declared that due process is not violated when state law makes retirement plan interests terminable even if funded by employee contributions. Dodge v. Board of Educ., 302 U.S. 74 (1937). The community property state of Texas has applied such a rule. See note 76 infra.

The civil service retirement system is directly funded by payroll deductions. There has been no attempt to prevent tracing of the employee’s earnings into whatever rights he has in the system as there was with respect to OASDI (by labeling of payments as “taxes” that became part of the general revenues of the United States). This difference makes it far more difficult to hold there is no due process violation in terminating civil service retirement benefits.

Unlike the OASDI scheme, the civil service retirement statutes do not specifically declare the reserved power of Congress to terminate the system. This may strengthen the case for the proposition that cutting of civil service retirement benefits is unconstitutional.

In the main, however, the OASDI and federal civil service benefit systems are quite similar, as was pointed out in Stouper v. Jones, 284 F.2d 240 (D.C. Cir. 1960), which upheld retroactive application of a change in the civil service retirement system cutting off the receipt of benefits by a participant who had been making contributions to the plan. See also Gentry v. United States, 546 F.2d 343, 351-53 (Cl. Ct. 1976) (civil service benefits on no different footing than OASDI for purposes of determining if benefits condition was unconstitutionally discriminatory). In Stouper the court observed that the federal civil service retirement scheme was similar to OASDI but unlike privately purchased annuities in that the amount of benefits received turned not directly on the amount of contributions but on length of time worked, salary level, number of dependents, etc. See 5 U.S.C. § 8339 (Supp. V 1975), as amended by Act of Sept. 3, 1976, Pub. L. No. 94-397, 90 Stat. 1202. The civil service plan, unlike OASDI, provides a joint and survivor annuity for a married participant, unless he or she affirmatively opts against it, while an unmarried participant can work out a similar program for kindred. Id. § 8339(j), (k) (Supp. V 1975). Section 8340 provides for upward cost-of-living adjustments of annuities paid under the act. Id. § 8340 (Supp. V 1975), as amended by Act of Oct. 1, 1975, Pub. L. No. 94-397, § 1306, 90 Stat. 1462. However, like OASDI, § 8341 provides annuity benefits for a widow or widower (terminated upon remarriage unless this occurs after age 60); § 8341 also provides children’s annuity benefits of $900 to $1080 per year per child, terminable at marriage. Id. § 8341 (1970 & Supp. V
The California cases finding a community interest in military retirement pay and other federally created benefits which Congress reserves the right to terminate are inconsistent with Nizenkoff and Kelley, where the noncontractual basis of social security benefits was stressed in holding that there was no community interest. The former cases are also arguably inconsistent with language in Brown which seems to say that only a contractual right, and not a mere expectancy, can constitute property. 76

The inconsistency is pointed out by a 1977 supreme court decision, In re Marriage of Hisquierdo. 77 There H argued that

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1975). Lump sum death benefits payable to a designee of the employee are also provided for under the Act. Id. § 8342 (1970).

There is an anti-assignment clause similar to that applicable to OASDI. "The money mentioned in this subchapter is not assignable, either in law or equity, except under the provisions of section 8345(g) of this title, or subject to execution, levy, attachment, garnishment, or other legal process, except as otherwise may be provided by Federal laws." Id. § 8346 (Supp. V 1975).

One provision, however, suggests that a contractual right can be obtained under the Act. Section 8343 provides for a civil service employee to make voluntary contributions to the fund in addition to the mandatory 7% payroll deduction. The section provides that each $100 contributed will return to the contributor $7 per year in retirement benefits plus 20 cents for each year of age over 55 attained by the participant at the date of retirement. It is hard to believe that the courts would hold an employee who had made such contributions subject to the whim of Congress to the power of Congress by abolishing entirely the civil service retirement program. Surely some contract right to at least have the money returned would be found. But see Steinberg v. United States, 163 F. Supp. 590, 591 (Ct. Cl. 1958) (civil service retirement benefits in the nature of a gratuity).

76. In re Retirement of Brown, 15 Cal. 3d 838, 845, 544 P.2d 561, 565, 126 Cal. Rptr. 633, 567 (1976). Moreover, the Brown opinion expressly recognizes that some interests under a contract (such as a donee beneficiary's interest where the power to alter the beneficiary is reserved) are "expectancies." Id. at 845 n.6, 544 P.2d at 565 n.6, 126 Cal. Rptr. at 637 n.6 (quoting Grimm v. Grimm, 26 Cal. 2d 173, 157 P.2d 841 (1945)); Id. at 846 n.8, 544 P.2d at 566 n.8, 126 Cal. Rptr. at 638 n.8 (citing CAL. CIV. CODE § 700). There is a strong suggestion in Brown that the court would not have treated such expectancies or gratuities as community property at divorce. It is also recognized in Brown that by the law of some jurisdictions retirement pay is not a contract right but a "gratuity." Id. at 845, 544 P.2d at 565, 126 Cal. Rptr. at 637.


77. 19 Cal. 3d 613, 566 P.2d 224, 139 Cal. Rptr. 959 (1977); accord, Eichelberger v. Eichelberger, 557 S.W.2d 587 (Tex. Civ. App. 1977), writ —.
benefits under the federal Railroad Retirement Act could not be community property because they were governed by the same principles applicable to OASDI benefits under the Social Security Act. Thus, he contended, Flemming v. Nestor applied to make the benefits noncontractual and, hence, incapable of being community property. The court responded: “Although there are some similarities between social security benefits and railroad retirement pensions, the same may be said regarding military retirement pensions which we held in Fithian and its progeny to constitute community property. Thus, we are not convinced by husband’s argument.”

As Hisquierdo implies, there seems to be no logical basis for distinguishing the military pension cases and their progeny from Kelly-Nizenkoff. In my view, those cases recognizing a community interest in future federal benefits are correct as a matter of community property law and the social security cases in error. This is because of a distinction recognized neither in Brown, which

78. 19 Cal. 3d at 619, 566 P.2d at 227, 139 Cal. Rptr. at 593.

draws a line between mere expectancies and property arising by contract right, nor in the social security cases. Expectancies can be divided into two categories: (1) those arising as a windfall, such as an anticipated bequest or inheritance from an aging relative, and (2) those earned by labor or purchased with community funds,\textsuperscript{80} such as a waiter's tip or a law firm associate's hope for a Christmas bonus.

While neither the community nor the individual, of course, can have any interest in category (1) windfall expectancies,\textsuperscript{81} to the extent that expectancies can be assigned as the belonging of a person or persons, category (2) earned expectancies could belong to the community. As a matter of terminology the concept of community "property" would be broadened to include these earned expectancies. This seems to be the view of one commentator on \textit{Brown} who believes that case "rests ultimately on considerations more basic than the formal classification of contractual rights as a form of property."\textsuperscript{82} She reads \textit{Brown} as "stress[ing] that the rights of the nonemployee spouse arise from the fundamental principle of community property law that both spouses participate in the community and both are entitled to share in its rewards."\textsuperscript{83} An early casenote on

\textsuperscript{80} Consider the problem I raised on a recent community property examination where \textit{W} during marriage and cohabitation uses \$5 to buy an Irish Sweepstakes ticket when such contracts are illegal and unenforceable as a lottery. Before the date of the drawing and the race, the state legislature legalizes such contracts by statute applicable to all future lawsuits, no matter when the contract was entered into. This statute takes effect shortly after \textit{W} and \textit{H} are divorced and before \textit{W} wins \$10,000. A strong argument can be made that \(H\) owned half the ticket at divorce—it had an expectancy of being legalized—and that \textit{W} must account to him for \$5000.

The Louisiana Supreme Court recently identified a community interest in employee benefit schemes that, at divorce, "may be a mere expectancy without marketable order or redeemable cash value." T.L. James & Co. v. Montgomery, 332 So. 2d 834, 851 n.2 (La. 1976). The court was speaking of future benefits generated by community labors and seems to mark Louisiana as a community property state recognizing "earned expectancies."

Texas abandoned its version of the French vestedness test in Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976), relying heavily on \textit{Brown}. Cearley involved a federal military pension, and the Texas Court of Civil Appeals had not only declared the pension nonvested in the \textit{French} sense but had stressed that the husband had no contractual right to it because there could be no promissory estoppel against the federal government. 536 S.W.2d 96 (Tex. Civ. App. 1976). In reversing this decision the Texas Supreme Court is necessarily adopting, albeit tacitly, some doctrine in which an earned but noncontractual asset can be community owned. \textit{Accord, Van Loan v. Van Loan, 569 P.2d 214 (Ariz. 1977).}

\textsuperscript{81} \textsc{Cal. Civ. Code} §§ 5107-5108 (West 1970).

\textsuperscript{82} \textit{Community Property Interests in Nonvested Pension Rights, supra} note 28, at 279.

\textsuperscript{83} \textit{Id.} at 279. The writer concludes that "noncontractual bonuses intended as additional compensation" for work performed during marriage but paid after divorce are subject to division at divorce as community property. \textit{Compare} this position with Comment, \textit{Lump Sum Division of Military Retired Pay: Ramsey v. Ramsey, 12 Idaho L. Rev. 197 (1976), revised & reprinted as Bowman, Lump Sum Division of Military Retired Pay: A Dissenting View, 3 Community Prop. J. 135 (1976), asserting that federal benefits Congress is not required to have paid cannot be community property.}
French also would recognize a community interest in what many would call "expectancies" when they arise from the labor of a spouse. Such expectancies arise, for example, from an invention created during marriage but patented and developed thereafter, or from an advertising contest essay composed during marriage and awarded a cash prize after divorce.

The category of earned expectancies can itself be subdivided into two types: (a) those given some recognition in law by the existence of a noncontractual cause of action, and (b) those protected by no legal remedy at all. In the latter subcategory would fall the waitress' hope of a tip and the law firm associate's hope of a bonus (assuming no promissory estoppel basis to compel awarding of a bonus). On the other hand, the inventor of the unpatented, undeveloped new device does have a legal remedy if, for example, his plans are stolen by a competitor or there is other wrongful interference with his right to determine when he will put the invention in the public domain.

Although the Brown commentator would extend community property status to earned expectancies not protected by any noncontractual cause of action at all, it is not necessary to take that step to conclude that Nizenkoff and Kelly are incorrect in holding that Congress' power to abolish the OASDI benefit plan precludes any community interest in future benefits. Future OASDI benefits are clearly protected by a noncontractual cause of action, under Flemming v. Nestor or its progeny, against arbitrary congressional mitigation or termination of benefits. Although such a cause of action arises by force of the fifth amendment rather than by contract, it is still not a windfall expectancy. It would exist only in favor of one who, at the time of the congressional action objected to, had participated in the social security program by labors that generated FICA taxes, or a spouse or child or another claiming

84. Note, Community Property: Division of Expectancies as Community Property at Time of Divorce, 30 Calif. L. Rev. 469, 470 (1942) [hereinafter cited as Division of Expectancies].


In this area the federal control over patent rights preempts some state law conferring property interests in inventions, yet large areas are left to the states. See, e.g., Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) (federal supremacy in patent area does not preempt state law giving protection to trade secrets).

The writer of the contest essay would likely have a similar remedy if it were stolen and submitted to the contest operator by the thief. Although the 1942 commentator seems not to have considered it, it is quite likely that if the essay had been, at the time of divorce, submitted to the operator, a proprietary contract right of the type held in Brown to be community property would exist. It is generally held that once a promise has acted in reliance to perform the terms of an offer to form a unilateral contract, the offer cannot be withdrawn. See Division of Expectancies, note 84 supra. Thus, the contestant spouse would have a cause of action at divorce to assure that the contest sponsor fairly considers his or her entry and in fact awards the prize to a bona fide entrant.
through that participant on the basis of such labor. A similar cause of action protects expectant interests in other federal benefit programs, such as veterans' pensions and the Civil Service Retirement Plan. The right to bring such suits can quite readily, in some cases, be shown to have been onerously acquired during marriage, by labor or with community contributions of money.

It should be clear that the proposal made is not that the cause of action itself is community owned, although it is clearly "property." If shortly before a divorce Congress had passed a discriminatory amendment to the Social Security Act eliminating expectant benefits of the "insured" participant spouse, he would have acquired during marriage a right to bring suit. Moreover, it seems clear this right is traceable to the FICA tax generating labors that give the participant spouse standing to sue. But the action is of no value to the community unless it can also share in future benefits which will be protected by a favorable judgment. An award at divorce to the potential plaintiff's spouse of half of any judgment collected on the cause of action would be absurd in such a case: Any judgment obtained would merely declare the discriminatory amendment invalid and give damages only as to benefits previously unlawfully withheld under the invalidated amendment; it would not award any future sums payable. Rather, although property may exist in the form of the protecting cause of action, the spouse should be able to assert a community interest in the expectancy itself\textsuperscript{86} and to obtain an award at divorce of a fractional portion of tangible benefits payable if and when the expectancy ripens into money or other valuable property.

Recognition of the new category of community interest, earned expectancy, may create some problems in tracing but these will generally be no more difficult than the tracing problems in \textit{Brown}.\textsuperscript{87} The inventor spouse, for example, may want to establish that a portion of the work was done on his project before marriage (or

\textsuperscript{86} Many in the legal profession would consider the hypothetical invention discussed above to be "property" not an "expectancy" because its value at the nondevelopment stage is protected by a noncontractual cause of action in tort against wrongful conversion. See Davis, \textit{A Consideration of the Separate and Community Property Aspects of Inventions and Patents}, in ESSAYS IN THE LAW OF PROPERTY PRESENTED TO CLYDE EMERY (S.M.U. Law School 1975). That is, in the event of abuse, profits to the converter may be recovered. See I G. THOMPSON, REAL PROPERTY 26 (J. Grimes Repl. 1964); H. TIFFANY, REAL PROPERTY § 3 (3d ed. 1970). I take no issue with such a definition of "property." It seems clear, however, that even those who consider the undeveloped invention "property" could distinguish the hope of receiving OASDI benefits by one who has engaged in FICA tax generating labors. The protective cause of action under Fleming v. Nestor, 363 U.S. 603 (1960), in giving relief only for arbitrary meddling by Congress with the expectancy, is considerably lesser protection than that given the invention. There remains in the case of future OASDI benefits the power of a third party (Congress) to prevent vesting of fully protected rights (\textit{i.e.}, a claim to cash against the social security administration).

\textsuperscript{87} OASDI benefits are an exception; they raise extremely difficult tracing problems. See text accompanying notes 396-448 infra.
after separation) just as the pensioner spouse in a Brown-type case may establish that a portion of the labor or the contributions that built up his or her interest in a plan were not community.88

Another type of problem, more likely to arise in the subcategory of expectancies not protected by any cause of action, is distinguishing between expectancies earned by labors and those obtained by a gift. An example would be an expensive Christmas present given to an employee by a boss who also happens to be a good friend. The trier of fact in the divorce, probate or other court will be able to decide the primary motivation,89 or perhaps even divide the expectancy or property90 as partly a gift windfall and partly earned. Other problems may arise when the recipient spouse, for example, asserts that the great bulk of the bonus or present is a reward to him or her for post-separation (or pre-marriage, for that matter) labors. Again, such problems should not arise with such frequency or cause such great difficulties to the trier of fact so as to reject extending the Brown case to earned expectancies. It seems to me, moreover, that in the case of year-end bonuses the courts could fashion a presumption (or draw an inference) that a year-end bonus is equally earned by each day's work, casting on the spouse disfavored by this solution the burden of showing a different source.91

II. THE STATUS OF CALIFORNIA'S "TERMINABLE INTEREST" RULE: APPLICATION TO PRIVATE AND FEDERALLY CREATED PENSIONS?

Part I of this Article has shown that the rule of Brown, which recognized a community interest in "nonvested" pension and retirement plans, will also extend to federally created plans which Congress can amend or terminate and to private plans where an employer's reserved power to terminate is not construed as absolute. This part will consider the post-Brown viability of the "terminable interest" rule (also referred to as the Benson-Waite doctrine).92 Under this rule, retirement plan interests traceable to contrib-

89. This distinction is regularly drawn in income tax cases. E.g., Commissioner v. Duberstein, 363 U.S. 278 (1960).
90. The problem could typically arise when the H and W separate in the summer and H receives a Christmas "bonus" later that year with the divorce hearing the following year. Now the expectancy has ripened into valuable property but it "vested" at a time when the parties were permanently separated. See CAL. CIV. CODE § 5118 (West Supp. 1977). Thus the nonrecipient spouse must claim through the expectancy.
91. See note 32 supra.
92. See Thiede, supra note 4, at 638. The rule is referred to as the "Benson-Waite doctrine" because of the two cases primarily responsible for creating it. Waite v. Waite, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972), overruled on other grounds, In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); Benson v. City of Los Angeles, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963).
utions of community funds or to community labor constitute community property, but the interest of the nonparticipant spouse terminates at the death of either spouse. This termination permits the employee spouse, when he dies first, to designate a third party beneficiary of all post-death benefits rather than just the decedent’s community half interest.93 When the nonemployee spouse is the first to die, his or her testamentary power to bequeath a third party a half interest in all community properties does not extend to the retirement plan.94 Somewhat inconsistently, however, dissolution of the community by divorce, rather than by death of a spouse, does not terminate the nonemployee spouse’s interest. She (since the nonemployee in the cases is usually the wife, the female pronoun will be used for convenience) may be awarded a fractional interest of future sums paid to the employee spouse,95 but not, of course, such payments as accrue after either H or W dies. Or, the court may place a present lump sum value on the community interest in the pension (the pre-death interest), award it to the employee spouse and award the nonemployee spouse community assets of offsetting value to effectuate the equal division required by section 4800 of the California Civil Code.

This section of the Article traces the development of the terminable interest doctrine and explores its precise contours. It will be shown that the doctrine is totally inconsistent with certain sections of the California Civil96 and Probate97 codes that deal with community property. Because of this inconsistency the doctrine must rest on an implied partial repeal or amendment by the state legislature of all or some of these statutes. Although the doctrine originated in cases involving state created retirement plans98—statutes having the

95. That is, H may have to share with W sums paid to him after divorce. It seems clear, however, although a case presenting the question has yet to appear among the reported decisions, that if H remarried and W’s benefits became payable to W, the court would hold the community interest in them to have terminated even though both H and W were still alive. The logic of Benson and Packer, see notes 101-25 supra, compels that result.
97. CAL. PROB. CODE § 201 (West 1956).
98. The California legislature has enacted numerous pension plans which have provisions possibly subject to the terminable interest theory. Millions of dollars could be diverted from the community property system to the detriment of the spouse of participants if Benson-Waite were freely applied. Each plan, of course, continues the retiree’s pension payments after the spouse’s death and thus raises an issue as to whether the employee’s spouse loses all interest at her earlier death.

In addition, many of the plans provide for benefits payable after the retiree’s death before his spouse, including widow’s pensions and children’s pensions, and even parents’ pensions on occasion. It is also very common to empower the
potential implied to repeal pro tanto the conflicting statutes—it has been illogically extended to both federally created and private plans. 100

This section of the Article predicts that the state supreme court not only will hold the doctrine inapplicable to federally created and private retirement plans but will also probably disapprove the rule with respect to state created pensions because there simply is no evidence of a state legislative intent to cut off a community interest in post-death benefits. In fact, with respect to many state created pensions there is clear recognition of a community interest extending beyond the death of H or W.

participant employee to designate a beneficiary to receive either lump sum death benefit payments or a survivor’s annuity.

For legislative enactments having one or more of these features, see, e.g.:  
(1) State Employees Retirement System—CAL. GOV’T. CODE §§ 12479 (designee to receive accrued but unpaid salary at employee’s death); 21204, 21365.1, 21367.51 (death benefits for surviving spouse); 21250 (pension for surviving spouse); 21263 (pension for surviving spouse of highway patrolman); 21332-21333 (optional survivor pensions payable to designated beneficiary); 21382 (allowance for surviving spouse caring for minor children and for minor children) (West 1963 & Supp. 1977).

(2) County Peace Officers Retirement Law—CAL. GOV’T. CODE §§ 32056 (pension for surviving spouse or children); 32062 (optional pension for surviving spouse or designated beneficiary) (West 1968).

(3) County Employees Retirement Law—CAL. GOV’T. CODE §§ 31760.1, 31765-31765.1 (survivor's pension for spouse designated as beneficiary or for minor children); 31762-321764 (optional survivor’s annuity to designated beneficiary); 31780 (death benefit for designated beneficiary); 31781.1, 31845 (death benefits for surviving spouse); 31786-31787 (death benefit for surviving spouse or minor children); 31846 (survivor benefits for minor children); 31848 (survivor benefits for parents) (West 1968 & Supp. 1977).

(4) Fire Service Retirement Law—CAL. GOV’T. CODE §§ 32355 (pension for surviving widow or minor children); 32361 (optional survivor’s pension for spouse or designated beneficiary) (West 1968).


(6) Judge’s Retirement System—CAL. GOV’T. CODE §§ 75034.1, 75075.1 (pension for surviving spouse); 75071, 75077, 75091, 75093-75094, 75104.4 (optional surviving spouse pensions); 75096 (children’s survivor benefits); 75104.5 (death benefits payable to beneficiary designated by judge) (West 1976).

(7) State Teacher’s Retirement System—CAL. EDUC. CODE §§ 23800, 23803, 23916 (death benefits for designated beneficiary); 23804 (pension for surviving spouse or children); 24200 (optional survivor annuity for designated beneficiary) (West Spec. Pamph. 1976).


(9) Oakland City Charter—§§ 2007-2008, 2608, 2612 (pension for surviving spouse or children).


100. See, e.g., In re Marriage of Bruegl, 47 Cal. App. 3d 201, 120 Cal. Rptr. 597 (4th Dist. 1975), overruled on other grounds, In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1963); text accompanying notes 150-51 infra.
A. Development of the Terminable Interest Rule

The seeds of the terminable interest rule were first sown in *Packer v. Board of Retirement*\(^{101}\) in 1950. In *Packer*, the deceased husband had participated in a state created pension plan from 1926 to 1946. In 1937, provision for a widow’s pension was added to the plan. When this provision was repealed in 1941, other benefits automatically became part of the plan.\(^{102}\) On H’s death in 1947, W claimed entitlement to a widow’s pension on the theory that the 1937 provision had vested rights in her as a third party beneficiary to the pension contract that could not be eliminated without an unconstitutional taking of property. This argument was rejected by the court.

[A] widow’s interest, prior to her husband’s death, has been considered to be merely a part of the husband’s pension benefits and as such subject to being wholly eliminated, provided, of course, that the total change in the husband’s pension rights does not exceed the permissible bounds of a modification. It may be conceded that the husband’s pension rights derived from his employment during marriage are community property, but this does not furnish any basis for the claim that the widow has a separate, vested right to a pension that is different from her community interest in her husband’s pension rights.\(^{103}\)

Having properly rejected the argument on third party beneficiary principles of contract law,\(^{104}\) however, the court went on to state

\(^{101}\) 35 Cal. 2d 212, 217 P.2d 660 (1950).

\(^{102}\) The *Packer* court found the changes made in the plan to be permissible, 35 Cal. 2d at 218-19, 217 P.2d at 664-65, under the previously established rule that, although an employee participating in a state government pension plan had a contractual right to continuation of the plan, the government could make reasonable modifications in it. The participant was not contractually guaranteed any precise benefits schedule at the time he entered employment, but merely overall benefits substantially as valuable as those offered when participation in the program began. See Miller v. State, 18 Cal. 3d 808, 557 P.2d 970, 135 Cal. Rptr. 386 (1977); Abbott v. City of Los Angeles, 50 Cal. 2d 438, 326 P.2d 484 (1958); Allen v. City of Long Beach, 45 Cal. 2d 128, 287 P.2d 765 (1955) (statute increasing amount of deductions from paycheck to fund pension cannot stand unless benefits are also increased); Kern v. City of Long Beach, 29 Cal. 2d 848, 179 P.2d 799 (1947); Farina v. City of Emeryville, 188 Cal. App. 2d 100, 10 Cal. Rptr. 288 (1st Dist. 1961).

The reason for implying such a retained power to change the terms while not substantially altering the total value of benefit is stated in the *Kern* case: “The rule permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficial policy.” 29 Cal. 2d at 854-55, 179 P.2d at 803. Most other community property states agree with the California rule. See Hanson v. City of Idaho Falls, 92 Idaho 512, 446 P.2d 634 (1968); Weaver v. Evans, 80 Wash. 2d 461, 495 P.2d 639 (1972); Eisenbacher v. Tacoma, 53 Wash. 2d 280, 333 P.2d 642 (1958). In Texas, however, the public employer impliedly retains the right to terminate the pension and the employee has no such “vested” rights. See note 76 supra.

\(^{103}\) 35 Cal. 2d at 216-17, 217 P.2d at 663. Accord, Sweesy v. Los Angeles County Peace Officers Retirement Bd., 17 Cal. 2d 356, 110 P.2d 37 (1941).

\(^{104}\) Indeed, even under the third-party beneficiary theory the result seems
that "the wife of a public employee does not acquire a vested interest in a pension until it becomes payable to her." While this dictum referred to a wife claiming as third party beneficiary rather than as owner of half the community interest, it was not so narrowly read in subsequent decisions, such as Benson v. City of Los Angeles.

1. Benson v. City of Los Angeles

In Benson, H began working for, and participating in the retirement program of, the Los Angeles Fire Department in 1916. In 1920 he married W1. In 1940 he retired and began receiving his pension. In 1952 H obtained an out-of-state divorce from W1 and subsequently married W2. His retirement plan included a pension

appropriate since W's rights were not eliminated altogether; rather her rights on H's death for reasons other than service-connected injury were dropped while, at the same time benefits in the event of H's service-connected death were expanded. 105: 35 Cal. 2d at 217, 217 P.2d at 664.

106. Had the Packer analysis been phrased in third-party beneficiary terms, the case probably would not have spawned such dubious progeny as Henry v. City of Los Angeles, 201 Cal. App. 2d 299, 20 Cal. Rptr. 440 (2d Dist. 1962). A charter change was made in the provisions of the pension for widows of Los Angeles firemen and policemen. Under prior law the claimant had to be married to the fireman a year before his death; now she had to be married to him a year before his retirement. The court said the pension was an "element of the husband's contractual compensation," id. at 313, 20 Cal. Rptr. at 448 (emphasis added), and that there was a real "benefit to a fireman or policeman of being able to protect his widow with a pension irrespective of when his marriage to her occurred, provided, of course, it occurred at least one year prior to his death." Id. at 314, 20 Cal. Rptr. at 448 (emphasis added). The change in the charter "was a disadvantage to such employees and we find that it was not accompanied by comparable new advantages." Id. at 315, 20 Cal. Rptr. at 449 (emphasis added). Had the court considered the situation of a fireman or policeman who was married when the pension benefits were earned, however, recognizing that Packer viewed the community in such a case as owning the bundle of rights, the harm is less clear. The charter change merely eliminated a third party not a member of the community—H's second wife, whom he marries after retirement and hence after ownership of the pension has been fixed—as a potential beneficiary. Perhaps it is of benefit to the present community to make provision for H after W1's death, including making it possible for him to remarry, but certainly this is a more difficult question than that with which the Henry court dealt.


108. H did not obtain personal jurisdiction over W1, thus the divorce court in New Jersey lacked the power to disturb any of W1's property rights except that terminating of the marital status converted the former community property from community-owned to tenancy in common. See Estin v. Estin, 334 U.S. 541 (1948); Waite v. Waite, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972), overruled on other grounds, In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); Weber v. Superior Court, 53 Cal. 2d 403, 348 P.2d 572, 2 Cal. Rptr. 9 (1960); Hudson v. Hudson, 52 Cal. 2d 735, 344 P.2d 295 (1959). Using the time test of pro rata apportionment, see note 32 supra, the pension was apparently owned 4/24 by H as his separate property and 20/24 as community property, although 7/24 of the latter was pre-1927 so-called "community property" owned entirely by H until dissolution of the marriage. See note 120 infra; Reppy, Retroactivity, supra note 31, at 1055. Apparently, however, even H's ex parte divorce was enough to vest in W1 an ownership interest in the pre-1927 community property and hence analysis can proceed as if a full 20/24 of the ownership of the pension became tenancy in common property of H and W1 after his divorce.
for "his widow," provided she had been married to him for a year.109

Upon H's death in 1960, W_1 claimed entitlement to the entire widow's pension,110 even though W_2 was the obvious "widow" of H, and alternatively claimed her fractional community share in the pension.111

The California Supreme Court rejected W_1's claim to all the widow's pension:

Conceding the community nature of the pension, it follows that the community possessed only such an interest therein as August's [H's] employment contract provided. . . . That contract provided for payments to August during his lifetime and thereafter for the payment of benefits to August's "widow." Certainly if August had married and divorced several wives during the time he was employed by the city, each former wife would not be entitled to a widow's pension.112

The supreme court, however, did separately consider W_1's sometimes blurred alternative claim to her fractional community share in the pension.

Discussing this claim, the court focused on the terms of the pension contract between the community and the city, never considering the question whether the contract unlawfully allowed H to agree to give community property to a "widow" without his then-wife's consent.113 The court then cited Packer for the proposition

109. This was the provision in effect when H began his employment. In 1925 there was an attempt made to change it so that the widow had to be married to H one year before he died. Application of the 1925 change to persons previously employed was held invalid under the Kern principle. See 60 Cal. 2d at 358, 384 P.2d at 649, 33 Cal. Rptr. at 260-61; notes 20, 106 supra.

110. Petition for Hearing in the California Supreme Court at 19, 28, Benson v. City of Los Angeles, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963). The argument was not totally lacking in merit. She contended that under the concept of divisible divorce, see Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Hudson v. Hudson, 52 Cal. 2d 735, 344 P.2d 295 (1959), the New Jersey decree could only change the status of her and her husband, H: When it came to family law status, Olive, W_2, was the widow; but since the ex parte decree could not affect proprietary rights, Teresa, W_1, was still the widow when it came to such questions as who owned what items of property. Thus, W_1, conceded that she had to survive H to claim any of the widow's pension. Petition for Hearing in the California Supreme Court, supra, at 28; Petitioner's Opening Brief at 30, Benson v. City of Los Angeles, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963). However, under the community property-based claim for 10/24 of the widow's pensions, the existence of W_2 would satisfy the condition of the contract that there be a widow and W_1's estate could make a claim for 10/24 as well as could W_1.

111. The most logical claim W_1 could make was to half of the community share of the pension. She could not claim the portion earned by H when he was single, nor the half of H's community interest which would pass under the pension plan's terms by treating them as a form of testamentary substitute. See Tyre v. Aetna Life Ins. Co., 54 Cal. 2d 399, 353 P.2d 725, 6 Cal. Rptr. 13 (1960); Cal. Prob. Code § 201 (West 1956).

112. 60 Cal. 2d at 360, 384 P.2d at 651, 33 Cal. Rptr. at 259.

113. Id. California Civil Code § 5125(b) (West Supp. 1977), as amended by 1977
that the pension contract vested in \( W \) no rights beyond the community’s right to enforce the contractual provision for payment of a widow’s pension.\(^{114}\)

Not only was the court’s inattention to the anti-gift provision of what is now Civil Code § 5125(b)\(^{115}\) erroneous, but its construction of \textit{Packer} was ill conceived. \textit{Packer} did no more than establish that \( W \) had to make her claim derivatively as a former member of the community, not as a third party beneficiary in her own right. The question of the power of \( H \) and his employer to contract to divert community property to a third party (the widow of \( H \)) without \( W \)'s consent as required by statute simply was not presented in \textit{Packer}. Nevertheless, the \textit{Benson} court felt \textit{Packer} was somehow authoritative,\(^{116}\) for it continued:

Cal. Stats. ch. 692, § 1, the anti-gift statute, prohibits one spouse from conveying community property without consideration or written consent of the other spouse. \textit{Benson} suggests that a third party who contracts with a spouse in such manner as to assist him or her in violating the prohibition of the anti-gift statute cannot be liable to the party’s spouse and can always take refuge in the contract. This is incorrect. For example, a life insurance company given written notice by \( W \) of her interest in a policy purchased with community funds cannot, without incurring liability to \( W \), perform the contract on \( H \)'s death by paying all the proceeds to \( H \)'s designee. See Sieroty v. Silver, 58 Cal.2d 799, 803, 376 P.2d 563, 566, 26 Cal. Rptr. 635, 638 (1962), \textit{overruled on other grounds}, Estate of Baglione, 65 Cal. 2d 192, 197, 417 P.2d 683, 687, 53 Cal. Rptr. 139, 143 (1966); Grimm v. Grimm, 26 Cal. 2d 173, 157 P.2d 841 (1945); Novo v. Hotel del Rio, 141 Cal. App. 2d 304, 295 P.2d 576 (3d Dist. 1956). \textit{See also} Cal. Ins. Code § 10172 (West Supp. 1977), enacted to give relief in some instances from results such as that in Blethen v. Pacific Mut. Life Ins. Co., 198 Cal. 91, 243 P. 431 (1926). \textit{See generally} the discussion of § 10172 in Leonard v. Occidental Life Ins. Co. of Cal., 31 Cal. App. 3d 117, 106 Cal. Rptr. 899 (1st Dist. 1973). The reason is obvious: Since one spouse alone cannot undercut the protection of the other which the legislature established in \textit{Cal. CIV. CODE} § 5125(b), certainly he cannot achieve the same end by payments made under contract with a third party, at least where the other party to the contract is aware of the community interest of the spouse.

114. "On the face of the contract entered into between the community and the city Teresa was not entitled to assert any personal rights other than those of the community . . . ." 60 Cal. 2d at 360, 384 P.2d at 652, 33 Cal. Rptr. at 260.


116. It is true, undoubtedly, that when August and the City entered into a contract of employment neither had any donative intent to make a gift of community funds. They had employment in mind, and the city charter added to the terms of the contract the provision for diverting community assets to a third party, the widow. Nevertheless, the statute then in effect limiting \( H \)'s power over community property, former \textit{Cal. CIV. CODE} § 172, 1891 Cal. Stats. ch. 220, § 1, was so drafted as to bar more than gift transactions with donative intent: "provided, however, that he [husband] cannot make a gift of such community personal property or dispose of the same without a valuable consideration . . . without the written consent of the wife." The consideration referred to means consideration to the community, as is clear from all of the life insurance cases where there was consideration to \( H \) and the insurer yet \( W \) was able to void as to her half interest a designation of a third party as beneficiary of community-owned benefits. \textit{See, e.g.}, Sieroty v. Silver, 58 Cal. 2d 799, 376 P.2d 563, 26 Cal. Rptr. 635 (1962), \textit{overruled on other grounds}, Estate of Baglione, 65 Cal.2d 192, 197, 417 P.2d 683, 687, 53 Cal. Rptr. 139, 143 (1966); Grimm v. Grimm, 26 Cal. 2d 173, 157 P.2d 841 (1945); New York Life Ins. Co. v.
The rule that a wife’s interest in a widow’s pension may never vest in her in the absence of the happening of the contingency upon which payment of the widow’s pension depends was firmly established before the *Packer* case. . . . Its basis is that to vest interests not subject to control by the employee would impose such inflexibility upon public employment that the purpose of providing for retirement would be defeated. Such purpose is said to be to include competent persons to enter and remain in public service. . . . Moreover, there is a public policy inherent in the right of a governmental body to make reasonable modifications and changes to a retirement system, which policy would be defeated by the *vesting of rights in someone other than the employee.*

The italicized language, the crux of the decision, contradicts *Packer*, earlier language of *Benson* itself, and basic community property law. The passage purports to reaffirm *Packer*, but the *Packer* court declared that the pension benefits earned by a spouse’s labors during marriage were community property. *118* Moreover, the *Benson* court itself had begun its analysis of *W*’s contentions by holding that “pension rights which are earned during the course of a marriage are the community property of the employee and his spouse.” *119* Community property is owned equally by *H* and *W* and has been since 1927; *120* it is not vested solely in the employee spouse. It is possible that the court meant merely to reiterate the holding of *Packer* that no third party beneficiary rights would be recognized until the time of payment and that only the community consisting of the employee and his or her spouse had protected proprietary rights prior to that time. *121* Nevertheless, a key passage of the *Benson* case suggests that the court in fact meant to make the entire pension package *H*’s separate property. This passage appears in the court’s discussion of life insurance cases. Conceding that in the life insurance situation, “even after her husband’s death a wife is able to recover half of the proceeds of such policies although she

Bank of Italy, 60 Cal. App. 602, 214 P. 61 (1st Dist. 1923). In *Benson* everyone seemed to assume that a benefit to *H* accruing only after the community is dissolved—protection for his second wife—would actually be consideration to the community sufficient to remove from the apparent prohibition of former § 172 the extension of such benefits to a widow other than the wife of the employee who lived with him in community when the benefits were earned.

117. 60 Cal. 2d at 361-62, 384 P.2d at 652, 33 Cal. Rptr. at 260 (emphasis added).
118. See text accompanying note 103 supra.
119. 60 Cal. 2d at 359, 384 P.2d at 651, 33 Cal. Rptr. at 259.
121. In some contexts the husband-wife community has actually been treated as the employee although only one of them is bound to provide labor. See, e.g., Fink v. United States, 454 F.2d 1387 (Ct. Cl. 1972), *cert. denied*, 409 U.S. 844 (1972).
is not a named beneficiary,'" the court distinguished the employment contract situation:

[T]he vested interest which the wife may protect by her collateral control thus precludes an involuntary deprivation thereof in the case of the community interest in insurance on the husband's life. But the acquisition by a wife of a vested interest in her husband's public employment contract might defeat the public purpose in providing a retirement plan for public employees. The distinction lies in the nature of the control which the law permits the husband and wife to independently, lawfully exercise regardless of the community nature of the pension right, and for policy reasons it is deemed necessary that the husband-employee alone exercise control unhampered by vested interests in any third party, including his community partner."

In other words, if the pension rights were community property, the wife would have the limited "control" of being able to block H's attempts to make transfers of the community interest without consideration. Somehow, public policy required the husband to be able to contract with his governmental employer to provide for the transfer without consideration of what would otherwise be community property.

Read most broadly, Benson holds that the entire pension package is H's separate property and thus is not subject to the anti-gift statute. This reading would most logically have to rest on an implied partial repeal of what is now Civil Code section 5110, defining community property, for if that statute is applicable to the pension rights they would certainly be community property.

Benson is, however, susceptible of a narrower reading under which W, did have a vested one-half ownership interest in the pension insofar as H earned it by his labors during marriage. The Los Angeles city charter was construed to give H the right to enter into a contract with the City in which he could transfer community property (i.e., to W) without his wife’s consent; as so construed, it worked an implied partial repeal of the anti-gift statute. This narrow reading recognizes that W has vested proprietary interests in the community property but that they will not "hamper," to use the term chosen by the Benson court, H's power to make a third party

122. 60 Cal. 2d at 363, 384 P.2d at 653, 33 Cal. Rptr. at 261.
123. Id. at 363, 384 P.2d at 653-54, 33 Cal. Rptr. at 261-62.
124. The court was mistaken in stating that W's veto power over gifts arose from her half ownership of the community property. The power to bar such gifts was conferred by statute in 1891, see note 116 supra; California wives were not recognized as having a half ownership interest in the community until 1927. Moreover, Benson was decided long before the introduction of equal management in 1975; at the time of Benson, H had exclusive control of the pension, whether it was community or his separate property, subject only to the bar of the 1891 statute against transferring the community interest without consideration or W's written consent.
donee beneficiary contract otherwise prohibited by the 1891 anti-gift legislation.\footnote{125}

2. \textit{Waite v. Waite}

Although the narrow reading of \textit{Benson} can explain its result, it cannot fully explain the subsequent development of the terminable interest rule with regard to benefits accruing after the nonemployee spouse's death. Some indication of how the rule would be developed appeared in the 1970 case of \textit{Phillipson v. Board of Administration}.\footnote{126} However, it was not until \textit{Waite v. Waite},\footnote{127} decided in 1972, that the court extended the rule to hold the wife unable, if she predeceases her husband, to bequeath any interest—on the theory that she had a fractional community interest—of future pension payments $H$ may receive after her death.

In \textit{Waite}, $H$ had participated during marriage in the state judge's retirement plan and had earned benefits that were vested under the then applied \textit{French} test. In post-divorce litigation to the property rights of the former spouses, the trial court divided the community property so as to make $W$ the owner in fee simple absolute of the entire community interest in the retirement benefits.

\footnote{125} The power of $H$ to make gifts of community property is not necessarily inconsistent with recognizing $W$ as equal owner. A Texas wife is co-equal owner of community property with her husband. \textit{See, e.g.}, Hopkins v. Bacon, 282 U.S. 122 (1930); Wright v. Hays' Adm'r, 10 Tex. 130, 133 (1853). A Texas spouse can make reasonable gifts of community property without the consent of the other spouse. \textit{See, e.g.}, Givens v. Girard Life Ins. Co., 480 S.W.2d 421 (Tex. Civ. App. 1972), \textit{writ refused n.r.e.}. The type of "gift" upheld in \textit{Benson} might well pass muster under Texas' reasonable gifts standard. Undoubtedly, the great bulk of the monetary contributions on $H$'s behalf into the pension fund provided for benefits to be paid during his life; moreover, in most cases the wife living in community with $H$ would also be the widow who receives payment.

The narrow reading of \textit{Benson} means that the Los Angeles city charter has the same effect on $W$'s community ownership in the pension as did the federal legislation providing for national service life insurance. Notwithstanding language in Wissner v. Wissner, 338 U.S. 655 (1950), suggesting that the United States Supreme Court felt a wife could have no vested interest at all in the proceeds, \textit{see text accompanying note 230-40 infra}, the California courts presently view the insurance coverage as a community asset to the extent it was earned by a spouse during marriage. Federal law merely preempts the 1891 anti-gift statute leaving $H$ free to designate a third party to receive all the proceeds, while the state gives $W$ some remedy for this invasion of her rights other than a veto over the gift. \textit{In re Marriage of Milhan}, 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974), \textit{cert. denied}, 421 U.S. 976 (1975). \textit{See text accompanying notes 261-64 infra}.


Thus, if W predeceased her former husband, the retirement payments she had been receiving would then be paid to her heirs or legatees.

On appeal, H contended first that the pension benefits were his separate property and alternatively that any community interest awarded to W ended with her death. The first contention was summarily rejected; 128 the declaration in Benson that the wife had no rights in the pension until her husband died meant only that she had no rights as a third party beneficiary, not that she lacked a community interest. 129 "[B]oth Benson and Phillipson clearly distinguish the spouse's vested community interest in the employee's lifetime pension" from other benefits. 130

However, H's alternative position was upheld by the court. "[I]f plaintiff [W] dies before him, her share of the monthly pension payments should then go directly to him, and not to plaintiff's estate." 131 The court reasoned that the pension program's purpose was to provide subsistence to former employees and dependents, not to enrich the estates of any of them: 132

The wife complains that this reasoning deprives her of an "equal" portion of the pension; if the judge enjoys a right to payments for his lifetime but her right is limited to the period of the judge's life or her life (whichever is shorter), her interest would be unequal in length to his, and actuarially of lesser value. The wife, however, can claim no right to precise equality 133 in the division of community

128. "Surely pension benefits do not represent the beneficial [sic] gratuities of the employer; they are, rather, part of the consideration earned by the employee . . . . Consequently, the community property of the marriage includes not only the contributions but also the matured pension rights payable as a benefit of employment." 129 Id. at 469-70, 492 P.2d at 18, 99 Cal. Rptr. at 330. 130. Id. at 475, 492 P.2d at 19-19, 99 Cal. Rptr. at 330-31. Cf. Dickey v. Retirement Bd., 16 Cal. 3d 745, 749 n.2, 548 P.2d 689, 692 n.2, 129 Cal. Rptr. 289, 292 n.2 (1976): "[T]he wife of a public employee does not have a separate vested right to a pension. [Emphasis added]." See also Branson v. Fireman's Retirement Fund, 79 Idaho 167, 312 P.2d 1037 (1957). 131. Id. at 475, 492 P.2d at 19, 99 Cal. Rptr. at 331. 132. Id. at 472, 492 P.2d at 21, 99 Cal. Rptr. at 333. 133. "Pension programs for public employees serve two objectives: to induce persons to enter and continue in public service, and to provide subsistence for disabled or retired employees and their dependents." . . . Accordingly, the state has established here a pension plan in which pension benefits terminate with the death of the employee or, under optional programs, with the death of his surviving spouse . . . . The state contributes no benefits to the employee's estate, his heirs, or his legatees. The state's concern, then, lies in provision for the subsistence of the employee and his spouse, not in the extension of benefits to such persons or organizations the spouse may select as the objects of her bounty. Once the spouse dies, of course, her need for subsistence ends, and the state's interest in her sustenance reaches a coincident completion. When this termination occurs, the state's concern narrows to the sustenance of the retired employee; its pension payments must necessarily be directed to that sole objective. Id. at 473-74, 492 P.2d at 21, 99 Cal. Rptr. at 333. 133. See note 135 infra.
assets, in fact, in Phillipson we suggested that if feasible the court should award the entire pension to the employee, and compensate his spouse with property of equivalent value. Thus a spouse suffers no injury when the court, in effectuating the purposes of the pension program, awards the employee more than half the actuarial value of the pension rights; the court, if it sees fit, may compensate the spouse by an award of more than half the value of some other community asset.

We conclude that the statutory design for judge's pensions negates the spouse's contention that her legatees should inherit pension-payments payable for the balance of the judge's life. Whatever community interest the wife may claim, it cannot transcend the legislation upon which the pension itself rests. The legislation grants to the wife, not an inheritable legacy, but a continuing economic protection for her lifetime, a state-secured provision for subsistence.134

Curiously, the court's final statement in Waite, footnote 9, appears to contradict the holding that the community interest ended with W's death.

The judgment could be corrected by simply striking the award to plaintiff's devisee or heirs in paragraph 2 of the judgment. This modification, however, would transform the superior court's equal division of this community asset into an actuarially unequal division. The trial court, if it sees fit to do so, may compute that difference in actuarial value and alter other portions of its judgment to compensate plaintiff [wife] for this loss in value.135

Having held that the community had no interest in benefits accruing after the death of the wife, simply striking the award of post-death benefits to W would not have disturbed any previously decreed equal division of community assets. The trial court's error, given the apparent holding in the text of the Waite opinion, was in awarding W a share of property that was not community, while otherwise making an equal division of community assets. In view of footnote 9, however, Waite simply addresses the remedy a divorce court should use in making an equal division of community assets when state created retirement benefits are among them. The error

134. 6 Cal. 3d at 473-74, 492 P.2d at 21-22, 99 Cal. Rptr. at 333-34.
135. Id. at 474 n.9, 492 P.2d at 22 n.9, 99 Cal. Rptr. at 334 n.9 (emphasis added).

The supreme court gave the trial judge discretion to revise the judgment to make an equal division, rather than compelling the judge to do so, because the present rule of Civil Code § 4800 mandating an equal division was not yet in effect. Waite involved a 1968 divorce; the 50-50 division rule is part of the Family Law Act of 1970.

Consider in conjunction with note 9, heading 4 in the opinion: "The superior court exceeded its discretion in awarding benefits to plaintiff's heirs and devisees." Id. at 472, 492 P.2d at 20, 99 Cal. Rptr. at 332. This indicates that the only error was in the method of making division, not in declaring the extent of the community interest.
arose in not awarding all post-death community owned benefits to the spouse participating in the retirement plan with an offsetting award of other community property to the nonparticipant spouse. No post-Waite decision I have found so interprets Waite. The reason for this seems clear: Footnote 9 is inconsistent with the rest of Waite.

First it is clear that true community property principles were not applied across the board in Waite, for Benson was reaffirmed with a specific holding that the divorce court could deal only with pension benefits "payable in the lifetime of the defendant" husband. Secondly, with respect to the particular issue of interests after W's prior death, the Waite court, as noted, said the legislature had "grant[ed]" the wife economic protection only "for her lifetime." The statement that the "community interest the wife may claim" cannot "transcend" the pension legislation indicates that somehow the pension statute was viewed as restricting the operation of the Civil Code sections which, if given their ordinary operation would have made all the pension benefits community property. Finally, the supreme court in Waite had before it the opinions that had been written in the court of appeal: a majority opinion extending the terminable interest rule to cut off the community interest at W's death without any suggestion at all—as in footnote 9 of Waite—of an inconsistent, narrower basis to reach the same result in that case; and Justice Kaus' dissenting opinion strongly asserting that since benefits payable after W died would have been earned by H during marriage they necessarily were community property. With the issue so succinctly posed by these opinions it seems clear the supreme court agreed with the majority

136. 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); In re Marriage of Peterson, 41 Cal. App. 3d 642, 115 Cal. Rptr. 184 (2d Dist. 1974) (W's "rights in the husband's pension plan are limited to amounts payable to him while he is living"); Bensing v. Bensing, 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1st Dist. 1972); Berry v. Board of Retirement; 23 Cal. App. 3d 737, 100 Cal. Rptr. 549 (2d Dist. 1972) (at divorce community interest consists of pre-death anticipated payments considering the life expectancy of both H and W) Fithian, Peterson and Bensing were all overruled on other grounds in In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

137. 6 Cal. 3d at 472 n.6, 492 P.2d at 20-21 n.6, 99 Cal. Rptr. at 332-33 n.6.

138. Id. at 474, 492 P.2d at 22, 99 Cal. Rptr. at 334. As established in Packer, such a pension statute "grants" nothing to the wife at all as such; rather it provides for a remuneration for services which, if performed by a married person, become under the Civil Code sections concerning community property co-owned by H and W. Most likely the legislature enacting pension statutes has no intent at all to affect the testamentary power of the employee's spouse, assuming that is covered by other statutes. It is difficult to imagine, in any event, that intent with respect to her testamentary power is different when provision is made for the employee's pension than it is when providing for his salary. No suggestion has ever been made that legislative intent is defeated by giving W testamentary power over half of H's unspent earnings on hand at her death.
and rejected Kaus' view. Footnote 9—which is consistent with Justice Kaus' position—seems to be an oversight by the court and, not surprisingly, has been ignored in subsequent cases.

With Waite the two prongs of the terminable interest rule had been established: (1) The community interest expires with the death of the employee so that his surviving spouse is not assured of any share of continuing benefits (Benson); and (2) the interest ends at his spouse's death to cut off her testamentary power (Waite).

3. Extension to Federal and Private Pensions

Post-Waite cases have not only ignored the inconsistency of footnote 9 and construed Waite broadly, but have also applied the terminable interest rule to situations very different from those under which the rule arose. Disregarding the fact that the rule can only be premised on implied partial repeal by the state legislature of California's community property statutes, courts have extended its application to federal and private pension plans.

Application of the rule to federally created plans began with Bensing v. Bensing,139 a case involving Air Force retirement benefits. In Bensing the court of appeal simply declared Waite to be controlling on the issue of the wife's testamentary power over her community share of benefits. The opinion indicates no awareness of the difference between the power of federal enactments to displace state community property statutes and the power of the state legislature to implicitly enact partial repealers. Nor was any such distinction noted by the supreme court in In re Marriage of Fithian,140 a case which involved the question whether federal military pension law conflicted with, and thus presented a question of preemption of, state law. The court found that the federal statute, which was assumed to withhold testamentary power over the pension from W, did not conflict with California law.141 However, the California


141.[It is argued, this aspect of the plan is significantly incompatible with our community property scheme. This contention, however, overlooks the fact that retirement benefits in California, though community property, do not necessarily constitute an inheritable legacy. Consistent with community property law, a wife may maintain a nontestamentary community property right in benefits which extends only during the lifetime of her husband. [Citing Waite.]

10 Cal. 3d at 600, 517 P.2d at 453-54, 111 Cal. Rptr. at 373-74.
cases cited by the Fithian court all involved state government pensions where it was theoretically possible that the enacting body intended—and had the power—to alter the effect of basic state community property law. No explanation was made of the process by which federal pension enactments altered state law. Fithian also extended the terminable interest rule to the extent of approving legislation that allowed \( H \) to designate the recipient at his death of all post-death pension benefits. (In Benson, the legislature itself had fixed the second wife as the recipient.)

A third case in which federal retirement benefits were in issue, \textit{In re Marriage of Peterson}, involved a civil service retirement plan in which \( H \) had a vested right (in the French sense) at the time of separation either to an annuity or to withdraw his contributions. In holding that the wife had an interest only in amounts payable before the death of either spouse, the court questioned the logic and fairness of the terminable interest rule itself, but it failed to explain why cases construing state legislation as intending to depart from basic community property principles can have any bearing on whether federal programs preempt those same principles. It merely noted that "[I]n general, the California state employees' retirement system parallels the federal system with respect to survivor's pensions and lump sum benefits."

Not only have post-Waite cases illogically applied the terminable interest rule to federally created plans, but one case, \textit{In re Marriage of Bruegl}, purports to extend it to purely private

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142. It is, of course, theoretically possible for federal enactments to alter state law by preemption. See notes 225-40 & accompanying text infra.
143. "Although insurance proceeds are community property to the extent the policy was purchased with community funds . . . the principle does not extend to annuity plans created in the employment context." 37 Cal. 3d at 601, 517 P.2d at 454, 11 Cal. Rptr. at 374.
145. \textit{See note 75 supra} regarding the details of the federal civil service retirement plan.
146. Considerably broader benefits had not yet vested in the French sense and were held by the Peterson court, writing prior to Brown, not to be community property. The Peterson opinion is highly critical of the pre-Brown law that required it to hold there was no community interest in broader benefits. The court was perhaps unaware of the body of federal law suggesting that indeed these future benefits constituted a true expectancy because Congress could eliminate them. \textit{See text accompanying note 75 supra}.
147. 41 Cal. App. 3d at 653, 115 Cal. Rptr. at 192.
148. The Peterson court's statement that it was not deciding if there had been preemption is inaccurate. At least, the preemption argument made by \( H \) there was rejected, for under his theory state law could not apply at all, there would have been no community interest, and the pension rights would have been owned entirely by \( H \) under some sort of federal common law of marital property rights. \textit{Id}.
149. \textit{Id} at 655, 115 Cal. Rptr. at 193-94.
\end{flushleft}
pensions. In *Bruegl*, *H* participated during marriage in a private pension fund and earned credits which the court held to be community property. The plan provided that if an employee with *H*’s tenure died, certain death benefits would be payable to his designated beneficiary. These benefits would be reduced by the amount of pension payments received by *H* after his retirement. The *Bruegl* court thought the terminable interest rule was triggered whenever contingent post-death benefits were found in a pension plan: “Since the identity of the beneficiary and whether that person survives will not be known until Herbert’s death . . . Evelyn has no community interest in the guaranteed payment feature of the plan insofar as it relates to payments due after Herbert’s death.”151 No explanation was made of how, without a statutory basis on which to build an argument of implied repeal or preemption, *H* was able to contract with his union and employer to avoid the anti-gift rule of Civil Code section 5125(b).

B. A Contrary Line of Authority

Coexisting with the *Benson-Waite* line of cases is a contrary, older line of authority applying ordinary principles of community property law to pension rights even though they are created by act of the state legislature. The rights, if purchased with community property or acquired by community labor, are treated as equally owned. The participant spouse cannot give away, by any beneficiary designation, more than his half of the community interest in benefits payable after his death, unless his spouse consents. Presumably, although the matter has not been subject of an express holding, the courts deciding cases in this line of authority would permit the nonparticipant spouse to bequeath her interest in future benefits.

The anti-*Benson* line of authority begins with the 1936 California Supreme Court decision, *Cheney v. City and County of San Francisco*.152 In *Cheney*, *H* entered city employ in 1929. He married *W* in 1932 and died in 1933. His vested pension plan benefits included payment to his designee (*H* had named his mother) of all of his contributions into the plan plus six months salary. The surviving wife’s claim of a community half interest153

151. *Id.* at 206, 120 Cal. Rptr. at 600.
152. 7 Cal. 2d 565, 61 P.2d 754 (1936).
153. *W*’s theory was that *H*’s rights “vested” when he died, which was during marriage, and that therefore all the benefits were acquired during marriage and thus were community property. The Supreme Court, even before the demise of *French*, found this contention erroneous: Once vesting created “property,” the pro rata apportionment rule applied. See note 32 supra. Moreover, even if a time-of-vesting approach were to be utilized (Louisiana once used such a rule, see, e.g., *Succession of Fay*, 161 La. 1022, 109 So.2d 824 (1926), but has now abandoned it, see note 32 supra) to make the benefits all community, the wife in *Cheney* could not have
was denied because of an antenuptial agreement to live separate in property. However, the court said: "We are perforce committed to the view that the amount payable from the employees retirement system upon the husband’s death represented earnings. As such it was community property unless the agreement executed by the husband and wife providing otherwise was still in force." To the extent that the terminable interest rule makes post-death benefits in a pension created by state law the employee’s separate property, it conflicts with the italicized dictum in *Cheney*. Moreover, even if the terminable interest rule is narrowly construed to retain the community character of pension benefits earned during marriage but to lift the anti-gift provision of the Civil Code and alter the testamentary power provision of the Probate Code, the *tenor* of the *Cheney* dictum is contrary to the rule (even if the literal language of *Cheney* is not), for the *Cheney* court clearly seems to imply that only the antenuptial agreement, and not *H*’s designation of his mother as beneficiary, prevented the wife from prevailing.

The first holding in the anti-*Benson* line of authority is *Gettman v. Los Angeles Department of Water and Power*. Operating under a state created pension plan, *H* designated his son by a prior marriage as beneficiary of death benefits. When *H* died, *W₂* sought recovery of all of the benefits on grounds that the last contribution by *H* was a community asset of his marriage with *W₂*. *H*’s son sought all as designated beneficiary, and the pension operator suggested a pro rata division was required. The court of appeals, quoting the above passage from *Cheney*, adopted the pro rata solution and held: "Under the existing law of community property and the decisions concerning proceeds from insurance purchased with community and separate money, the judgment of the trial court giving the entire death and retirement funds to the named beneficiary must be reversed."

Death benefits under a pension program created by state law were also at issue in *Shaw v. Board of Administration*. *H* succeeded in taking half the benefits, for the community claim would be reduced due to reimbursement owed to *H* for funding the first two of three years of contributions.

154. 7 Cal. 2d at 569, 61 P.2d at 756 (emphasis added).
155. 87 Cal. App. 2d 862, 197 P.2d 817 (2d Dist. 1948).
156. Under this theory, applied by some community property states to benefits such as term life insurance, the last premium payment is assumed to have purchased the coverage for the period during which the insured died. The character of the last payment—community or separate—determines the character of the benefits. See, e.g., *Gaethje v. Gaethje*, 8 Ariz. App. 47, 442 P.2d 870 (1968); *Travelers Ins. Co. v. Johnson*, 97 Idaho 336, 544 P.2d 294 (1975); *Phillips v. Wellborn*, 89 N.M. 340, 532 P.2d 471 (1976); Comment, *Community and Separate Property Interests in Life Insurance Proceeds: A Fresh Look*, 51 WASH. L. REV. 351 (1976).
157. 87 Cal. App. 2d at 865, 197 P.2d at 819.
158. 109 Cal. App. 2d 770, 241 P.2d 635 (2d Dist. 1952). See also *Cavitt v. City*
acquired rights in the program during marriage and named W the
designee under the provisions of the plan purporting to empower the
employee-participant to name the recipient of all death benefits. H
and W were divorced, the court awarding her $400 as her share of
their community property. H died, not having expressly revoked his
designation of W as a beneficiary. Over an argument that the award
of property at divorce eliminated W's rights in the pension, W was
held to be entitled to the benefits. The district court of appeal said:

The provisions of the Retirement Law providing for a
death benefit are in the nature of a contract of life insur-
ance to be governed generally by the principles applicable
to such contracts.

. . . . The extent of the [divorce] decree in this respect,
applying it to its utmost, is that petitioner [W] lost any
claim to a community interest in the amount theretofore
paid to the system. If petitioner lost all community interest
in the amount theretofore paid to the system by Shaw [H],
it means no more than that her right to demand a propor-
tionate share of the death benefit, regardless of who might
be the beneficiary, was lost. 159

The italicized dictum implies that if W had not settled her com-
nunity property claim at divorce, she would have been able to claim a
share of death benefits if H had designated a beneficiary other than
W. The court assumed that the anti-gift rule applicable to community
property also applied to pension benefits onerously acquired
during marriage in a plan created by state law.160 This is inconsis-
tent with any reading of the Benson-Waite terminable interest rule,
which at the very least allows H to give away post-death benefits
notwithstanding Civil Code section 5125(b) and Probate Code section
201.

One case where a recovery was actually obtained under the
Cheney line of authority is Gallagher v. State Teachers Retirement

of Los Angeles, 251 Cal. App. 2d 623, 59 Cal. Rptr. 690 (2d Dist. 1967) (due to
stipulation, putative wife took share of benefits H had designated another to re-
ceive); Nichols v. Board of Retirement, 121 Cal. App. 2d 176, 262 P.2d 862 (4th
Dist. 1953). Shaw, Cavitz and Nichols were overruled on other grounds in Mass v.
Board of Education of San Francisco Unified School Dist., 61 Cal. 2d 612, 627 n.9,
394 P.2d 579, 589 n.9, 39 Cal. Rptr. 739, 749 n.9 (1964).


160. It is peculiar that the court speaks of W's interest in community funds
"theretofore paid to the system." The court would focus on this community
interest only if it felt it could not trace the community claim into the property right
in the plan itself. Instead, it would award reimbursement to the community for H's
having diverted community assets to improve his separate estate. See notes 176-78
& accompanying text infra. Yet the Shaw court assumes W could claim a "propor-
tionate share of the death benefit," obviously thereby tracing the community
contribution into the rights under the pension plan. The Shaw dictum can be
squared with Benson-Waite only by ignoring the latter language and assuming that
the court meant that the divorce decree merely eliminated W's half of a community
reimbursement claim.
System. Again, the state employee, $H$, neglected to revoke his designation of $W$ as his death benefits recipient although their divorce property settlement agreement awarded all of the pension plan to $H$. Thereafter, $H$ entered into a putative marriage with Elsie, who claimed a putative wife’s interest in the pension. The court of appeal permitted Elsie to take a pro rata share of the benefits based on the amount of time $H$ participated in the plan while he and Elsie had putative spouse status. Under Benson-Waite, since a putative wife has no greater rights to a community interest than a lawful wife, Elsie would have taken nothing; $H$ could name whomever he wished the designee to take all the death benefits. The decision is not, however, in direct conflict with Benson-Waite, because the first wife designee had in the trial court stipulated that Elsie was entitled to some recovery, and the only issue on appeal with respect to the amount of Elsie’s recovery was at what time her status as putative wife ended.

Perhaps the strongest recent case in the anti-Benson-Waite line of authority is Jorgensen v. Cranston. During marriage $H$ had

162. The effect of this, said the court of appeal, was that “the [first] wife had given up only her community property rights in such policy and had not renounced her interest as the husband’s beneficiary.” Id. at 515, 47 Cal. Rptr. at 143.
164. Apparently the court expected putative status to end as soon as the innocent spouse learned of the impediment to the “marriage.” This harsh position seems unfair to a putative spouse—especially one who has mothered her “husband’s” children and generally changed position in reliance on her former good faith belief—willing to continue living with the man despite an impediment to marriage. There is support for it, however. See Evans v. Eureka Grand Lodge, 149 So. 305, modified, 151 So. 664 (La. App. 1933). But see Jackson v. Swift & Co., 151 So. 816 (La. App. 1934) (putative status continues until annulment); Davis v. Davis, 521 S.W.2d 603 (Tex. 1975).
Several commentators support the Cheney line of cases as stating the proper rule. See, e.g., W. De Funiak & M. Vaughn, Principles of Community Property § 68, at 150 (2d ed. 1971) [hereinafter cited as De Funiak & Vaughn]; Note, Community Property Status of Military Benefits, in Survey, The Supreme Court of California 1974-1975, 66 Calif. L. Rev. 305, 327 (1976) [hereinafter cited as Status of Military Benefits]; Pension & Widow’s Death Benefits, note 32 supra. See also Kent, supra note 4, at 638-41. But see Hughes, supra note 29, at 878 (when $W$ predeceases $H$ Benson-Waite approach avoids difficulties “proliferated to a point of confusion almost beyond imagination”). Hughes nevertheless finds it illogical that community interests of the nonemployee spouse vanishes at dissolution of marriage by death but no dissolution by divorce.
Committee on Death Taxation of Estates & Trusts, Probate & Trust Division of the ABA, Property Owned With Spouse: Joint Tenency, Tenancy by the Entitites and Community Property, 11 Real Prop. Prob. & Tr. J. 405, 444 (1976) seems to assume that post-death benefits are community property in concluding that there is no taxable gift when $H$ elects to take smaller pension payments for his
participated in the state judge’s retirement system. At the time of
H’s death, death benefits under the plan were an amount equal to
the judge’s contributions into the fund and were payable to his
designated beneficiary. Thereafter the statutory scheme was amend-
ed to provide an annuity for the judge’s widow equal to half of what
the judge would be receiving if he were alive. The state refused to
pay such an annuity to W on the ground that the amendment as
applied to her constituted a gift of public funds. Cases had already
established that no such gift was involved in increasing benefits to
the widow of a retired employee under a pension provision specific-
ally giving benefits to the widow. Such a provision gave her the
type of “pensionable status” that made an increase in payments
lawful. The surviving spouse in Jorgensen, however, had previous-
ly been entitled to benefits not under a specific widow’s pension
provision, but simply as H’s death benefits designee. Thus, the
state contended, W lacked the necessary pensionable status.

The state’s argument was rejected, inter alia, on the ground
that the statute empowering H to designate a beneficiary had to be
construed together with the community property statutes and that H
could not have designated away more than half the death benefits.

The Attorney General contends that Mrs. Jorgensen never
did have a “pensionable status” because as Government
Code section 75104 read when Judge Jorgensen died the
benefits were payable not to his spouse as such but to his
named “beneficiary.” And, it is argued, the judge might
have named anyone to receive such benefits. The point is
not persuasive. The fact is that, regardless of whether the
judge had the power to do so, he had not named a person
other than his wife. He had named her. . . . Moreover,
under our community property system, and using the anal-
ogy of insurance proceeds, the [husband] would not have
had the power without his wife’s consent to name another
beneficiary as to all of the benefits. This would have been a
gift of the community.166

C. Which Line of Authority is Correct?—A Critique

The terminable interest rule has no foundation in any statutory
language and is wholly the concoction of a court apparently dis-
pleased with some aspects of the community property system.
Moreover, it will be shown that the original logic for the terminable
interest rule has been recanted in Brown. The extent to which the
doctrine now survives is unclear.

The earliest roots of the terminable interest theory are found in

life plus a widow’s pension for W. The writers consider all the interests community
owned regardless of the form of payment. The possibility that the widow might be a
different person than the wife owning a community interest was not considered.

166. 211 Cal. App. 2d at 299-300, 27 Cal. Rptr. at 301.
Packer, which declares that “the wife of a public employee does not acquire a vested interest in a pension until it becomes payable.” Of course, the Packer court was not talking about the wife as a partner in the community, but about any third party donee beneficiary of pension benefits named by the husband or by the draftsmen of the state created pension plan. The Packer language was cited out of context in Benson as supportive of the rule that a wife does not have a community interest in pension benefits and that the property right belongs solely to the husband. Somehow this interpretation was felt to be necessary to enable the legislature to make modifications in the plan.

Brown, however, has squarely repudiated this notion, noting that the legislature has as much power to reasonably modify the community’s interest as it has to modify a right owned solely by the employed spouse. Brown makes clear that pension benefits earned during marriage by a husband, would, under basic principles of community property law, be community owned. Brown does not directly renounce the “logic” (if it can be called that) of Waite that the legislature, in providing post-death benefits payable after either W or the employee H died, intended to deny to W either an ownership interest in or a power to deal with these benefits. Thus, the extent to which the terminable interest rule can survive Brown is unclear.

1. Legislative Intent in the State Statutes
   Creating Retirement Plans

There are two theoretical bases under which the application of the Benson-Waite doctrine to state created plans can survive the repudiation of the Benson logic. The first would start with an assumption that the legislature intended Civil Code section 5110 to

167. See text accompanying note 103 supra.
168. See text accompanying note 117 supra.
169. In Benson v. City of Los Angeles and Packer v. Board of Retirement the court expressed the fear that to recognize a nonemployee spouse’s vested interest in public pension rights before such spouse was entitled to payment would hamper modification of the pension program to adapt to changing circumstances. In Allen v. City of Long Beach . . . we held that a public employee’s property interest in his pension rights does not prevent the public entity from modifying those rights so long as the modification is reasonable and does not result in net disadvantage to the employee. By the same reasoning recognition of the spouse’s property interest should not bar a reasonable, nondetrimental modification of the pension system.
15 Cal. 3d at 849 n.11, 544 P.2d at 568 n.11, 126 Cal. Rptr. at 640 n.11 (citations omitted).

The first reported decision after Brown to consider the effect of the Benson-Waite rule is In re Marriage of Andreen, 76 Cal. App. 3d 667, 143 Cal. Rptr. 94 (3d Dist. 1978). Finding the answer to the problem “not crystal clear” the court of appeal applied Benson. The result was that rights to a widow’s pension that the husband had earned during marriage under the state judges’ retirement law were not community property. Id. at 674-75, 143 Cal. Rptr. at 98-99. Implicit in the holding is that Benson made the contract right to enforce the promised widow’s pension the judge’s separate property, although some parts of the Andreen opinion could
make all pension plan rights earned by the employee-participant during marriage and cohabitation community property. However, since Benson-Waite denies W the power when she predeceases H to bequeath any interest in the pension, Probate Code section 201 must implicitly be partially repealed or amended. Assuming that the broad reading of Waite is applied, there is also an implied partial repeal of or amendment to Civil Code section 4800. 170 To the extent that an employee spouse must be awarded all the post-death benefits in the community owned pension package, an equal division of the community is not required. Even when there is sufficient other property to effect the equal division, the broad discretion of the trial court is circumscribed in that no discretion is allowed as to who is awarded post-death benefits. It would be error to award such benefits to the nonemployee under any circumstances. Finally, when H predeceases W, any provision authorizing him to designate a recipient of death benefits impliedly repeals in part or amends the anti-gift provision of Civil Code section 5125(b) and/or the provisions of Probate Code section 201 limiting a spouse’s testamentary power over community funds to half interest and confirming the surviving spouse’s ownership of the other half. Instead, the pension legislation gives H a testamentary power of appointment over W’s half interest in post-death benefits—that is, he gives away W’s property as her agent. 171

The problem with an attempt to save Benson-Waite by this analysis is the last kicker—the power of appointment given H over W’s half interest. A power of appointment is a property right, and support a different rationale for the result: The right to a widow’s pension was community property, but its value was zero due to the many conditions precedent to its being reduced to a flow of cash.


171. Additionally, it seems probable that the Court would hold that during marriage H has exclusive management and control over the pension and that the legislation impliedly repeals pro tanto or amends CAL. CIV. CODE § 5125(a) (West Supp. 1977) to that extent. If equal management were strictly applicable, W could file with the pension plan operator options to take certain benefit plans unless it could be held that H, by entering into his employment relation, had seized exclusive control of all aspects of it, a likely limitation on equal management. See Reppy, Retroactivity supra note 31, at 1014-22. In addition, the pension legislation will be read as denying a divorced wife awarded a terminable life interest any management and control powers over the property right of pension participation. Indeed, Brown seems to overrule Waite to the extent that Waite approved of the divorce court’s seizing from H the power to elect pension plan options. Brown states that:

As to the claim that our present holding will infringe upon the employee’s freedom of contract, we note that judicial recognition of the nonemployee spouse’s interest in vested pension rights has not limited the employee’s freedom to change or terminate his employment, to agree to a modification of the terms of his employment (including retirement benefits), or to elect between alternative retirement programs. We do not conceive that judicial recognition of spousal rights in nonvested pensions will change the law in this respect. The employee retains the right to decide, and by his decision define, the nature of the retirement benefits owned by the community.

15 Cal. 3d at 849-50, 544 P.2d at 568, 126 Cal. Rptr. at 640 (footnote omitted).
if \( H \) has such a power over \( W' \)s half interest when \( H \) dies first but she does not have power over his half interest when she dies first, the property rights of \( H \) and \( W \) are not equal. The property in which their ownership interests are unequal is, thus, not community property as defined by Civil Code section 5105. Moreover, if one starts with the assumption that section 5105 vests in the wife an equal half interest in the pension benefits because they are community property, to confer on \( H \) a testamentary power of appointment over \( W' \)s half interest would be an unconstitutional taking of her property.\(^{172}\) Thus, the first theory to explain the Benson-Waite line of cases cannot stand.\(^{173}\)

A second explanation of Benson-Waite is that the portion of the pension benefits in which \( H \) has greater proprietary rights—post-death benefits—is not community property. It fails the definitional test of section 5105 and, for lack of any other classification, must be \( H' \)s separate property, although certainly not passing the definitional test for that either.\(^{174}\) Although \( H \) thereby has more rights in the entire package of pension benefits than does \( W \), this fact should not be fatal to the holding that the rights consisting of benefits payable before the death of \( H \) or \( W \) are community property. Ownership of property is often divided between community and separate estates.\(^{175}\) For example, if \( H \) buys a life estate in land with community funds and subsequently buys the remainder, with his separate funds, it is not necessary to find a merger. The community

\(^{172}\) See McKay v. Lauriston, 204 Cal. 557, 269 P. 519 (1928) (giving \( W \) testamentary power of appointment over half of \( H' \)s property denies due process).

\(^{173}\) But see Pension & Widow's Death Benefits, supra note 32, at 601, suggesting that Benson creates a "new class of community property" in which \( W' \)s interest is defeasible but \( H' \)s is not. The writer recognized that so downgrading \( W' \)s interest was tantamount to returning to the pre-1927 definition of so-called community property where \( W \) had but a mere expectancy. Id. at 602. See note 108 supra. Actually, the more accurate date is 1891, for in that year the legislature prohibited gifts of community property by \( H \) without \( W' \)s written consent. 1891 Cal. Stats. ch. 220, § 1 (which was part of former Cal. Civ. Code § 172 when Benson was decided).

\(^{174}\) Separate property is that acquired "before marriage" or "by gift, descent, devise or bequest." Cal. Civ. Code §§ 5107-5108 (West 1970). See Pension & Widow's Death Benefits, note 32 supra, concluding that if Benson means what it says (that a wife has no interest in post death benefits), it cannot be community property. Id. at 599.

\(^{175}\) This is frequently the case where property is owned in tenancy in common with one spouse, having contributed separate funds to the original purchase price, owning a tenant's share as separate property, the community the other cotenant's share. See Estate of Lewis, 218 Cal. 526, 24 P.2d 159 (1933); Miller v. Brode, 186 Cal. 409, 199 P. 531 (1921); Schuyler v. Broughton, 70 Cal. 282, 11 P. 719 (1886); Mason v. Mason, 186 Cal. App. 2d 209, 8 Cal. Rptr. 784 (2d Dist. 1960).
interest continues in the life estate although $H$'s total proprietary rights in the land exceed $W$'s. However, when a portion of pension rights is owned separately by $H$, by his continued participation in the pension plan during marriage, which adds to the value of that interest, he is using community assets—money or his labors—"to enhance the value of his separate property." It is a basic principle of community property law that at dissolution of the marriage the community estate is entitled to reimbursement for community assets used to enhance the value of separate property. The wife is able to assert half of the community claim. None of the terminable interest cases has mentioned a wife's claim for reimbursement as an alternative to tracing the community investment to the pension benefits. Therefore, it is unclear whether state legislation creating pension rights abrogates the rule that a spouse who uses community funds or labor to improve his separate wealth must reimburse the community. If not, then it is possible for $W$ to use it to almost totally avoid the operation of the terminable interest rule. This she could do if (1) the measure of reimbursement is the increase in value created rather than just the money diverted to building up the separate property or the value of labor, and (2) she can assert a lien on the separate property at issue. There is some authority for both such propositions, although the case law area is highly confused.\footnote{See generally Comment, The Husband's Use of Community Funds to Improve His Separate Property, 50 CALIF. L. REV. 844 (1962) (hereinafter cited as Husband's Use). The most recent statement of the rule, In re Marriage of Warren, 28 Cal. App. 3d 777, 104 Cal. Rptr. 860 (2d Dist. 1972), plainly states that in a case where $H$ improves his separate property with community, the community "is entitled to either the amount expended or the value added—whichever is greater, so that there will be no benefit from the breach of trust." Id. at 782, 104 Cal. Rptr. at 863-64 (dictum). Earlier cases such as Provost v. Provost, 102 Cal. App. 775, 283 P. 842 (2d Dist. 1929), however, probably were referring to increase in value as limiting recovery, not increasing it, when that sum was less than the amount spent. Such limitation is the rule in Texas and Louisiana, where, however, rents and profits from the improved separate property were community owned and so the community benefited from the improvement. See Reppy & De Funiak, supra note 3, at 243. The Texas-Louisiana rule is properly recognized by the Warren court as being logically inapplicable in California where rents and profits of separate property are separate.

In the pension setting, the amount of benefits claimed will usually exceed the investment so that awarding reimbursement in the former amount in effect makes an award of interest. Interest has never been given in a reimbursement case. See Bartke, Yours, Mine and Ours—Separate Title and Community Funds, 44 WASH. L. REV. 379 (1969). This probably reflects the approach in Texas and Louisiana with respect to interest; in both states, since rents and profits of the separate estate are community, the community does receive increased rent from separate property in lieu of interest. Precedents there, however, should not be
Presumably the full amount of all post-death benefits to which W could make a claim would equal the increased value resulting from using community funds to acquire such rights, and the lien would assure W of half that value—just what she would get if the benefits were in fact community property and the ordinary rules concerning gifts and testamentary powers were applied. If reimbursement were

authoritative. In Texas and Louisiana (as to husbands, at least) reimbursement in the pension setting would be affected by a probable holding that income earned by pension plan trustees on separate funds invested in the plan were community owned. On the other hand, if interest is ever awarded in California in a reimbursement case it may be on a theory that the defendant spouse has breached a quasi-fiduciary responsibility, see Cal. Civ. Code § 5125(e) (West Supp. 1977), and must account for all loss as a fiduciary. Yet, in the Benson-Waite setting, at least where H does not designate a third party other than W as pension plan beneficiary, no deliberate act by him raises any reimbursement claim. Rather, it is the foolish terminable interest rule itself that permits such claim to arise. Assessing interest is arguably inappropriate where H has proceeded at all times in the utmost good faith in his management of community assets.

While the law is confused with respect to the measure of reimbursement, there is even greater confusion as to whether the reimbursement claim is secured by a lien and even, if so, in whose favor the lien runs. Provost v. Provost, 102 Cal. App. 775, 283 P. 842 (2d Dist. 1929), seems to approve the Washington decision of Legg v. Legg, 34 Wash. 132, 75 P. 130 (1904), where the court held the reimbursement claim was secured. See also Wheeland v. Rodgers, 20 Cal. 2d 218, 222, 124 P.2d 816, 819 (1942) (dictum) (emphasis added): “[T]he wife is entitled to reimbursement upon the dissolution of the marriage and has a claim therefore against the property improved . . . .” Cf. Estate of Inman, 148 Cal. App. 2d 952, 307 P.2d 953 (1st Dist. 1957), overruled on other grounds; Cooke v. Tsiouroglou, 59 Cal. 2d 660, 666, 381 P.2d 940, 943, 31 Cal. Rptr. 60, 63 (1963), noting that where H used community funds to enhance W's separate property estate there is no lien because a gift will be found. This suggests that where there is no gift, a lien arises. There is even a line of cases stating that the community actually obtains a share of ownership of the separate asset as a result of the improvement. See, e.g., Long v. Long, 88 Cal. App. 2d 544, 199 P.2d 47 (2d Dist. 1948); cases discussed in Husband's Use, supra, and in Bartke, supra. Some California decisions suggest no lien for the community arises automatically as a matter of law. See, e.g., Dunn v. Mullan, 211 Cal. 583, 296 P. 604 (1931); Lutwis v. Johns, 24 Cal. 98 (1864). But a divorce court has inherent power to impose a lien on property awarded to H to secure rights of W. See Gonzalez v. Gonzalez, 152 Cal. App. 2d 103, 312 P.2d 333 (2d Dist. 1957) (lien imposed on H's realty to secure alimony and child support payments). If W could have such a lien declared before rights of third parties such as second-wife "widows" and death benefit designees mature, she would receive protection almost equivalent to co-ownership.

In other states the existence of the lien is well established, see, e.g., Shanafelt v. Holloman, 61 N.M. 147, 296 P.2d 752 (1956); Merkel v. Merkel, 39 Wash. 2d 102, 234 P.2d 857 (1951), and it arises when the improvement is made. Any lien in Louisiana or Texas would probably not attach until a divorce court or probate court imposed it at dissolution of the marriage. Reppy & De Funik, supra note 3, at 245. Most of the cases state that the lien is in favor of the community, which would mean that its existence would not bar H's creditors from reaching the property even if it arose during marriage under a managerial system of creditors' rights as California employs. See Groelemund v. Cafferata, 17 Cal. 2d 679, 111 P.2d 641, cert. denied, 314 U.S. 612 (1941). According to Conley v. Moe, 7 Wash. 2d 355, 110 P.2d 172 (1941), the lien arising in Washington is in favor of the wife (i.e., for half of the sum a community lien would be for). If California recognized such a lien, W would have security as against H's creditors after the lien arose, except for necessary creditors.
not for the enhanced value but for the value of community assets diverted to the plan, the court would encounter great difficulties in estimating what percentage of employee and employer contributions funded the post-death benefits and what percentage funded the community owned benefits.

One can only guess what the supreme court will decide when a wife aggrieved by Benson-Waite proceeds on a reimbursement claim. Louisiana courts, faced with a similar issue, have repeatedly held that the aggrieved spouse does have a reimbursement remedy in the amount of the employee’s contributions. I would assume however, that if the court believes the legislature wanted W to have no share of post-death benefits, as it announced in Waite, it would infer that W should not indirectly achieve all or a part of the same end by reimbursement. Consequently, pension legislation, whether enacted by the legislature directly or through the approval of a city charter, would not only impliedly repeal in part or amend Civil Code sections 5108, 5107 and 5110 but would also impliedly bar the reimbursement remedy ordinarily used when community assets are employed to enhance a spouse’s separate estate.

No explanation of the terminable interest rule can dispel its greatest flaw: the absence of any evidence of legislative intent to deprive the wife of her community property rights both in the statutory language and in the legislative history documents. It is, purely and simply, a product of the supreme court’s fancy. The mere provision for a widow’s pension does not mean the legislature intended to take the first wife’s property when she was not the widow. More likely, the legislature, assuming the “widow” would be the same spouse whose community funds have been used to acquire rights in the program, intended to expand her rights rather than cut off payments on her husband’s death. There is just no suggestion that by providing for a widow’s pension the legislature

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179. All of the cases holding the community has an interest in noncontributory pensions require that employer, as well as employee, contributions be treated as community property.

It is to be conceded that the Louisiana cases are distinguishable. The courts there read the pension legislation as making all state law created benefits, not just post-death benefits, separate property of the participant spouse, thus the injustice to the other spouse is much greater and the need for some remedy far more compelling. Incredibly, a leading expert on Louisiana community property law disapproves of the allowance of reimbursement even when all benefits purchased are separate property of the employee. Pascal, Matrimonial Regimes, in Work of the Louisiana Appellate Courts for the 1974-1975 Term, 36 LA. L. REV. 409, 415-16 (1976); Pascal, Matrimonial Regimes, in Work of the Louisiana Appellate Courts for the 1973-1974 Term, 35 LA. L. REV. 303, 308-09 (1975).
had in mind the case where fifty per cent of a second wife's benefits were purchased with the first wife's property,\textsuperscript{181} or, if it did have this situation in mind, that it intended to overturn established law that gave \(W_1\) a remedy. A reasonable interpretation of the provision for a widow would be that she takes subject to the community property rights of an employee's prior wife.\textsuperscript{182} If it be thought that the legislature wanted the second wife as widow to receive 100\% of the widow's pension without having to account in any way to \(W_1\) (something I strongly doubt the legislature considered) there are still methods to reduce any conflict between the widow's pension provision and the equal ownership rule of Civil Code section 5105. At divorce, the court could protect \(W_1\) by a division of property that treats any widow's pension rights as community assets, valuing that contingent asset as best it can and awarding it to \(H\), while making the 50-50 division called for by Civil Code section 4800.\textsuperscript{183}

\textsuperscript{181} This is the case in situations like Benson where all contributions to the program are made during the first marriage and after retirement \(H\) and \(W_1\) are divorced, he remarries, and dies survived by \(W_1\) and \(W_2\).

\textsuperscript{182} It should be noted that under the anti-gift statute as amended effective 1975, and until the return to the pre-1975 approach in 1977, \textit{written} consent of the nondonor spouse to a gift of community property was not required. Presumably this meant consent could be oral or implied, as in the state of Washington, see \textit{Wash. Rev. Code} § 26.16.030(2) (1976), whose management and control statutes were followed in many respects by the Legislature's enacting the 1975 reforms. See Repp, \textit{Retroactivity}, supra note 31, at 980-81. Perhaps if \(W\) knew that \(H\) was participating in a retirement plan with a widow's pension and approved of it generally, her consent to funding a gift to a possible third party widow could be implied with respect to community contributions in money or labor during 1975-77.

\textsuperscript{183} In unusual cases where the employee \(H\)'s pension is about the only community asset existing at divorce, it would be necessary to award \(W\) more than 50\% of the payments \(H\) might receive in his life after divorce to offset awarding the post-death benefits all to \(H\). Alternatively, some of \(H\)'s separate property could be given to \(W\), or he could execute a promissory note in her favor. Such methods of property division, however, ordinarily have adverse income tax consequences because a taxable event, not just division, is found to have occurred. See Carrier v. Commissioner, 64 T.C. 959 (1975), \textit{affirmed}, 552 F.2d 1330 (9th Cir. 1977); Rev. Rul. 76-83, 1976-1 C.B. 213; Sutherland, \textit{ABA Family Law Section Program: The Economics of Divorce (in a Community Property Division)}, 4 COMMUNITY PROP. J. 47, 50-51 (1977).

It must also be noted that in the event any post-death benefits subject to the present terminable interest rule were not statutorily exempt from the estate tax, a question arises as to whether the entire proceeds should be taxed as passing from \(H\) to the beneficiary as his separate property. See Estate of Bogley v. United States, 514 F.2d 1027 (Ct. Cl. 1975). That is, if applied to California law rather than to Texas law, where \(H\) can make reasonable quasi-testamentary gifts of \(W\)'s share of community assets, see note 125 supra, Rev. Rul. 75-240, 1975-1 C.B. 315, could be erroneous. It held that lump-sum death benefits payable to \(H\)'s designee were, as part of a pension program earned by \(H\) during marriage, community property so that \(W\), via \(H\)'s agency, had made a gift of half the amount to the designee and owed a gift tax under § 2501 of the Internal Revenue Code. The exemption for gifts by the employee-donor did not apply. But in California, if \(H\) is able to designate a taker of all the proceeds, the property may be found to be owned entirely by him.

The effect of Rev. Rul. 75-240 is partly reversed by § 2209(a)(5) of the 1976 Tax Reform Act, which amended the exemption statute, I.R.C. § 2517, to pick up so
Just as weak as the Benson-Waite argument with respect to legislative intent concerning widow’s pension provisions is the position of that doctrine concerning the legislative intent behind death benefits provisions. It is truly hard to believe that the Legislature, in providing for $H$ to designate a death benefits recipient, intended him to defeat $W$’s property rights when he predeceased her. More likely the Legislature was thinking solely of a handy procedure—avoiding estate administration—for transmitting the benefits when it provided for an employee’s designation.\footnote{184} The death-benefits provisions can be readily construed to avoid a conflict with Civil Code section 5125(b) and Probate Code section 201: A designation by $H$ that does not assure $W$ of at least fifty percent of those benefits traceable to community participation in the program can be voided to that extent by $W$ unless she gives written consent to the designation.\footnote{185}

Certainly the validity of a designation of $H$ cannot be determined without reference to independent bodies of law. For example, an argument that the legislature intended $H$ to name a designee without any interference by the courts surely would be unavailing if it were shown that the designee had a gun to $H$’s head when he filled out the form, that $H$ was temporarily mad when doing so, or that the designation resulted from deliberate misrepresentations to him by a benefited party. Such designations would be voided by ordinary principles of duress, mental capacity to act, and fraud. The anti-gift provision of Civil Code section 5125(b) is intended to prevent a fraud on $W$’s property rights,\footnote{186} and no reason appears why it should be excluded from the broad category of fraud and deceit rules under which the validity of the employee spouse’s designation can be tested. Certainly it is not inconsistent with $H$’s statutory power of designation to value as community property at divorce future death benefits designable by $H$ and award them to him while making an equal division of the community property.

Whatever may be thought of the presumed legislative intent under the Benson-Waite doctrine with respect to “widow’s” pensions and designable death benefits, when it comes to that prong of

\footnote{184. The argument for legislative intent to authorize $H$ to divest $W$ of her property rights is strongest under those plans which confine the permissible designees of $H$ to specified classes of close relatives. At least here $W$’s property rights will not be defeated in favor of $H$’s mistress; the legislature has, to a considerable degree, determined for $H$ who is and who is not entitled to his bounty (i.e., there is a type of “floating” forced heirship). But even here it is pure conjecture to conclude that divesting of $W$’s property rights was intended, and it is not inconsistent to require that she have consented to the extent, her property is taken from her by $H$’s designation.}

\footnote{185. \textit{See} note 182 \textit{supra} (implied consent from 1975 to 1977).}

\footnote{186. \textit{See}, e.g., Fields v. Michael, 91 Cal. App. 2d 443, 205 P.2d 402 (2d Dist. 1949).}
the doctrine that cuts off W's interest in post-death benefits payable to H when W predeceased him, there is not a single word of statutory language that expresses the intent to defeat the testamentary power given W by Probate Code section 201. It is senseless to say, as did the Waite court, that in fashioning a pension scheme the legislature had no intention of conferring benefits on the heirs of legatees of a participant's spouse. Undoubtedly there is the same absence of intent when it comes to the salary paid to a married state employee, yet if some savings from that salary are on hand when W predeceases H no one would dispute her power to bequeath half of it. 187 And W's testamentary powers would be no less if H had invested some of his salary in an annuity payable over his life. On the other hand, legislators must be deemed to know such a basic principle of community property law as equal ownership by H and W of rights acquired onerously during marriage and cohabitation. And it is only logical to assume that if they intended legislation to deviate from it they would have said something to that effect.

It is indisputable that any theory of the Benson-Waite doctrine involves an implied partial repeal of or an amendment to longstanding statutes that state fundamental principles of California marital property law. That is, under any theory there has to be some restriction or expansion of the scope of one or more of the following: Civil Code section 5105, providing for equal ownership of community property; Civil Code sections 5107 and 5108, defining separate property; Civil Code section 5110, defining community property; Civil Code section 5125(b) requiring written consent to gifts of community property by one spouse; Civil Code section 4800, calling for equal division of community assets at divorce; and Probate Code section 201, 188 confirming a surviving spouse's ownership of a half interest in community property and limiting the decedent's testamentary power (or quasi-testamentary power by will substitute)189 to a half interest.

187. Or H may be a government contractor who has entered into a contract with the state during marriage and substantially performed it before W dies. Although payments to H by the government may be made for several years after W's death, half of the amount attributable to the community's interest in the contract will be owed to W's legatees. See Waters v. Waters, 75 Cal. App. 2d 265, 170 P.2d 494 (4th Dist. 1946).

188. Where interests in a pension were quasi-community property, the implicated statute at death would be CAL. PROB. CODE § 201.5 (West Supp. 1977) and, at divorce, CAL. CIV. CODE §§ 4800, 4803 (West Supp. 1977). At annulment of a putative marriage, CAL. CIV. CODE § 4452 (West Supp. 1977), defining quasi-marital property, would be involved.

In a pre-Waite ruling, the IRS assumed that application of ordinary community property principles entitled W, on predeceasing H, to bequeath by will her half of the community interest in H's pension package. Rev. Rul. 67-278, 1967-2 C.B. 323.

The conclusions in Benson and Waite of broad intent to partially repeal or amend these statutes by implication—being based on the flimsiest of evidence of legislative intent—openly conflict with the frequently stated rules that partial repeal by implication is disfavored, that there is a presumption against it, and that an existing statute is not impliedly repealed to any degree by a subsequent act "unless provisions of the latter are so inconsistent with the former that the two cannot have a concurrent operation [or] unless the later act so fully covers the whole subject matter of the prior as to afford conclusive evidence that it was intended to supercede it entirely." The state supreme court recently observed that repeals by implication are recognized only when there is no rational basis for harmonizing two potentially conflicting laws. . . . Furthermore, we must assume that when passing a statute the Legislature is aware of existing related laws and intends to maintain a consistent body of rules. . . . "[T]he should not be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of

190. No distinction is made between implied partial repeals and implied amendments changing the operation of pre-existing statutes in the cases indicating disfavor with statutory constructions requiring a conclusion of implied partial repeal or amendment. See, e.g., Ex parte Smith, 40 Cal. 419, 420 (1870); VFW v. State, 36 Cal. App. 3d 688, 694, 111 Cal. Rptr. 750, 754 (3d Dist. 1974); People v. Fitzgerald, 14 Cal. App. 2d 180, 197, 58 P.2d 718, 727 (3d Dist. 1936), overruled on other grounds, People v. Weiss, 50 Cal. 2d 525, 566, 327 P.2d 527, 544 (1958).


It is true, of course, that the doctrine is merely an aid to construction when legislative intent is unclear. See, e.g., County of Los Angeles v. Frisbie, 19 Cal. 2d 634, 639, 122 P.2d 526, 529 (1942); Cannon v. American Hydrocarbon Corp., 4 Cal. App. 3d 639, 648, 84 Cal. Rptr. 575, 581 (2d Dist. 1970). But it is submitted that in none of the terminable interest cases has there been such an unambiguous expression of intent to partially repeal or to amend the Civil Code and Probate Code sections affected that the rule of construction could be ignored.

It is clear from the numerous cases, including Waite, holding that the nonemployee spouse does have some community interest in a pension created by state legislation, that the pension statutes are not viewed as "covering the whole subject matter" of the spouses' interests in pensions and that usually it is assumed that the pension statutes operate in conjunction with community property statutes. Indeed, the interest awarded the wife at divorce in California in her husband's pension must be created by Cal. Civ. Code § 5110 (West Supp. 1977), as the pension statutes themselves confer no such interest on a wife, but mention only the employee and, sometimes, his widow and designees.
law unless such intention is made clearly to appear either by express declaration or by necessary implication.\footnote{192}

Thus it has been held that a pre-existing minimum wage law that prohibited an employer from counting a waitress’ tips toward the minimum compensation was in no way restricted by a later statute requiring restaurants to post a notice to patrons stating the extent to which tips of waitresses were credited to wages. The statutes could be harmonized by viewing the latter as upholding the credit against wages for tips received only with respect to wages above the minimum.\footnote{193} And where a statute was enacted ordering county boards of supervisors to open all meetings to the public, it had to be construed in light of existing statutes recognizing the attorney-client privilege. The statutes were reconciled by excepting from the open meeting act meetings of the board members with the district attorney to discuss litigation strategy.\footnote{194}

It has been shown that no irreconcilable conflict exists between provisions in state employee retirement plan legislation for a widow’s pension or for death benefits payable to a designee of the employee and basic community property principles. At divorce, employee $H$ can be awarded such pension rights and $W$ can be awarded assets of offsetting value to effectuate an equal division of the community. When $H$ predeceases $W$ during marriage his beneficiary designation requires $W$’s consent to be effective as to her half of the community interest.\footnote{195} Finally, the provision for continu-

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  \item \footnote{192} Fuentes v. Workers’ Comp. App. Bd., 16 Cal. 3d 1, 7, 547 P.2d 449, 453, 128 Cal. Rptr. 673, 677 (1976). Accord, Theodor v. Superior Court, 8 Cal. 3d 77, 92, 501 P.2d 234, 245, 104 Cal. Rptr. 226, 237 (1972); County of Los Angeles v. Frisbie, 19 Cal. 2d 634, 644, 122 P.2d 526, 532 (1942). The rule stated is applicable even if the subsequent statute is, like a pension law, special, with the pre-existing statute being one of general application (as are the basic community property sections). See Warne v. Harkness, 60 Cal. 2d 579, 587-88, 387 P.2d 377, 382, 35 Cal. Rptr. 601, 606-07 (1963); Coca Cola Bottling Co. v. Feliciano, 52 Cal. App. 2d 351, 354, 123 P.2d 868, 870 (2d Dist. 1939).
  \item \footnote{193} California Drive-In Restaurant Ass’n v. Clark, 22 Cal. 2d 287, 292-93, 140 P.2d 657, 660 (1943) (alternative holdings). Under the logic of this case, a pension statute entitling $H$ to designate the recipient of death benefits would operate only on that section of the pension package that was owned by $H$.
  \item \footnote{195} It is hard to imagine how the provision in pension statutes for the employee to designate a recipient of death benefits can be treated any differently by the courts than the designation of community life insurance proceeds by one spouse, since various provisions of the Insurance Code do anticipate that there will be a beneficiary designated by the purchaser of the policy. See, e.g., CAL. INS. CODE \S\ 10171 (West 1972). However, where $W$ has a community interest in an insurance policy, $H$’s designation is voidable unless $W$ has consented to it. See cases cited at note 113 supra.
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ing payments to $H$ even though $W$ has died can readily be reconciled with section 201 of the Probate Code by requiring $H$ on receipt of such funds to account to $W$'s legatees for that portion equivalent to half of the community interest.\footnote{196}

Moreover, provisions in several significant pension programs enacted by the legislature make very clear its intent not to engraft the terminable interest theory onto the legislation but to have it subject to the basic community property statutes. For example, the State Teacher's Retirement System legislation provides:

Payment to a beneficiary designated in the form on file in the system at the date of death by a warrant drawn prior to any claim under a will or under community property rights constitutes full discharge of any and all liability of the board and system by reason of the member's death.\footnote{197}

Payment pursuant to the board's determination in good faith of the existence, identity or other facts relating to entitlement of persons constitutes a complete discharge of and release of the system from liability for the payment so made.

Notwithstanding the provisions of Sections 5105 and 5125 of the Civil Code relating to community property interests, whenever payment or refund is made by this system to a member, former member, beneficiary of a member or estate of a member pursuant to any provision of this part, the payment shall fully discharge the system from all adverse claims thereto unless, before payment is made, the system has received at its office in Sacramento written notice of adverse claim.\footnote{198}

Quite similar is a provision of the Education Code covering school district retirement plans.\footnote{199} Part of the State Employee's Retirement

\footnote{196} In Texas the courts have the power to order a state government agency operating a pension fund to make out two checks and mail one to $H$ and one to \textit{W. Collida v. Collida, 546 S.W.2d 708 (Tex. Civ. App. 1977), writ dismissed. The same remedy would probably be available in favor of $W$'s legatees.}


\footnote{198} \textit{Id.} § 24603.

A very similar statute, applicable to all ERISA governed and non-ERISA governed pension plans, is \textit{Cal. Civ. Code} § 5106 (a), (b) (West Supp. 1977). Section 5106 does not expressly mention "community property rights" as the basis of objection to disbursement made by the plan administrator. But the statute does appear in the portion of the Civil Code dealing with community property law; and it absolves the plan operator of liability, notwithstanding \textit{Cal. Civ. Code} §§ 5105, 5125 (West Supp. 1977), unless the party objecting has filed a written claim of entitlement with the plan administrator before payment was made. Section 5106(a) is completely inconsistent with application of the terminable interest rule to non-governmental (ERISA governed) pension plans. Section 5106(b) extends the inconsistency specifically appearing in some state created plans, to all non-ERISA governed plans.

\footnote{199} Any other provision of the law to the contrary notwithstanding, whenever any member of the district retirement system dies while in active membership status, including those on a deferred membership status, or within four months after the termination of the member's employment in a status requisite for membership in the retirement system, benefits payable
System is even more clearly inconsistent with Benson-Waite, in that it expressly recognizes that "a person other than the surviving spouse" may be entitled "under the community property law" to some of the benefits normally paid to a participant's widow or widower.200

Such provisions which require W to give notice of her claim or be barred from asserting it against the pension fund are remedial in nature. They attempt to protect the pension fund from a community property liability that would exist under the Cheney-Jorgenson line of cases but which would not exist under Benson-Waite. If it was the intent to bar liability on the ground that there was no community interest to assert after either H or W died, certainly there would be no invitation to the person asserting a community claim to give notice to or file a claim with the pension fund operator, as appears in the State Teacher's Retirement System and the District Retirement Plan. The implication is that the community claim, timely filed before a widow or designated beneficiary is paid, will be honored. Government Code section 21201.5 provides a remedy for the State Employee's Retirement System while actually reciting that the possibility that someone other than the widow "is entitled under the community property laws of this State to a portion of the benefit." That could only refer to a prior spouse. And the San Francisco charter provision is to the effect that not only is it the law that such claimant "shall have" a community property interest but that she will "be paid" it by the operator of the fund.201

at death, unless a claim by someone other than the designated beneficiary or beneficiaries is filed with the retirement system during the period provided in this section, shall be paid to the beneficiary or beneficiaries designated by him on a form provided by the retirement system and on file in the office of the retirement system prior to the death of member. Payment to a beneficiary or beneficiaries designated in the form on file in the retirement system at the date of death by a warrant drawn prior to any claim under a will or under community property rights, shall constitute full discharge of any and all liability of the district retirement board and retirement system by reason of the member's death. The retirement system shall provide a 30-day claim period subsequent to notification of death before drawing a warrant in favor of the designated beneficiary or beneficiaries.


200. If a person other than the surviving spouse of a deceased member of this system is entitled under the community property laws of this State to a portion of the benefit provided in this chapter for the said surviving spouse, any monthly payments provided in this chapter in lieu of or as an actuarial equivalent of the benefit for said surviving spouse, shall be reduced by an amount which bears the same ratio to the monthly amount otherwise payable, as the portion to which such other person is entitled under said community property laws bears to the actuarial equivalent of the monthly amounts otherwise payable.

CAL. GOV. CODE § 21201.5 (West 1963).

201. If any person other than such surviving spouse shall have and be paid a community property interest in any portion of any benefit provided under § E, any allowance payable under this subsection shall be reduced by the
Certainly the courts could not apply the terminable interest theory to any pension plan having a provision like those preceding. Furthermore, these statutes specifically indicate that the legislature finds no inconsistency with provisions for widow’s pensions and death benefits payable to designated recipients and basic community property laws. The statutes are to be reconciled by reducing the widow’s or designee’s benefits if a community property claim is first filed with the pension operator.

To me it is inconceivable that the legislature that specifically made the Teacher’s Retirement System and the State Employee’s Retirement System subject to community property rights of former spouses intended former spouses not to have such rights in pensions arising from the Los Angeles City Charter (Benson) or the Judge’s Retirement System (Waite). Benson and Waite assume senseless inconsistency by the legislature.202

The quickness with which the California appellate courts have found that state pension legislation overrides the Civil and Probate code sections setting forth basic principles of community property is all the more surprising in light of their treatment of federal statutes which allegedly are inconsistent with those principles and which must, if inconsistent with state law, prevail under the supremacy clause of the federal Constitution.203 When a state-federal conflict is alleged, the state supreme court will severely limit the possible scope of the federal statute in order to reconcile it with state community property law where “Congress has not spoken with force and clarity” that this reconciliation should not be made.204 An “unequivocal Congressional mandate”205 to displace the community property system must appear. It is inconceivable that any less strict test should be applied when a state rather than federal law is alleged to be in conflict with the basic community property statutes. Indeed, since most federal legislators are generally unfamiliar with community property principles, they are more likely than state legislators to intend to engraft more familiar206 English common law

actuarial equivalent at the date of the member’s death, of the amount of benefits to such other person.

SAN FRANCISCO CITY CHARTER, § 165.2 (1952).

202. Moreover, even under the flexible “any rational basis” test of equal protection under the 14th amendment, how can one justify depriving wives of Los Angeles city employees of rights given to wives of San Francisco city employees? Note that, technically, CAL. CIV. CODE § 5106(b) (West Supp. 1977) seems to apply now to the Los Angeles Plan. See note 196 supra.

203. U.S. CONSTR. art. 6, cl. 2. Assuming, that is, there is a constitutional basis for preemption. On federal preemption of community property laws generally, see text accompanying notes 225-61 infra.


205. 11 Cal. 3d at 478, 521 P.2d at 1116, 113 Cal. Rptr. at 724.

206. See note 325 infra.
concepts of marital property on federally created schemes. State legislators however, are familiar with community property and would have little reason to be hostile to that system and no reason at all to prefer English common law concepts of increased separate ownership of marital property. Thus, a test even more stringent than the “force and clarity” formulation would seem to be appropriate in cases where implied partial repeal by the state legislature of the community property provisions is asserted.

2. Extension of Benson and Waite to Federally Created Pensions and Private Pensions

In In re Marriage of Fithian and In re Marriage of Peterson, the courts found that federally created pension plans which withheld post-death benefits from W did not conflict with California law. The Benson-Waite doctrine was found to eliminate such conflict and, thus, precluded any question of federal preemption.

Both courts overlooked the fact that any terminable interest provisions in the federal schemes, rather than eliminating a preemption issue, raised one. The state legislature, in enacting pension statutes or authorizing city charters containing such provisions, may impliedly repeal or amend the basic community property statutes in the Civil and Probate codes. Congress, however, cannot effect an implied repeal of California law; it can only preempt these state statutes by exercising a source of constitutional power conferred on it to invade the residual powers under the tenth amendment in the states over such local matters as marital property rights. As has been noted, preemption in the area of marital property rights will be found only when Congress has spoken “with force and clarity” in creating a federal marital property rule to replace the state rule, which in my opinion it had not done in the legislation involved in

207. See e.g., Phillipson v. Board of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970), overruled on other grounds, In re Marriage of Brown, 15 Cal.3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), where an anti-assignment clause in a state pension was not, although similar in some respects to the anti-assignment provision relied on strongly by the United States Supreme Court in Wissner v. Wissner, 338 U.S. 655 (1950), as a basis for preemption, found to be inconsistent with the California marital property law because it “was enacted in a community property context.” 3 Cal. 3d at 44-45 n.10, 473 P.2d at 772-73 n.10, 89 Cal. Rptr. at 68-69 n.10.


211. See text accompanying note 204 supra; text accompanying notes 230-40 infra.
Fithian and Peterson. Finally, if the preempted statute has conferred a property right on a person, as Civil Code sections 5110 and 5105 do for W in property earned during marriage by H, the attempt to preempt may be unconstitutional unless the affected party is given just compensation.212

Even more patently erroneous than the extension of Benson-Waite to federally created plans was the application of the doctrine in Bruegl to nonstatutory private pensions arising under contract between H and his employer. While the state legislature may exercise a power to impliedly repeal or amend state statutes, and while preemption by federal statute is theoretically possible, it is obvious that parties may not contract to alter the effects of existing state law on third persons. Clearly, the consent of the wife in Bruegl was necessary to validate the terminable interest provisions of the private pension there involved.213 H could not waive for her the protection of the anti-gift statute.

In the face of the inability of the federal government or private parties to partially repeal or amend the community property statutes, Bruegl is plainly wrong214 and, absent further finding of a constitutional federal preemption in those cases, so are Peterson and Fithian. Without a federal preemption, these cases could be correct in applying the terminable interest rule to federal provisions only if the courts will imply an extraordinarily broad intent for implied partial repeal or implied amendment into the mention in various state pension schemes of widow’s pensions, of designatable death benefits and of payments to the employee after his wife’s death. For example, the Los Angeles Charter firemen’s pension

212. See text accompanying note 245 infra. The federal military pension in Fithian was noncontributory, 10 Cal. 3d at 596, 517 P.2d at 451, 111 Cal. Rptr. at 371, and, arguably, state law never attached to the credits earned by H’s labor toward pension rights if this was the intent of Congress. Peterson, however, involved a civil service pension purchased by a paycheck deduction of seven percent of the employed spouse’s wages. 41 Cal. App. 3d at 646, 115 Cal. Rptr. at 187. It seems probable that when the federal government creates a contract right to compensation, state law at that point attaches to vest a community property right in the employee’s spouse. Then, when a deduction is called for by a separate statute, what is deducted is co-owned property under CAL. CIV. CODE § 5105 (West Supp. 1977), and there is a taking of W’s interests if preemption reduces her quantum of ownership. See text accompanying note 252 infra.

213. In her opening brief in Bruegl, the wife argued solely that pension benefits in general under H’s pension plan had vested under the then-governing French test because H had served the minimum ten years. Neither her brief nor the husband’s reply brief considered the possibility that there might be a community interest in pre-death benefits but none under Benson-Waite in post-death benefits. Petitioner’s Opening Brief and Respondent’s Reply Brief, In re Marriage of Bruegl, 47 Cal. App. 3d 201, 120 Cal. Rptr. 597 (4th Dist. 1975), overruled, In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

214. See Cohan & Fink, supra note 4, at 8; Thiede, supra note 4, at 644.

Bruegl arose long before ERISA, and in any event that Act does not impose the totality of the terminable interest doctrine on private pensions. The employer must make available an optional widow’s pension, but there is no preemption of state law as to how that option may be exercised. See text accompanying notes 359-95 infra.
provisions in Benson would have to be intended by the legislature to deprive not only the wives of firemen of their rights under the basic community property statutes by the technique of implied partial repeal but also the wives of federal employees and of employees participating in Brueg1-type private pension plans. Patently, the legislature did not have in mind such an extension and intended only to deal with the families of Los Angeles firemen and policemen. Likewise the state legislation in Waite could conceivably have worked an implied repeal of the Civil and Probate Code provisions with respect to spouses of state judges, but it is inconceivable that the judges' retirement plan statutes were intended to broaden the rights of husbands who were in the Army or Navy, were federal civil service employees, or who worked for private companies.215

The only other possible explanation for Brueg1 and (aside from preemption) for Fithian and Peterson is one based on constitutional law. The argument would be that to confine the terminable interest doctrine to state judges, Los Angeles firemen and other state employees operating under statutes that do not confirm community ownership of post-death benefits is to deny equal protection of the law. For example, it would allegedly be unconstitutionally discriminatory to single out wives of Los Angeles firemen and policemen and deprive them of their property right while not tampering with the rights of other wives. Thus Benson applies at all divorces. And Mr. Brueg1 would be denied equal protection if terminable interest provisions in his private pension similar to those granted Judge Waite were to be held invalid under section 5125(b) of the Civil Code and section 201 of the Probate Code.

The problem with this constitutional argument is that these equal protection contentions would involve no recognized suspect classifications and would be examined under the "any rational basis" test.216 It would probably be held reasonable to attract married persons to state employment by giving them pension rights broader than those of other married employees and, in order to

215. The difficulty in extending Benson-Waite to pension plans not created by state statute was perceived by a California trial judge, who preferred to reach the same result in federal pension cases by the preemption route. The courts "extrapolated [the terminable interest rule] into a general principle in Bensing v. Bensing, 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1st Dist. 1972). (Such extrapolation was necessary in Bensing, because it did not concern itself with the interpretation of any [California] statute.)" Goldberg, Is Armed Services Retired Pay Really Community Property?, 48 CAL. ST. B.J. 12, 89 (1973). Judge Goldberg does not suggest the source of the California appellate court's power to so "extrapolate" in the face of CAL. PROB. CODE § 201 (West 1956) and CAL. CIV. CODE § 5125(b) (West Supp. 1977), as amended by 1977 CAL. STAT. CH. 692, § 1. Similar failure to see the theoretical barrier to extending Benson-Waite to federal pension plans appears in Status of Military Benefits, supra note 165, at 323.

achieve this, cutting back somewhat the rights of their spouses.\textsuperscript{217} In any event, if it were to be held that the deviations from community property fundamentals in \textit{Benson} and \textit{Waite} violated the equal protection clause, surely the remedy would be to conform the special state pension statutes to the general rules rather than to amend by force of constitutional law the general rule to conform with the peculiar anti-wife animus found to have been the legislative intent with respect to spouses of Los Angeles firemen and state court judges. In sum, I do not think equal protection principles can explain extending \textit{Benson-Waite} to federal employees or private employees and their spouses.

3. The Future of \textit{Benson-Waite}

Since \textit{Brown} repudiated only the reasoning of \textit{Benson}, whether the terminable interest doctrine itself will be scuttled remains to be seen. Surely, however, counsel in future cases will be able to make clear to the court that the interests in state pension rights affected by \textit{Benson-Waite} are not being treated as community property despite the repeated declarations that they are.\textsuperscript{218} To the extent that $H$ and $W$'s interests are unequal and $W$ has no rights that survive her, the property is clearly not community.\textsuperscript{219} This was aptly recognized by Justice Otto Kaus in his dissent from the court of appeal's majority opinion in \textit{Waite} applying the terminable interest rule to limit $W$ to a life estate interest in $H$'s future pension benefits:

Had the court divided up any other right to periodic payments, owned by the community, it certainly would not have made payments to plaintiff [$W$] dependent on her

\textsuperscript{217} In Louisiana, statutes creating retirement plans for state employees are construed to imply repeal \textit{pro tanto} the Civil Code provisions defining community property. All benefits are separately owned and the community is compensated by way of reimbursement (without interest) of community funds contributed to the plan. Reimbursement occurs at dissolution of the community. See note 180 \textit{supra}. It was contended in Teachers' Retirement Sys. v. Vital, 304 So. 2d 53, 59 (La. App. 1974), affirmed, 317 So. 2d 179 (La. 1975), that this denied equal protection of the law to spouses of state employees. Unquestionably, they were worse off at dissolution than other spouses who could claim a community half-interest in the entire nongovernmental pension package, because the state employee's spouse could not share in the gain made by the investment. The equal protection argument was summarily rejected, however.

\textsuperscript{218} \textit{See}, e.g., the passage of \textit{Waite} quoted in text accompanying note 128 \textit{supra}; of \textit{Benson} at note 112 \textit{supra}; \textit{In re Marriage of Fithian}, 10 Cal. 3d 592, 596, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371, \textit{cert. denied}, 419 U.S. 825 (1974), \textit{overruled on other grounds}, \textit{In re Marriage of Brown}, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), addressed to military benefits which it held subject to \textit{Benson-Waite}: ""The law is settled in California that retirement benefits which flow from the employment relationship ... are community property subject to equal division between the spouses in the event the marriage is dissolved.''

\textsuperscript{219} This was recognized by the dissenting judges in a \textit{Fithian}-type case in Idaho, \textit{Ramsey v. Ramsey}, 96 Idaho 672, 680-84, 535 P.2d 53, 61-65 (1975) (McQuade, C.J., and Bakes, J., dissenting), although the dissent itself there fell into error in finding a federal preemption.
survival to receive them. Thus, for example, had the community owned a note payable in installments and had the court decided to award the community property equally, ordered that plaintiff receive one-half of each future payment as it was made, surely it would not have occurred to any one that her death precluded payment to her estate. No different result should follow just because the community asset is a right to periodic pension payments. 220

Justice Kaus is clearly correct.

Benson and Waite are untenable statutory interpretation decisions. Their judicial butchery of fundamental principles of community property on pure conjecture as to what the legislature intended by way of implied repeal is reminiscent of the early decisions of the California Supreme Court that were so hostile to community property. 221 Benson and Waite are also very reminiscent of French v. French in that the court in each of these cases, while giving lip service to the definition of community property, judicially created an exception that destroyed the husband-wife equality, 222 the primary principle on which a community property system is founded. 223 The impact of the inequality created was most severe in French, for it was not uncommon at divorce for the “nonvested” contract rights of one spouse’s pension to be the sole community asset of value. The harm to the nonemployee spouse may not be as significant monetarily in most widows’ pension cases such as Benson, yet the drain on the community of funds diverted to the benefit of a second wife could be of substantial value in some situations. The impact of the Fithian-Peterson-Bruegi rule, allowing H to designate a recipient other than W for all death benefits payable

220. Waite v. Waite, 17 Cal. App. 3d 108, 125, 94 Cal. Rptr. 677, 688 (2d Dist. 1971), aff’d, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972), overruled on other grounds, In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). Justice Kaus’ opinion stated, however, that W would have no interest in a widow’s pension provided under H’s retirement plan. This seems inconsistent with the quoted passage’s treatment of the terminable interest concept generally. Perhaps Justice Kaus simply felt bound by Benson when it came to the widow’s pension.


222. See Cal. CIV. CODE § 5105 (West Supp. 1977). See also Petition for Hearing of Jean Waite, Waite v. Waite, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972), attacking the terminable interest rule as fashioned there by the court of appeal majority (the same position taken by the supreme court in Waite) as inconsistent with community ownership: “The idea of two equal and conterminous interests in property, one of which lasts much longer than the other, is a bit reminiscent of George Orwell’s Animal Farm, in which all the animals share equally, except that the pigs’ share was more equal than that of the others.”

223. I am here speaking of the broad reading of Waite given to it in subsequent
when he dies, could well result in his widow being left penniless. Certainly, in any event, the unfairness of the terminable interest rule is not de minimis.

In Brown the court re-examined the reasoning for the rule given in Benson, recognized that it was absurd to say that the legislature could modify a pension plan if rights in it were owned by the husband but not if rights in it were owned by the community, and repudiated this "logic." Thus, at present, any vitality of the terminable interest rule arises out of the theory of Waite that the legislature intended to eliminate the wife's interest in various post-death pension plan benefits purchased with community funds.

It is fairly certain that the supreme court will at least disapprove Bruegl and confine the terminable interest rule to state legislation that has the power to impliedly repeal the Civil Code and Probate Code provisions assuring the nonemployee spouse an equal interest in community property. I also think it likely that in state pension cases the court will limit Waite to its narrow holding so that post-death benefits are valued as community property and awarded to the employee spouse, with the other spouse receiving assets of offsetting value to assure the equal division required by section 4800 of the Civil Code. If the narrow reading of Waite is adopted for divorce cases, and then when the marriage is dissolved by death and the terminable interest rule is applied (e.g., by cutting off W's testatory power when she dies first or by giving H a testatory power of appointment over W's interest in death benefits), equality could be essentially restored by giving the community (and W or her estate as to one half) a reimbursement claim.

These developments would eliminate most of the unfairness of the terminable interest doctrine. 224 A more straightforward approach would be for the court to concede that the finding by Waite and its offspring of legislative intent to have unequal interests in property acquired with community funds has no basis in statutory language, logic or legislative history. Civil Code sections 4800, 5105, 5107, 5108, 5110, and 5125(b) and Probate Code section 201 should be applied according to their terms until some credible case for implied partial repeal is presented.

cases such as Peterson. As has been noted, interpreting the Waite holding most narrowly, the equality principle is not disturbed. See text accompanying notes 135-38.

224. The unfairness would remain in death cases where there were insufficient funds to provide reimbursement and in all cases if the reimbursement were limited to the amount spent and the community were given neither interest on the sums diverted to acquire the separately owned post-death benefits nor a share of the gain made in the investment. Unfairness would occur at divorce where the equal division required a buy-out with separate property of H or a promissory note, if it created a taxable event that would not exist if all aspects of the terminable interest doctrine were simply scuttled.
III. THE LIMITED ROLE OF FEDERAL PREEMPTION IN THE AREA OF MARITAL PROPERTY LAW

Part I of this Article has shown that with respect to federally created pension and retirement benefits, the fact that Congress has reserved the power to modify or terminate the rights of participants does not preclude a property interest in the benefits that is capable of community ownership. Part II has shown that the terminable interest rule does not apply to federally created plans. Rather, it is only through federal preemption that ordinary community property principles giving the nonparticipant spouse an equal ownership of federal benefits, testamentary power over half, and protection against unconsented to gifts can be displaced.

The law concerning federal preemption of California community property principles is explored in Part III. The general issues discussed include the specificity of language needed to show federal intent to preempt; the difference between a preemption of state law that gives a married person co-ownership of community property and preemption that merely alters management and control principles or state law remedies; the need for a constitutional source of power beyond the supremacy clause for a preemption that works a taking of a married person's property rights conferred by state law; and what constitutes the required just compensation under the fifth amendment for an authorized "taking" of property through preemption of state law. Specifically, Part III considers the extent to which two federal statutory schemes, OASDI provisions of the Social Security Act and ERISA, preempt California community property laws applicable to retirement benefits.

A. United States Supreme Court Policy Favoring State Control of Marital Property Rights

By force of the supremacy clause of the United States Constitution, state laws of any nature must yield to conflicting federal statutory or common law when Congress, properly exercising a constitutionally granted source of federal power, has expressly or by unmistakable inference sought federal supremacy. It is thus possible for state community property laws to be preempted. Nevertheless, the United States Supreme Court has announced a policy that federal preemption of marital property principles is disfavored and that state law should govern such issues unless Congress has with "force and clarity"225 unmistakably ordered

state law to yield. In very few contemporary cases\textsuperscript{226} has the Court inferred Congressional intent to subordinate state community property law to a federal marital property rule, and in none was the community property principle of equal ownership by $H$ and $W$ expressly preempted. Rather, the cases have been viewed as merely expanding the management and control given by state law to the spouse who acquired property created by federal statute.

One reason for the Court’s hesitancy to find that an act of Congress preempts state marital property law is the absence of a developed federal system to fill the void created if state law is not applied. This lack of federal marital property law has led the Court to find no preemption even in a case where state marital property law directly frustrated a strong federal interest. In \textit{United States v. Yazell},\textsuperscript{227} $H$ and $W$ defaulted on a Small Business Administration loan. When the United States sued $W$, she defended on the basis of Texas law (since repealed) limiting her power to bind her separate property. The defense was held valid over the contention that a federal law of capacity to contract had to govern when money was borrowed from the United States under legislation creating the Small Business Administration. The Court held that state family law rules

should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.

Each State has its complex of family and family-property arrangements. There is presented in this case no reason for breaching them. We have no federal law relating to the protection of the separate property of married women. We should not here invent one and impose it upon the States . . . . \textit{[T]here is no “federal interest” which justifies invading the peculiarly local jurisdiction of these States, in disregard of their laws, and of the subtleties reflected by the differences in the laws of the various States which generally reflect important and carefully evolved state arrangements designed to serve multiple purposes.}\textsuperscript{228}

\begin{footnotes}
\item[226.] I do not consider the old Homestead Act cases (\textit{e.g.}, McCune v. Essig, 199 U.S. 382 (1905)) contemporary and am further excluding cases where there was no question that Congress had indirectly, in the taxation context, preempted community property law. \textit{See, e.g.}, United States v. Mitchell, 403 U.S. 190 (1971); Fernandez v. Wiener, 326 U.S. 340 (1945). As a further example, the Internal Revenue Code often preempts state community property laws which seek to protect a debtor’s interest in the community assets from “separate” creditors. \textit{See In re Ackerman}, 424 F.2d 1148 (9th Cir. 1970); United States v. Overman, 424 F.2d 1142 (9th Cir. 1970).
\item[227.] 382 U.S. 341 (1966).
\item[228.] \textit{Id.} at 352-33. Elsewhere in the opinion the Court said that accepting the
\end{footnotes}
This policy in favor of state control affects not only cases involving marital property rights but the entire field of family law. 229

1. Preemption of Community Property Law in the United States Supreme Court

The major contemporary Supreme Court case finding federal preemption of state community property law is Wissner v. Wissner,230 decided in 1950. In Wissner, a California widow sued the beneficiary named by her husband to recover her alleged community interest in certain federally created life insurance proceeds. H had been killed in the line of duty while serving abroad as an Army officer during World War II.231 H had subscribed to a National Service Life Insurance (NSLI) policy. Premiums were paid from his Army salary. The federal NSLI statutory scheme provided that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance" within a designated class.232

The state courts simply applied state law applicable to life insurance,233 holding that H had purchased the insurance with

SBA's contention required "overriding a state law dealing with the intensely local interests of family property and the protection . . . of married women." Id. at 349. It is significant that the Yazell court treated the unusual Texas coverture statute involved there as being on an equal plane with California community property law when the issue was federal preemption. Id. at 351. For other cases finding domestic relations law particularly unsuitable for federal regulation, see Ohio ex rel. Popovici v. Agier, 280 U.S. 379 (1930); In re Burrell, 136 U.S. 586, 594 (1890); Barber v. Barber, 62 U.S. (21 How.), 582 (1858); Bueschold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968); Roecker v. United States, 379 F.2d 400 (5th Cir. 1967), cert. denied, 389 U.S. 1005 (1967); Folsom v. Pearsall, 245 F.2d 562, 565 (9th Cir. 1957); In re Marriage of Pardee, 408 F. Supp. 666 (C.D. Cal. 1976).

When an act of Congress affects areas traditionally regulated by the states, there is a presumption of no preemption and the party claiming preemption must clearly and convincingly prove such intent by Congress. Jones v. Rath Packing Co., 430 U.S. 519 (1977). 229. See, e.g., De Sylva v. Ballentine, 351 U.S. 570 (1956), adopting a state law definition of "children" in renewal provisions of the pre-reform Federal Copyright Act, where the Court said: "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law . . . . This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." Id. at 580.


232. Id. at 658, quoting 38 U.S.C. § 802(g) (1940) (current version at 38 U.S.C. § 717(a) (1970)).

community funds and thus was barred from naming a beneficiary other than \( W \) to take more than his community half of the proceeds.\textsuperscript{234} The state court found no intent in the federal statutes governing NSLI to preempt state community property laws but added that if such intent were present, and if, as contended, the policy was \( H \)'s alone to do with as he pleased so that a named beneficiary could take all the proceeds, the federal statute would work an unconstitutional taking of \( W \)'s community half interest.\textsuperscript{235}

On appeal, the United States Supreme Court accepted the state court's holding that the policy had been acquired with community funds, adding in a footnote:

Major Wisner's army pay, which was held to be community property under California law\textsuperscript{2}, was the source of the premiums paid on the policy.\textsuperscript{236}

We assume the correctness of the lower court's statement of state law. . . . The view we take of this case makes it unnecessary to decide whether California is entitled to call army pay community property.\textsuperscript{237}

The Court, however, disagreed with the state court as to the intent of Congress in enacting NSLI. It held that in providing that \( H \) could designate a beneficiary of the proceeds, Congress had "spoken with force and clarity" sufficient to preempt any state law that "nullifies the soldier's choice and frustrates the deliberate purpose of Congress."\textsuperscript{238} Intent to preempt was also found in a statute immunizing the beneficiary from suit to reach the proceeds: "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.' "\textsuperscript{239} Assuming that the word "payments" includes those improperly made in derogation of a surviving beneficiary, it is clear to us that Congress intended to establish a federal scheme that Congress was empowered to control, and that it chose to do so in a manner that, it was believed, would protect the rights of the beneficiary.

\textsuperscript{234} 89 Cal. App. 2d at 764-70, 201 P.2d at 841-44.
\textsuperscript{235} The California District Court of Appeal held that Congress' power to provide a plan of life insurance for armed servicemen was subject to the limitations imposed by the . . . Fifth Amendment, providing that the Congress shall not deprive any person of life, liberty, or property without due process of law, nor take his property for public use without just compensation.
\textsuperscript{236} [1] In view of the Fifth Amendment, the Federal government had no power to provide, as it is contended it did . . . , that payments made to a beneficiary of a national service life insurance policy shall be exempt from the claims of the widow of the deceased insured to the right vested in her under the laws of this state to one-half of such payments.
\textsuperscript{237} 89 Cal. App. 2d at 765, 767, 201 P.2d at 841, 843. The state court relied on United States v. Cohen Grocery Co., 255 U.S. 81 (1921), where it was said that "a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth [Amendment]." Id. at 88.
\textsuperscript{238} 338 U.S. at 657.
\textsuperscript{239} Id. at n.2.
\textsuperscript{238} Id. at 658-59.
\textsuperscript{239} Id. at 659, quoting 38 U.S.C. § 816 (1940).
spouse's rights, it must be conceded that the literal language barred W's suit against the beneficiary to obtain half the benefits. The Court further construed the provision as barring an attempt to recover from the beneficiary any "equivalent amount" of money.240

The Supreme Court recognized that its holding as to the intent of Congress coupled with its concession that the policy had been purchased with funds equally owned by H and W required it to reach the fifth amendment due process issue.241

The constitutionality of the congressional mandate above expounded [that the widow could claim no rights against the beneficiary] need not detain us long. Certainly Congress in its desire to afford as much material protection as possible to its fighting force could wisely provide a plan of insurance coverage. Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman. The exemption provision is his guarantee of the complete and full performance of the contract to the exclusion of conflicting claims. The end is a legitimate one within the congressional powers over national defense, and the means are adapted to the chosen end. The Act is valid.242

If the Court is actually invoking the war power as constitution-al justification for the apparent outright taking of the wife's property interest without any compensation, it marks an extraordinary extension of the line of cases upholding the power of the government to destroy property in wartime emergencies without paying for it.243 Nevertheless, the literal reading of Wissner seems a direct response to the state court's holding244 that the existence of a state of war did not affect W's due process rights. On its face, Wissner is a case of congressional preemption of state community property laws by exercise of the federal war and defense powers. Wissner would then be irrelevant to most pension cases.

Two alternative explanations for the result in Wissner, both resting on preemption under Congress' spending power, would, however, give the case broader implications. First, the result is

240. Id.
241. "We are to determine whether the California community property law, as applied in this case, conflicts with certain provisions of the National Service Life Insurance Act of 1940; and if so, whether the federal law is consistent with the Fifth Amendment to the Constitution of the United States." 338 U.S. at 656 (emphasis added).
242. 338 U.S. at 660-61.
244. See note 235 supra.
explainable if footnote 2 of the Wissner opinion is disregarded and if it is assumed the Court disagreed with the California court’s decision that the NSLI policy was acquired with community funds. Presumably, the spending power of Congress includes the power to determine initially the property rights of the selected recipients of monies paid out by the federal government. While no reasonable argument could have been made in Wissner that Congress had chosen to exercise that power as to all compensation paid to servicemen such as H, arguably the statutory scheme did provide a means whereby a federal rule of property rights could attach to as much of the pay as was used to purchase NSLI. At least the argument holds if, as seems likely, H’s NSLI premiums were paid for by paycheck deductions. H’s election to have such deductions made could be viewed as his exercising a federally granted option to keep the amount of premiums within federal control and outside the reach of state law. The amount of the premiums was simply shifted from one federal depository (funds allocated to military pay) to another (the NSLI account) and never came under the control of state community property law. Thus, nothing was taken from W, for the community never had any interest at all in the policy.245

The second alternative explanation of Wissner is that, indeed, as implied in footnote 2 of the opinion, the policy was community property, and, thus, so were the proceeds.246 Federal law did not preempt state law247 giving W an equal, vested proprietary interest, but only increased H’s management and control over the property beyond that conferred by state law and reduced W’s management powers. That is, only the anti-gift provision of California law248 was preempted. Assuming that the military interests of the federal government involved in providing benefits to federal employees (especially those in the military) would give the United States a basis for

245. While inconsistent with footnote 2 of the opinion, this theory is consistent with a subsequent statement by the Court that “The federal statute establishes the fund in issue, and forestalls the existence of any ‘vested’ right in the proceeds of federal insurance.” 338 U.S. at 661. That is, since Congress can abolish the insurance coverage at its whim, the rights are a mere expectancy, not property, and for this reason W has lost nothing when federal law declares the proceeds paid, the first emergence of property in the case, to be solely H’s and his designee’s. But see Free v. Bland, 369 U.S. 663 (1962), suggesting that even before the insured died and proceeds became payable there was a property interest and it was H’s separate property:

Our holding is supported by Wissner v. Wissner, 338 U.S. 655. There the Congress made clear its intent to allow a serviceman to select the beneficiary of his own government life insurance policy regardless of state law, even when it was likely that the husband intended to deprive his wife of a right to share in his life insurance proceeds, a right guaranteed by state law.

Id. at 670. (emphasis added).

246. This theory is then apparently inconsistent with the quoted matter in note 245 supra.


taking—through the device of $H$’s beneficiary designation—$W$’s property interests if just compensation were paid to her, the question is what, if anything, $W$ does obtain in lieu of half the proceeds. It could not seriously be contended that $W$ obtains just compensation in the form of the pleasure of making a gift to $H$’s designee of her half interest. Where $W$ has not consented to the designation, $H$ is not acting as her agent under California law in making the gift. To say that federal law makes $H$ her agent is simply another way of conceding that there is a taking and does not show any just compensation. However, if federal law itself authorizes—or if it incorporates state law authorizing—a wife who loses her interest in NSLI proceeds in such manner to pursue another remedy, it is possible that there is just compensation for $W$’s loss. While Wissner bars the state law remedy for $W$ against NSLI donee after $H$’s unconsented to gift of $W$’s community interest, nothing in the opinion seems to stand in the way of a different remedy, a suit against $H$’s estate. If the estate has sufficient funds to pay to $W$ a sum equal

249. See McDonald v. Senn, 53 N.M. 198, 204 P.2d 990 (1949), where the New Mexico Supreme Court, analyzing Grolemund v. Cafferata, 17 Cal. 2d 679, 111 P.2d 641, cert. denied, 314 U.S. 612 (1941), concluded that California law did not in fact recognize $W$ as an owner of community property. Grolemund held that the 1927 statute making $W$ an equal owner of community property did not bar $H$ as manager from using it to pay his own separate debts that in no way benefited the community. The New Mexico court said it was a “specious argument” to contend in the face of Grolemund that $W$ had a vested ownership interest in community property. 53 N.M. at 210, 204 P.2d at 997. What that court failed to predict was that California would, when ultimately faced with the problem adverted to, follow the Spanish-Mexican rule that such a use of community funds by $H$ did not deprive $W$ of ownership interest in the community property but rather changed the community asset from cash or other property to a claim against $H$ for reimbursement at dissolution of the community. See Weinberg v. Weinberg, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967); In re Marriage of Walters, 57 Cal. App. 3d 802, 129 Cal. Rptr. 351 (1st Dist. 1976).

250. See, e.g., Harris v. Harris, 57 Cal. 2d 367, 369 P.2d 481, 19 Cal. Rptr. 793 (1962) (W’s executor suing for her); Ballinger v. Ballinger, 9 Cal. 2d 330, 70 P.2d 629 (1937); Britton v. Hammell, 4 Cal. 2d 690, 52 P.2d 221 (1935); Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933); Medeiros v. Cotta, 130 Cal. App. 2d 740, 279 P.2d 814 (3d Dist. 1955). Although these cases provide a remedy and federal barring of it appears at first blush to be a mere procedural change rather than a taking of property, if it is $W$’s only remedy and without it she loses her property, the effective taking of property cannot be shielded from due process clause analysis by “procedural” or “remedial” labels. Ordinarily, changes in management and control do not involve, however, shifting of property interests. Reppy, Retroactivity, supra note 31, at 977.

251. See Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477 (1933); Fields v. Michael, 91 Cal. App. 2d 443, 205 P.2d 402 (2d Dist. 1949). Cf. Cohrs v. Scott, 161 Tex. 111, 338 S.W.2d 127 (1960) ($W$ must exhaust the remedy against $H$ before proceeding against the donee). $W$ would make a claim against $H$’s estate as a creditor and hence could reach not only his half of the community property but also his separate property. It might even be possible to fashion a lien for her to give her priority over other creditors. The basis for such lien would be federal common law created by the courts to fill the void left by preempting the anti-gift provision of state law with the goal in mind of doing so in such manner as to make the preemption statute constitutional. Giving $W$ security would reduce the number of cases where her remedy after preemption would be insufficient to preclude a holding of a taking of her property.
to half the community share of the NSLI proceeds, compensation would seem to be adequate. The constitutional question would then be whether there was a sufficient federal interest to alter the state law method of protecting W’s property rights.

In a case where, however, the only assets are the insurance proceeds, the preemption would be unconstitutional (because W would receive no compensation) unless the power to take property without compensation in wartime emergency could be invoked by the government. Once the federal government permits state law to attach and to vest rights of property in the wife, no act of Congress can take them away without due process and compensation. What is “property” under the due process clause does not stem from the Constitution itself but “from an independent source such as state law.”

2. Supreme Court Recognition of “Taking” Problems in Preemption Cases

In two Supreme Court decisions subsequent to Wisner, where the federal war power could not be invoked to validate a taking of a community property state wife’s property right in federally created assets, the Court made it clear that the due process clause will not ordinarily allow a federal preemption that results in such a taking. Thus, questions of what is just compensation never arise.

In Free v. Bland, a Texas H used community funds to purchase U.S. savings bonds. Pursuant to federal regulations authorizing the purchaser of bonds to do so, H had them issued in joint tenancy form. The joint tenants were H and his wife. She predeceased him with a will leaving her half of the community property to Son. The Texas courts held that W had a right of testamentary disposition over half of the bonds under state law.

252. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). Accord, Goss v. Lopez, 419 U.S. 565, 572 (1975). It is held in Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977): “Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several states.” Were the rule otherwise, Congress could nullify the due process clause at its whim simply by declaring that a person whose alleged rights are affected by federal legislation had no property rights because Congress was preempting the state law that gave property rights. The constitutional prohibition of a taking would become meaningless verbiage.


254. It seems apparent that these funds were not acquired from the federal government, as were the funds in Wisner that went to pay for the NSLI. It was thus impossible for the federal government to have initially preempted the Texas community property law, and thus the taking issue could not be avoided by a holding that the federal government had prevented state law from ever attaching to the funds used to buy the bonds.

255. 369 U.S. at 664-67.
but the United States Supreme Court reversed on preemption grounds. Texas was required to permit $H$ to set up such a joint tenancy.

Since the decision merely deprived $W$ of testamentary power, which is not traditionally viewed as a property right which due process bars the government from altering, constitutional problems other than the operation of the supremacy clause were not discussed in *Free*. However, the court went out of its way to declare that federal preemption would not be permitted to undermine community property rights "where the circumstances manifest fraud or a breach of trust tantamount thereto on the part of a husband while acting in his capacity as manager of the . . . community property."

An even stronger caution as to the limited role of federal preemption on a spouse’s property interests was given in *Yiatchos v. Yiatchos*. A Washington husband had purchased U.S. savings bonds with community property and, pursuant to federal regulations, designated his brother to be the owner of the bonds on $H$'s death. The Washington Supreme Court held that Brother had to account to $W$ to prevent her being divested of her property rights. Notwith-

256. The legislatures are free to limit or even abolish the statutory power to make a will and the power to take under a will. *See, e.g.*, Irving Trust Co. v. Day, 314 U.S. 556 (1942); United States v. Perkins, 163 U.S. 625 (1896); United States v. Fox, 94 U.S. 315 (1876); Estate of Manchester, 174 Cal. 417, 163 P. 358 (1917); Estate of Carpenter, 172 Cal. 268, 156 P. 464 (1916); *In re Comassi*, 107 Cal. 1, 40 P. 15 (1893); *cf.* Estate of Terry, 65 Cal. 2d 60, 416 P.2d 473, 52 Cal. Rptr. 441 (1966); Estate of Knutzen, 31 Cal. 2d 573, 191 P.2d 747 (1948) (limiting the power of aliens in such circumstances). *See also* Estate of Phillips, 203 Cal. 106, 263 P. 1017 (1928), *cert. denied*, 278 U.S. 599 (1928). Moreover, Texas law already permitted $H$ to defeat some of $W$'s conveyed property rights in community assets by his power to make reasonable gifts as her agent. *See* note 125 *supra*. Federally extending that doctrine arguably might not be a taking of property. In addition, it is possible that after the federal preemption decreed in *Free*, $W$ might have a remedy for her lost testamentary power by permitting her will to operate on a portion of $H$'s half interest in such assets as community cash equal to half the value of the bonds. That is, the aggregate theory of community property ownership would be imposed on Texas law by virtue of the preemption. *See* Reppy & De Funiak, *supra* note 3, at 441-45. Texas does apply the aggregate theory when $H$ dies before $W$ and attempts to make a quasi-testamentary disposition of community property by will substitute. *See* Krueger v. Williams, 163 Tex. 545, 359 S.W.2d 48 (1962).

257. 369 U.S. at 670. The Court went on to state that the "doctrine of fraud applicable under federal law" was not at issue. *Id.* If the latter wording means that the fraud concept will be developed as a matter of federal common law, it will not prevent a holding of an unconstitutional taking of $W$'s property interest if the federal fraud rule authorizes substantially more giving away of $W$'s property than state law does. In California, with its strict anti-gift provision, a very broad federal concept of fraud would be needed to moot the constitutional due process issue raised by the preemption.


259. *In re Yiatchos' Estate*, 60 Wash. 2d 179, 182, 373 P.2d 125, 127 (1962). The Washington Supreme Court held $H$'s attempt to designate his brother as owner of the bonds at his death completely void. Therefore, while $W$ took her half interest, $H$'s passed not to Brother under the designation but through $H$'s will. This gave
standing the federal rules purporting to authorize the purchaser of federal bonds to designate a recipient of the entire proceeds at his or her death, the United States Supreme Court was generally in agreement:

Under the federal regulations petitioner [Brother] is entitled to the bonds unless his deceased brother committed fraud or breach of trust tantamount to fraud. Since the construction and application of a federal regulation having the force of law . . . are involved, whether or not there is fraud which will bar the named beneficiary in a particular case must be determined as a matter of federal law . . . .

But in applying the federal standard, we shall be guided by state law insofar as property interests of the widow created by state law are concerned. It would seem obvious that the bonds may not be used as a device to deprive the widow of property rights which she enjoys under Washington law and which would not be transferable by her husband but for the survivorship provisions of the federal bonds.260

B. The Present Status of the Preemption Doctrine in California

1. The Position of the State Supreme Court

Following Free and Yiachos, the California Supreme Court refuses to find any federal preemption of a spouse’s proprietary rights under the state’s community property system absent an express statement by Congress that it intends to deprive a California married person of his or her property. Such an intent has not been found in contemporary decisions of the court. Presumably, where such intent is found, the attempted preemption will be held unconstitutional if no federal interest sufficient to disturb state property rights appears and, even if it does, if the aggrieved spouse has no remedy which can stand as just compensation for the taking.

Furthermore, in In re Marriage of Milhan,261 a post-Wissner

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260. 376 U.S. at 309. The Court did, however, preempt under the federal bond regulations certain state procedural rules. The Washington court had held that the brother carried the burden of proof to establish that W had consented to the gift to the brother. The United States Supreme Court held that W had to plead and establish no such consent. So long as W was alive to testify, this switching of the burden of proof surely did not rise to the level of a taking of property. However, were W deceased by the time of trial, the placement of the burden of proof would virtually control the outcome of the case and it could cogently be argued that depriving W of the so-called procedural benefits of state law in actuality worked a taking of her property rights.

case involving an NSLI policy, the Court interpreted Wissner narrowly as holding that the federal NSLI statute preempts only the state anti-gift and testamentary control provisions. No provision of the federal statute was found to conflict with equal ownership provisions of state law. Accordingly, it was held that an NSLI policy was community property to be valued as such at divorce in making the mandatory fifty-fifty division of community property. Preemption of state law was upheld to the extent that W's ownership of half the proceeds could be taken from her by the force of H's beneficiary designation made pursuant to the management powers given him by federal law. But W would receive full compensation at divorce by an award of an offsetting amount of other community property. In finding no uncompensated taking of W's property interests under federal law but merely a change in remedies, the Milhan court adhered to the policy that a federal statute will be read, absent an expressed intent to “occupy the field” otherwise controlled by community property principles, to preempt state law only so far as necessary to carry out the federal

262. Of course, at divorce H must be awarded all of the policy, W taking other community property in lieu thereof, to adhere to the federal rule giving H the power to select a beneficiary of all the proceeds. It should be noted that, after awarding H the policy, if there is not sufficient community property left to give W 50% in value, a California divorce court should invade H's separate property. This cannot be done under state law, but it could be permitted under federal common law where there has been a preemption of the state rule that makes possible an equal division. Presumably the federal common law, to fill the void, allows the divorce court, as is done in almost all English common law jurisdictions, see note 326 infra, to award some of H's separate property to W in order to make an equitable division of property at divorce.

NSLI proceeds are also treated as community property at H's death in California, subject to his right to name a beneficiary of his choice. Estate of Allie, 50 Cal. 2d 794, 329 P.2d 903 (1958). Contra, Estate of Hutson, 49 T.C. 495 (1968) (proceeds are separate property); Rev. Rul. 74-312, 1974-2 C.B. 320; Rev. Rul. 56-603, 1956-2 C.B. 601 (turning, however, on the use of the community jurisdiction of the inception of title doctrine).

263. There would seem to be a “taking” when W is denied a claim to a share of the proceeds; certainly there is when other assets on hand are insufficient to make W whole in dollars and cents for her loss. This conclusion cannot be avoided on the theory that Congress has merely created a class of property that only one person can own—that is incapable of co-ownership. See, e.g., Muckleroy v. Muckleroy, 84 N.M. 14, 498 P.2d 1357 (1972) (professional license cannot be co-owned). Cf. Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (3d Dist. 1969). Perhaps the federal contract is a property right that only the employee can own under federal law, but certainly the same thing cannot be said of money paid out under it. If federal law made money incapable of co-ownership, not only community property but also the concepts of tenancy in common, joint tenancy, and tenancy by the entirety would be destroyed. It seems clear that if there were tortious interference with a married physician's use of her medical license—something the Muckleroy court finds to be property, but property incapable of common ownership—and if the license holder recovered money damages in a cause of action against the tortfeasor, certainly they would be community property. Therefore, to recognize that federal law bars W from claiming her share of benefits paid out under an insurance or pension plan earned by community consideration is necessarily to recognize a taking under the Fifth amendment of W's property interests, assuming state law was allowed to attach initially to the labor or funds that produced the benefits.
mandate.264

The state supreme court's hostile attitude toward preemption, well founded in view of federal decisions such as *Yazell*, is seen in recent divorce cases involving federally created life insurance for civil service employees, federal military retirement pay, and Railroad Retirement Act benefits.

In *In re Marriage of Fithian*,265 a pre-Brown divorce case, *H* had acquired by his labors during marriage *French*-vested rights in a federally created retirement program for armed servicemen. The legislation contained no express statement by Congress that state law making *W* co-equal owner of the retirement plan rights was preempted, and the state supreme court held it would not infer such intent unless the state law "interferes in any way with"266 or "frustrate[s]"267 the purposes of the federal legislation.

The mere fact that the statutes said the benefits should be paid to *H* and that they were his personal entitlement was not found to preempt expressly the law giving *W* a co-equal interest.268 Nor was

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266. *Id.* at 605, 517 P.2d at 457, 111 Cal. Rptr. at 377.

267. *Id.* at 597, 517 P.2d at 451, 111 Cal. Rptr. at 371.

268. The Fithian court did, however, cut down *W*'s interest in the plan by finding in the federal statutes a form of the Benson-Waite terminable interest rule. The court somehow assumed there was no federal-state conflict, see text accompanying note 139 supra, failing to realize that Congress could not impliedly repeal *pro tanto* the state statutes but could only preempt them.

The many additional decisions holding military benefits paid by the federal government to be community property include *Commissioner v. Wilkerson*, 44 T.C. 718, affirmed, 368 F.2d 552 (9th Cir. 1966); *In re Marriage of Wilson*, 10 Cal. 3d 851, 519 P.2d 165, 112 Cal. Rptr. 405 (1974); *In re Marriage of Martin*, 50 Cal. App. 3d 581, 123 Cal. Rptr. 634 (3d Dist. 1975), overruled on other grounds, *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976); *In re Marriage of Brown*, 27 Cal. App. 3d 188, 103 Cal. Rptr. 510 (2d Dist. 1972); *Bensing v. Bensing*,
this language found to mean that state community property law would frustrate the achievement of any federal goals. Indeed, said the court, the contention that language directing sums to be paid to the federal employee preempted community property law would "embrace virtually all federally created benefit plans." Thus, the husband's contention in Fithian that congressional preemption made military retirement pay his separate property was rejected. Additionally, the court rejected the argument that a federal statute protecting the military retirement pay from attaching creditors preempted the state remedy of decreeing a co-owner of a fraction of future payments might receive: "An award of a community property share of retirement benefits to wife involves neither an attachment of federal funds nor a demand on the federal paymaster, but instead orders husband after he receives the benefits to fulfill his obligation in the future pursuant to the judgment of dissolution."269

Finally, the fact that the federal legislation provided for payment of a benefit to a widow of the serviceman and excluded his divorced wife from receiving such payments did not mean that state


For the contra position, see Goldberg, note 215 supra; Comment, Lump Sum Division of Military Retired Pay, 12 Idaho L. Rev. 197 (1976), revised and reprinted as Bowman, Lump Sum Division of Military Retired Pay: A Dissenting View, 3 Com. Prop. J. 135 (1976).


Apparently the federal paymaster would not honor an order by the divorce court directing it to prepare two checks and send one to W. United States v. Smith, 393 F.2d 318, 321 (5th Cir. 1968) (Army retired pay; anti-attachment statute relied on). But see United States v. Stiller, 553 S.W.2d 227 (Tex. Civ. App. 1977), writ
law could not accord the first wife a community property interest in the pension:

Congress' concern for the welfare of soldiers' widows sheds little light on Congress' attitude toward the community treatment of retirement benefits. . . . It is not incongruous for Congress to supply a program to aid widows who no longer have husbands to provide sustenance, and omit to do so for ex-wives who can rely on state family law concepts of support, alimony, and community property as a source of income.271

Carlson v. Carlson272 involved the question whether Congress, in providing a group life insurance plan for federal civil service employees, had preempted California law so that the benefits acquired by H with earnings during marriage would, at his death, be his separate property rather than community, or for other reasons payable in full to his designee. The Employers Group Liability Insurance (EGLI) was similar to the military life insurance considered in Wissner in that a statute authorized the employee to designate a beneficiary of his choice. But the California Supreme Court distinguished Wissner; with respect to civil service employees there was lacking "the overriding national interest in affording protection to the serviceman in his service to the country, with a resultant enhancement of his morale . . ."273 In the case of civil service employees, neither the "sacrifices" associated with military service nor the same "national interest" were present.274

Moreover, the language of the EGLI statute did not contain the strong anti-attachment clause relied on by the Supreme Court in Wissner. In Carlson, H had to rely mainly on the provision authorizing him to name a beneficiary. This provision, however,

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271. 10 Cal. 3d at 600, 517 P.2d at 454, 111 Cal. Rptr. at 374. It is clear from the contrary position that the mere provision for a widow's benefit bars a divorced wife from claiming a community interest, see Case Note, 9 St. Mary's L.J. 135, 143-44 (1977).


273. Id. at 479, 521 P.2d at 1117, 113 Cal. Rptr. at 725. Carlson would seem to be in irreconcilable conflict with Rev. Rul. 57-446, 1957-2 C.B. 619, holding that for taxation purposes death benefits which a participant in federal civil service can purportedly pass to a designated beneficiary are entirely separate property. Reliance is placed in Wissner. The constitutional problems involved in the apparent taking by federal law of the wife's community interest in paycheck deductions by which federal civil service employees participate in the retirement plan are not adverted to. The ruling is plainly erroneous, as is a similar 1938 ruling by the Civil Service Commission, discussed in the 1957 ruling, which defeated a Louisiana wife's community property rights.

274. Id. at 477, 521 P.2d at 1116, 113 Cal. Rptr. at 724.
was typical of all life insurance schemes and did "not show the clear, unequivocal Congressional mandate required for preemption." Congress had "not spoken with force and clarity" to displace state law, and hence the insurance was a community asset.

In re Marriage of Hisquierdo involved a husband's claim that the Federal Railroad Retirement Act preempted state law so that all benefits under it were the railroad employee's separate property at divorce even though H qualified for benefits due to labor and payroll deductions in part during marriage. Again, an anti-assignment and anti-garnishment clause was held not to be a congressional declaration that the participant's spouse was to have no community interest. H also relied on provisions of the Act which provided for a widow's annuity for a spouse reaching a specified age and a provision disqualifying a divorced spouse from the right to any such annuity. For the reasons given in Fithian, this was rejected. Finally, the court rejected a contention that, in effect, the state law of community ownership was preempted by federal law reserving to Congress the power at any time to cancel the program. There was, said the California court, no authority for such power being held by Congress and, moreover, the same alleged congressional power applied to the military retirement benefits in Fithian but had not there barred the finding of a community interest.

Consistent with the Supreme Court's position on federal preemption of state community property law is the court of appeal's treatment of federal civil service retirement benefits in In re Mar-

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275. Id. at 478, 521 P.2d at 1116, 113 Cal. Rptr. at 724. See also Chambers v. Chambers, 259 La. 246, 249 So.2d 896, cert. denied 404 U.S. 856 (1971), overruled in part, West v. Ortego, 325 So. 2d 242, 249 (La. 1976) (federal statute conferring on the railroad employee an FELA tort action does not make that chose in action his separate property—no intent to preempt found).

276. 11 Cal. 3d at 476-77, 521 P.2d at 1115, 113 Cal. Rptr. at 723.


278. The Railroad Retirement Act pension fund is funded in a manner similar to that of the Social Security Act. See text accompanying notes 36-49 supra. A Railroad Retirement "tax" is imposed on employees and there is an annual appropriation from general funds of the United States into the railroad retirement pension account of the precise amount so raised by the tax. 45 U.S.C. § 231(n) (Supp. V 1975). For the similar provision in effect at the time of Hisquierdo's divorce, see Retirement Act of 1935, ch. 812, § 15, 49 Stat. 974 (1935).

279. 19 Cal. 3d at 617, 566 P.2d 226, 139 Cal. Rptr. 592.

280. Id. at 617-18, 566 P.2d at 226-27, 139 Cal. Rptr. 592-93.

281. Id. at 618-19, 566 P.2d at 227, 139 Cal. Rptr. 593.

282. In fact, the Railroad Retirement Act, 45 U.S.C. §§ 228-231 (Supp. V 1975) has no counterpart for § 407 of the Social Security Act, see text accompanying note 5 supra, specifically reserving the power to amend or repeal. Nevertheless, the case law suggests such a power. See the cases cited in the lower court's vacated opinion in In re Marriage of Hisquierdo, 63 Cal. App. 3d 231, 234, 133 Cal. Rptr. 684, 685 (2d Dist. 1976); Rubik v. Railroad Retirement Bd., 342 F.2d 662 (7th Cir. 1965), cert. denied, 382 U.S. 836 (1965); Stouper v. Jones, 284 F.2d 240 (D.C. Cir. 1960).
riage of Peterson. In Peterson, benefits were acquired during marriage by deductions from H's federal pay and by employer contributions. In addition to retirement pay H would receive, the plan provided for an optional widow's pension and for death benefits payable to designated beneficiaries. Writing before the overruling of French, the Peterson court held that all "vested" benefits were community property but subject to the Benson-Waite terminable interest rule. As has been observed above, the Peterson court believed (erroneously, I contend) that it did not have to consider whether federal treatment of post-death benefits in the civil service retirement scheme preempted state law because of the notion that not even California sought to create a community interest in such benefits.

2. Contrary Authority in the Court of Appeal

On the other hand, the court of appeal decisions dealing with OASDI benefits under the Social Security Act cannot be reconciled with the California Supreme Court cases such as Fithian and Carlson in dealing with the preemption issue. As a result of such preemption, future OASDI benefits earned by labor during marriage were held to be separate property of the "insured" spouse, while the other spouse received no compensation for the loss. In In re Marriage of Kelley, the court held that future social security benefits that H might receive, while based at least in part on his labors during marriage, were not community property. The court noted that the Social Security Act provides in certain instances for the payment of benefits to an insured participant's family members. This alone, apparently, was thought sufficient to preempt the state community property system:

The federal law specifically provides benefits for wives . . . , divorced wives . . . , widows . . . and surviving divorced wives . . . If all or any part of OASDI contributions or benefits are included in the mix of community property divisible on dissolution of marriage, what is a uniform federal scheme of benefits becomes one that

284. See text accompanying notes 144-49 supra. See also Estate of Perryman, 133 Cal. App. 2d 1, 283 P.2d 298 (1st Dist. 1955) (apparently recognizing, too, the participant's rights to defeat his widow under the terminable interest doctrine by designating his children as recipients of all death benefits); In re Marriage of Butler, 543 S.W.2d 147 (Tex. Civ. App. 1976), writ dismissed; Valdez v. Ramirez, 558 S.W.2d 88 (Tex. Civ. App. 1977), writ --; Estate of Worley, 87 Cal. App. 2d 760, 197 P.2d 773 (4th Dist. 1948) (wartime civilian employee deaths and prisoners of war benefits were earned compensation, not a gift). For the contrary position of the IRS, see note 273 supra.
285. See notes 144-49 & accompanying text supra.
286. 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (2d Dist. 1976).
varies depending upon the community property law of various states. 287

Preemption was also an alternative basis of the holding in In re Marriage of Nizenkoff. 288 Noting the Social Security Act provisions for payments under certain circumstances to a divorced wife or surviving divorced wife, the Nizenkoff court said:

These provisions demonstrate that in the statutory scheme of the Social Security Act, Congress has considered the termination of marital relationships by divorce and expressly set forth a method for protecting the interests of the divorced wife. . . .

The sweep of the Social Security Act is not to be interpreted by the variations and idiosyncrasies of local law. . . . As Congress expressly provided for the interests of a divorced wife in the social security system, it did not intend that they rely on state family law concepts of support, alimony[1] and community property.

. . . A ruling that social security benefits are divisible community assets would seriously interfere with the express statutory scheme of the Social Security Act and is forbidden by the supremacy clause of the U.S. Constitution (art. VI, cl. 2). Thus, we do not think that the rationale of In re Marriage of Milhan . . . applies to the instant case. 289

3. Can Nizenkoff and Kelley be Reconciled with Earlier Decisions?

Obviously, the Nizenkoff and Kelley decisions greatly expand the federal preemption doctrine at the expense of state marital property law. Under these cases, the mere provision in social security legislation for payments to wives, widows and divorced wives in some, 290 but not all, circumstances precludes community

287. Id. at 99, 134 Cal. Rptr. at 268-69.
288. 65 Cal. App. 3d 136, 135 Cal. Rptr. 189 (1st Dist. 1976) (footnote omitted). For the alternative holding that OASDI benefits to be paid in the future were a mere expectancy even under Brown, see text accompanying notes 64-66 supra.
289. 65 Cal. App. 3d at 140-41, 135 Cal. Rptr. at 191-92.
290. For example, to claim a divorced wife's benefit the woman must be age 65 and have been married to a fully insured H for 20 years.

That the Social Security Act provisions for paying benefits to dependents does not speak with "force and clarity" and provide an "unequivocal mandate" to preempt state law is especially clear when one compares the provisions of the Act relied on in Nizenkoff and Kelley with federal statutes drafted after Congress actually considered whether to preempt community property principles and decided to do so. In I.R.C. § 219(c)(2), concerning deductions from gross income for deposits in IRA accounts by a wage earner, it is stated: "[T]his section shall be applied without regard to any community property laws." Int. Rev. Code of 1939, ch. 619, § 402(b), 56 Stat. 942 (1942) (now, I.R.C. § 811(e)(2)), treated a decedent for estate tax purposes as owner of all his or her earnings or accumulations notwithstanding that by state law a surviving spouse owns a community half interest. This statute preempted the state law rule that one spouse had but a half interest in the community property by taxing the deceased "to the extent of the interest therein
interest. The force-and-clarity and unequivocal-mandate tests employed in the California Supreme Court cases are simply ignored, for there is not the slightest suggestion in such provisions of any consideration by Congress of community property or other state marital property law principles, let alone an intent to displace them.

Although the OASDI cases are technically distinguishable from Fithian and Hisquierdo in that the Court in neither of those cases considered a scheme providing actual benefits for a divorced wife (merely for a widow), the presence of the divorced wife held as community property by the decedent and surviving spouse . . . except such parts thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse." (emphasis added.)

I.R.C. § 911(c)(3), concerning exclusion from income of sums earned in foreign countries having community property systems, provides:

With respect to amounts received for services performed by a husband or wife which are community income under community property laws applicable to such income, the aggregate amount excludable . . . from the gross income of such husband and wife shall equal the amount which would be excludable if such amounts did not constitute such community income.

I.R.C. § 43(c)(2)(B)(ii) disregards community status and treats the acquiring spouse as sole owner for purpose of determining availability of earned income credit. I.R.C. §§ 1303(c) and 1304(c)(3)(B) disregard community property status in determining eligibility for income averaging. I.R.C. § 6013(e)(2)(A) disregards community property status in determining sums for which under some circumstances a nonearner spouse signing joint return which does not report all income is not personally liable.

Such "unequivocal mandates" to displace community property laws are found in the Social Security law itself with respect to certain narrow issues. See, e.g., Social Security Act § 211(a)(5)(A), 42 U.S.C. § 411(a)(5)(A) (1970). See also Treas. Reg. § 1.1402(a)-8 (1963), concerning when a self-employed person earns fully insured status:

If any of the income derived by an individual from a trade or business . . . is community income under community property laws applicable to such income, all of the gross income, and the deductions attributable to such income, shall be treated as the gross income and deductions of the husband unless the wife exercises substantially all of the management and control of such trade or business, in which case all of such gross income and deductions shall be treated as the gross income and deductions of the wife.

The unconstitutional sex discrimination here in no way means this statute is not evidence of how Congress speaks "with force and clarity" if it wishes to preempt community property laws.

Additional regulations promulgated under the Social Security Act speak with force and clarity when preemption of community property laws is intended. 20 C.F.R. § 404.350(d) (1977), concerning how to measure the contributions from a deceased insured that a widower or parent must establish to qualify for benefits, states:

When a person receives, and uses for his support, income from his services or property and such income, under applicable State law, is community property of himself and his spouse, no part of such income is a "contribution" by the spouse to such person's support regardless of any legal interest the spouse may have therein. However, when a person receives, and uses for his support, income from the services or property of his spouse and, under applicable State law, such income is community property, all of such income is considered to be a contribution by such spouse to such person's support.

benefit provisions in no way addresses the issue whether Congress sought to bar the states from awarding additional protection to the wife at divorce. In my view the suggestion in the Nizenkoff opinion quoted above that Congress “did not intend . . . alimony” to be available to a divorced wife whose husband participated in the OASDI program is absurd. Since most American workers fall under the Act, the notion would virtually abolish the concept of alimony. And the Act shows no more intent to oust state community property law giving protection to a spouse after divorce than state law of alimony simply because the husband is an OASDI participant.

Assuming one can hurdle the problem of tracing OASDI benefits to a spouse’s labors during marriage or to FICA taxes paid with community funds, there is no colorable argument for refusing to apply the limited preemption concept of the Milhan case. Federal legislation concerning retirement benefits such as the Social Security Act may authorize H to invest community labors or funds into retirement schemes under which, as with NSLI, third parties who are not members of the community will benefit. This arguably preempts the anti-gift and testamentary provisions of state community property law and the state law allowing W to trace her community claim to the cash benefit proceeds paid out to such third parties as a result of H’s labors during marriage. It does not, however, preempt the effect of California Civil Code sections 5110, 5105 and 4800. These provisions would assure W at divorce the same remedy as in Milhan, valuing the package of benefits acquired with community assets, confirming them in the insured spouse H, and awarding her other offsetting community property or separate property or a promissory note. There is no conflict at all between state and federal law when a divorce court keeps an eye on the value of

292. This very difficult problem is discussed in text accompanying notes 400-38.

293. See text accompanying notes 261-64 supra.

294. Assuming that the Social Security Act preempts the entire field of disbursing federal benefits to insureds and their dependents except for the explicit reference to state law of marital status and legitimacy in 42 U.S.C. § 416(h)(1)(A) (Supp. V 1975), I submit that the question of how much property a wife shall be awarded at divorce is a completely different “field.” It is an issue quite “remote” from the area of federal concern. See Bank of America v. Parnell, 352 U.S. 29, 33-34 (1956). Even within a “field” of federal regulation it is common for the federal courts to permit coextensive state regulation that does not frustrate the federal interest. See, e.g., Kesler v. Department of Public Safety, 369 U.S. 153 (1962); Village of Kake v. Egan, 369 U.S. 60 (1962).

It seems clear to me that application of the Milhan remedy in cases where there are undivisible future OASDI benefits earned by one spouse does not even relate to, let alone frustrate, any federal benefit. Nor do I see any constitutional source of power for the federal government to forbid use of the Milhan remedy at divorce in state court.

295. As a matter of state law, separate property cannot be awarded. But once any interference with the state scheme is required by federal preemption, a federal common law should provide a remedy to assure a fair and just division of marital property at divorce.
federal benefits one spouse will have after marriage in making a
division of community property or fixing alimony. The holding of
Nizenkoff and Kelley that these values cannot be considered by the
divorce court in carrying out the rules concerning a division of
property under Civil Code section 4800 is particularly outrageous
when the noninsured spouse of the OASDI participant cannot qual-
ify for any divorced wife benefits under the Social Security Act as,
for example, when the marriage lasted less than twenty years. That
was in fact the case in both Nizenkoff and Kelley.

It seems likely that not only was the Milhan remedy available
to the objecting spouses in the two cases, but that the Fithian
remedy—a contingent fractional award to \( W \) of OASDI benefits \( H \)
might receive in the future—was also, perhaps, not barred by
federal law. Section 407, the anti-assignment provision of the
Social Security Act, would perhaps not bar the state court from
decreeing \( W \) to be co-owner of such payments. If \( H \) refused to
account to her she could reach them as a co-owner, not as creditor;
or enforcement could be solely by contempt proceedings against \( H \)
to compel him to pay over to \( W \) her fractional share of payments \( H \)
himself should receive in the future. \( W \)'s rights would be reduced
by a related fractional formula (or eliminated with even a potential
future credit for \( H \)) if she began receiving divorced wife payments.

Since the terminable interest doctrine has no application to
federal retirement schemes, \( W \) would also have a claim on post-
death benefits. It is with respect to post-death benefits and also to a
second wife's lifetime benefits that a remedy under Fithian be-
comes dubious. Even though there has been no expression with
force and clarity to preempt, and no unequivocal mandate as in
Wissner, it could be argued that Congress' intent would be frustrat-
ed if a former wife of the insured could claim as co-owner, a
fraction of OASDI benefits payable to the second wife, children, or
parents of an insured. Thus, the Milhan remedy of lump sum
valuation of the entire package of benefits at the time of divorce,
or a combination of Milhan and Fithian, seems more likely to
succeed when post-death benefits are included in the community
property valuation.

296. The very difficult problem of how to value future OASDI benefits is
discussed in text accompanying notes 400-38 infra.
297. See notes 265-70 & accompanying text supra.
298. See text accompanying notes 139-49, 208-12 supra.
299. See notes 414-18 & accompanying text infra.
300. This is also similar to the procedure under the narrow interpretation of the
Waite case. See text accompanying notes 135-38 supra.
301. Such a combination would be achieved by an offsetting lump sum award
of property under Milhan for that value of the OASDI package consisting of post-
death and subsequent-spouse benefit awarded entirely to \( H \), plus a fractional award
of future OASDI payments \( H \) himself might receive.
With respect to disability payments under OASDI, current California law would apparently treat post-separation and post-death receipts as the injured person's separate property. The remedy here would be to seek reimbursement for some portion of the FICA taxes paid with community funds or the value of the community labors that generated the separate property insurance coverage.

4. The Constitutionality of Nizenkoff and Kelley

It has been noted above that in the Wissner case, the one contemporary community property preemption case where the United States Supreme Court faced the problem of the constitutionality of the preemption, the Court seemed to concede that the wife had a property interest under state law in the NSLI policy her husband had purchased; the federal power over national defense, however, authorized a taking without compensation of the wife's property rights. And in Yiatchos, the United States Supreme Court recognized expressly that ordinarily such state created property rights could not be disturbed under the guise of preemption.

If, in dealing with OASDI benefits, we accept the proposition that, because the program is funded by taxes added to general funds of the United States rather than by contributions directly to an OASDI account, benefits cannot be traced to the employment "taxes" paid by employees so that those funds cannot be viewed as premiums purchasing insurance coverage, there is little problem in upholding Congress' power to disburse benefits to the insured individual, his widow, child, or parent under the power to spend for the general welfare. While this power is subject to fifth amendment


303. But see In re Marriage of Robinson, 54 Cal. App. 3d 682, 126 Cal. Rptr. 779 (2d Dist. 1976) and In re Marriage of McDonald, 52 Cal. App. 3d 509, 125 Cal. Rptr. 160 (2d Dist. 1975), denying that any reimbursement was owed where separately owned worker's compensation personal injury awards were paid after separation to persons who had qualified for coverage, because of deductions of contributions to the compensation system from community payroll checks. The courts felt that § 5126(a) of the California Civil Code demanded denial of reimbursement, but they did not address the issue of whether some reimbursement was otherwise appropriate. Robinson and McDonald are criticized in Reppy, supra note 302, at 1398 n.142.

304. See text at note 236 supra.

305. See text accompanying note 260 supra.
equal protection limitations, there being no suspect classifications involved, the constitutional test applied will be the "rational basis" test. In essence, the Social Security Act treats divorced wives less favorably than wives and widows due to more onerous qualifications (such as a twenty-year marriage). But, as was recently held, the Congress could determine that the needs of these classes of individuals are different. An attack on this sort of line drawing in the federal legislation is, thus, not likely to be successful.

An interesting due process question remains. Conceding that the monetary payments by the employed person are really taxes, the Social Security Act nonetheless conditions insured status for receipt of benefits on a period of labor. Community property states treat a married person's labor during marriage and cohabitation as a source of property. The fruits of that labor are co-owned; if any substantial labor by a spouse is devoted to improving his or her separate estate, reimbursement is owed the community at dissolution of marriage. The property rights earned by each spouse from such labor are protected at divorce by the requirement in California Civil Code section 4800 of an equal division of community assets. It seems quite clear that, looking solely to state law, all OASDI benefits that can be traced to labor during marriage must be community owned. If such benefits were to become at divorce the property of the employed insured spouse, state law would require that the other spouse receive an offsetting award of other community assets or, perhaps, a promissory note. If by virtue of federal statutes as interpreted in Nizhenoff and Kelley, the distribution of property at divorce is changed and the wife receives less property than does the husband, there appears to be on the face a taking of her property rights that must be justified under the fifth amendment. It will not do to say that the federal law has merely changed the remedy at divorce and provided for unequal division: Civil Code section 5105 confers equal ownership rights that are protected by section 4800's equal division rule. The latter is not merely remedial. Whatever one may think of the attempt to justify the taking in Wissner under the federal war and defense power, that excuse for failure to pay just compensation simply is not available in Social Security Act cases. Surely the commerce clause cannot justify taking W's property and giving it to H without just compensation.

306. See text accompanying note 61 supra.
307. I think it would succeed if Nizhenoff were taken seriously in announcing the provision for a divorced wife's benefits under the Social Security Act preempts all state law for property division and alimony at divorce. We would then have the situation where one married to an employee for 19 years would receive nothing, but another married for 21 years would receive OASDI benefits after the insured's death.
308. See notes 176-78 & accompanying text supra.
The Kelley and Nizenkoff decisions are completely untenable in finding such a broad federal preemption as to result in detraction of a spouse's property rights under state law at divorce. Assuming that preemption was intended, however, there would seem to be three bases on which preemption would arguably be consistent with due process. The first requires a finding that the extent of preemption is such that state law never attaches to the labors that generate OASDI benefits. Thus, no community interest in the nonemployee spouse can be created by state law. The theory causes immediate problems: If the labor that qualifies an employed person and his family for OASDI benefits is noncommunity labor for purposes of determining rights in OASDI benefits, can it possibly be community labor for purposes of determining the spouse's rights in the salary earned by the employee during that time? Even if some portion of labor could be segregated from all of H's remunerative labor as being devoted solely to qualifying for OASDI benefits, a federal statute preventing state law from attaching to such labor could be attacked as a denial of fifth amendment equal protection to spouses who engage in labor not covered by the Social Security Act, since such married persons would be legally incapable of obtaining the benefits of separate labor.310 In any event, numerous provisions of the Social Security Act itself recognize that earnings of working spouses covered by the Act are community owned,311 and thus the Act must assume that the labors of an employed person are a community asset. The first theory thus collapses.

Second, the preemption decreed in Nizenkoff and Kelley might be constitutional if these cases are read narrowly to merely deprive W of the remedy of a division of property based on treating the value of anticipated OASDI benefits as a community asset. If another remedy is made available to her, such as a right of reimbursement on the theory that H has diverted community assets (his labors) to building up his separate estate, arguably whatever "taking" there is of property rights under state law is accompanied by just compensation—there is a mere change in form of W's property interests. There are, however, several problems with this theory. Although the briefs of the parties in Nizenkoff and Kelley did not

310. For example, H labors at a wage paying job; W invests and reinvests, by her labors, community funds (or for that matter her separate property with part of the gain being community under the rule of Beam v. Bank of America, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971)), or W saves the family money by engaging in the nonpaying "jobs" of babysitter, cook, and domestic housekeeper. Subject to a federal common law correcting the inequity, see text accompanying notes 319-26 infra, the upshot of preemption is that H shares at a full 50% level in W's investment earnings or savings through housekeeping while she is shut out (unless ultimately she makes it to wife, widow, or divorced wife beneficiary status under OASDI) from a part of the gain accruing from his labors.

311. See note 290 supra.
mention the possibility of relief for a spouse on the theory that the
other had diverted community assets to build up his or her separate
estate, the language of the decisions—particularly the statement
in *Kelley* that the "contributions" that earned insured status
under the Social Security Act for *H* were not community property—
suggests that the reimbursement remedy would not have been held
to be available. There is also the problem of finding a source of
federal power for taking *W*’s state law property rights even if full
compensation is paid to her. The congressional power to disburse
funds arguably cannot alone justify the holding of *Nizenkoff* and
*Kelley* since *W* has been stripped of her state law claim to half
ownership of *H*’s labor and its fruits during marriage. Nor does the
commerce clause appear to provide authority for Congress’ taking
of *W*’s state law property rights. It is hard to imagine the United
States Supreme Court’s finding that *W*’s rights result in any sub-
stantial burden to interstate commerce, the removal of which by a
compensated taking would be constitutional under the federal
commerce power. It would be particularly fantastic to hold that the
state’s *Milhan* remedy—awarding an offsetting share of other com-
modity property to the noninsured spouse after valuing the insured’s
package of benefits under OASDI to the extent they are earned
during marriage—interfered in any manner with interstate
commerce or even related to it. Yet *Nizenkoff* and *Kelley* hold that
the right to this remedy under California law is eliminated by the
Social Security Act.

Finally, even if there is a constitutional basis for a taking with

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312. The closest thing to any mention of the reimbursement issue was a warn-
ing by the uninsured *H* in *Nizenkoff* that “interesting questions, and perhaps
problems” would arise if a community interest in the future OASDI benefits were
not recognized. Opening Brief for Appellant at 11. *In re Marriage of Nizenkoff*, 65
Cal. App. 3d 136, 135 Cal. Rptr. 188 (1st Dist. 1976).

313. See text accompanying note 287 supra. In *Kelley* the trial court found that
*H* during marriage “contributed $5,696.75 to Social Security from his wages, the
contributions being governed by the federal law which does not recognize their
community nature.” Opening Brief for Appellant at 9. *In re Marriage of Kelley*, 64
Cal. App. 3d 82, 134 Cal. Rptr. 259 (2d Dist. 1976) (quoting the trial court’s finding
of facts).

314. The implications of *Nizenkoff* and *Kelley* also extend to community prop-
erty states where division of community assets at divorce is not, as in California,
done on a 50-50 basis but rather according to the needs of the spouses and other
§ 125.150 (1973). Under those circumstances it would seem that the court cannot
even take into account the fact that one spouse will be enjoying OASDI benefits at
retirement age. If these states could do that, California certainly could without any
additional interference with federal interests apply its *Milhan* theory in making
would also seem that even states like Washington which allow the divorce court to
award what state law terms separate property to the nonowner spouse, see *Wash.
Rev. Code* § 26.09.080 (1976), could not, under the preemption theory of *Nizenkoff*
and *Kelley*, look to the value of future OASDI benefits the insured spouse will
receive in determining if an award of *other* separate property was equitable.
just compensation, a reimbursement remedy may not be adequate to satisfy the fifth amendment compensation standard. Surely it will be inadequate in the case where the remedy runs solely against the insured $H$ who has no assets that can be awarded to $W$. Even if $H$ has considerable assets, it may be impossible to fashion standards to determine how much of $H$'s labor during marriage was devoted to earning OASDI benefits or the value of that labor. Additionally, there are considerable difficulties in allocating a portion of earned OASDI benefits to community labor for reimbursement purposes when the insured spouse could also claim insured status based solely on his labor before or after marriage. If the value of such labor can be assessed, but is much less than the value of the OASDI benefits which will be generated by it, assuming that this itself is calculable, reimbursement based on the value of labor may be inadequate compensation for the taking of the state law right to trace ownership to the proceeds thereof. (And to make a "reimbursement" valuation based on the value assigned to the OASDI benefits that $H$ has earned is simply to use the Milhan remedy while giving another name to it. Moreover, such an approach would require overruling Nizenkoff and Kelley).

The third theory for upholding the constitutionality of Nizenkoff and Kelley is similar to the second, but it looks to a federal common law of property rights at divorce to reach the conclusion that $W$ has not been deprived of her property rights. Federal common law might permit an unequal division of community property or an award of $H$'s separate property to $W$ if there were any unfairness to her in treating the contributions in labor that qualified $H$ for OASDI benefits and the benefits themselves as his own separate property. But this approach could assure just compensation only if accurate valuation could be made of the labor. In addition, just compensation might require that such value bear a fair relation to the lost interest of $W$ in the benefits generated by the labor, and that there was sufficient community and separate property of $H$ so that $W$'s reimbursement right could be reduced to cash or other valuable property. And, of course, the mere finding of just compensation cannot explain the source of federal power to displace $W$'s rights under California's Milhan remedy.

315. See Status of Military Benefits, supra note 165, at 324.
316. For a discussion of the very difficult problem of valuing future OASDI benefits at divorce, see text accompanying notes 400-38 infra.
317. See notes 302-303 supra.
318. See note 178 infra.
C. The Effect of Preemption on Benefits Deemed Not Community

All of the cases that have found a federal preemption of Civil Code sections 5110 and 5105, insofar as they define what is community property and how it is owned, conclude that certain property or rights to property acquired during marriage by labor or community funds are not co-owned by H and W as community property. These cases seem to assume that this finding means the property in question is "separate" property of the spouse who has "title" or whose labors earned the asset at issue (usually H's). It is then assumed that this is "separate" property in the California sense that no portion of it can be assigned at divorce to the other spouse and that it cannot be valued as co-owned property in dividing the community estate into portions of equal value under Civil Code section 4800.320 This line of reasoning is fallacious and highly illogical. If the state law of marital property interests has been preempted, which is the starting point of the analysis, the federally created right is the "separate" property of H in a federal common law sense of the term, not in a California marital property law sense.321

Federal preemption of state law creates a gap that has to be filled when issues otherwise decided by the preempted law arise.322 It is true that after finding a federal preemption, the court can choose to fill up holes in the federally created scheme by borrowing from state law.323 However, it would be absurd for the federal


321. Indeed, the federally created right will not even meet the definition of separate property in CAL. CIV. CODE §§ 5107, 5108 (West 1970), and for that reason alone should not fall under the rule that "separate" property (obviously meaning California-style separate property) cannot be divided at divorce. See note 319 supra.

322. The courts must fashion a federal common law rule to resolve an issue arising in a preempted field. Usually a uniform rule is desirable and the rule is therefore created from scratch by the court rather than borrowed from state law. See Textile Workers v. Lincoln Mills, 335 U.S. 448, 457 (1957); Pribe & Sons, Inc. v. United States, 332 U.S. 407 (1947); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942).

It should be clear that I do not, in citing such cases, take the view that federal common law should be applied in lieu of state community property rules in dealing with federally created benefits at dissolution of the community; rather, no preemption should be found and no basis for use of a federal common law rule should exist, since divorce suits and the like simply do not involve substantial interests of the United States. See Miree v. DeKalb County, 433 U.S. 25 (1977).

system to borrow from California law the rules concerning treatment of "separate" property at divorce and apply them to a type of property that is not "separate" in California. The California prohibition on dividing separate property at divorce is suitable only if the state is able to utilize some other method of granting economic protection at divorce to a nonlaboring spouse who has been unable to build up her or his own separate estate. In California, that other method is equal sharing of all assets earned by labor during marriage. If federal law precludes treating substantial amounts of such assets as community owned, the California treatment of "separate" property at divorce becomes unborrowable as a matter of common sense. Such a borrowing would combine elements of state and federal law favorable to the laboring spouse while including no rules to protect the nonworking spouse in many cases where federally fashioned retirement benefits are a primary asset at divorce.\(^{324}\)

If Congress has preempted community property law with respect to a federally fashioned property right, it can be assumed that since most congressmen hail from English common law rather than community property jurisdictions, any marital property concepts they have in mind to fill the void must be those which recognize "separate" ownership not in the Spanish-Mexican or civil law sense but in an English common law sense.\(^{325}\) Almost all states with the English common law background permit an award of English common law "separate" property to the owner's spouse at divorce.\(^{326}\)

\(^{324}\) This would allow a strong fifth amendment equal protection attack to be made. The borrowing of the portion of state law disabling the spouse of the worker from sharing in "separate" property would work a discrimination between spouses of participants in plans, such as the Railroad Retirement Act and civil service retirement schemes, where community property sharing occurs (and borrowing of state law as to "separate" property is never an issue), compared to spouses of participants in QASDI where no such sharing would be permitted.

An equal protection argument can be launched not only on the theory that wives of FICA-paying husbands are discriminated against but also on the theory that it is arbitrary for Congress to reduce benefits at divorce only in California, Louisiana and New Mexico (these are the only community property states that require both a 50-50 division of the community and an award of separate property, thus eliminating any borrowed state law remedy for unfairness created by federal preemption through the Social Security Act, see Reppy & de Funiak, supra note 3, at 464-65, and not in the other 47 states. But, of course, any discrimination is no more a result of federal preemption than of the fact that state law in these jurisdictions differs from the broader remedial powers which exist elsewhere.

\(^{325}\) See Goodman, A Community Property Citizen's Plea to Congress, 61 A.B.A.J. 1495, 1495 (1975) (Congress usually seems "blissfully unaware" of the existence of the community property system).

In cases where California community property law has been preempted, however, the fact that the word "separate" has different meanings under California and federal law has been overlooked. It has instead been erroneously assumed that a finding that federal law entitles $H$ to separate ownership of certain assets means that $W$ has no relief as to those assets. In *Pacific States Cut Stone Co. v. Goble*, the Washington Supreme Court pointed out this type of error. By the law of Washington, community property is not liable for a spouse's "separate" debts—debts incurred in endeavors not benefiting the community, often involving activities by which a spouse is taking care of his separate property. Prior to *Goble*, it had been held that when a spouse incurred a debt in Wisconsin, an English common law state that did not recognize community property, the debt could not be a community debt but had to be "separate," even if it related to an activity that would be a community endeavor in Washington. Thus, when the Wisconsin creditor attempted to collect his debt in Washington, he could not reach his debtor's community earnings on the theory that community property is not liable for a "separate" debt. *Goble* overruled this line of authority as "very nearly absurd," observing that in the Wisconsin sense of a "separate debt" the debtor's earnings were liable. Thus, a Wisconsin "separate debt" was quite a different creature from a Washington "separate debt" since in Washington the debtor's earnings were immune from liability for such a debt.

When one applies the lesson of *Goble* to preemption cases, a conclusion that federally created rights are not community property due to federal displacement of Civil Code sections 5110 and 5105 implicitly means that the property is the acquiring spouse's separate property as a matter of federal common law. So far as I am aware,

329. 70 Wash. 2d at 910, 425 P.2d at 632.
330. It is ironic that apparently the *Goble* court, having seen and corrected the error in *La Selle*, immediately fell back into it, this time to the benefit of out-of-state creditors rather than the Washington debtors who benefited by *La Selle*. *Goble* was like *La Selle* except that the creditor was from Oregon, where the debt had been contracted. The court concluded:

[S]ince the obligation of a husband in Oregon subjects all the property of the married couple to the debt except the separate property of the wife, the effect of applying Oregon law to the situation before us is that all property, including community property, held by the Gobles and the Wallaces [the Washington debtors], with the exception of the wives' (sic) separate property, is subject to the obligation involved.

*Id.* at 914, 425 P.2d at 635 (emphasis added). The italicized reference to "community property" strongly suggests that the second mention of "separate property" meant separate property as defined in the community property jurisdiction of Washington. Thus, *W*'s earnings, her "separate property" under the first italicized use of the phrase—its Oregon meaning—are liable for the husband's debt.
the federal common law rights at divorce of the nonacquiring spouse arising out of the existence of such property have not yet been defined by federal courts. However, it seems reasonable to believe that rights similar to those recognized in states having an English common law base for marital property law will be fashioned to serve as the federal rule. California divorce courts can fairly anticipate that this federal common law rule will permit deviation from California's fifty-fifty division rule for community property and its "untouchable" rule for Spanish-Mexican separate property to ameliorate any unfairness resulting from a holding that all of the OASDI benefits earned by H must be his own property in which W has no interest.

In a case where H is fully insured under the Social Security Act on the basis of labor during marriage and where there is no community property of value as well as no Spanish-Mexican separate property to divide, it may well be that federal common law would, in order to assure a fair division of property, permit an award to W of a fractional interest in future OASDI payments (federal common law "separate property") that H as an insured participant under the Social Security Act may receive. The contrary argument would be that federal common law would view alimony as sufficient relief for W, notwithstanding the fact that it would terminate on her remarriage.

D. ERISA: Preemptive Effect on State Community Property Law Relating to Private Pensions

The Employee Retirement Income Security Act of 1974 (ERISA) is a pervasive federal regulation of most private pension and retirement plans. The primary provisions of ERISA concern early vesting of retirement rights, minimum funding standards, portability to permit retention of benefits on change of jobs, and fiduciary standards for plan administrators. Provision is also made for the benefit of wage earners whose employers do not operate a federally qualified plan to make tax deferred investments for retirement security in Individual Retirement Accounts (IRA's).

It has been urged by commentators and litigants that ERISA

333. Authorities suggesting ERISA preempts all state community property law including co-ownership principles or part of state law, or discussing the problem include: Benjamin & Casey, Tax Planning With Life Insurance in Community Property States, 3 COMMUNITY PROP. J. 99, 104, 112 (1976); Johnson & Jones, supra note 270, at 5; Mansour, ERISA: Can Your Client Afford It?, 51 CAL. ST. B.J. 186, 230 (1976) (observing the conflict between California's anti-gift provision and the joint and survivor annuity provisions of ERISA); Thiede, supra note 4, at 646-50 (concluding that by federal preemption the Benson-Waite doctrine now applies to private plans governed by ERISA); Note, Pension Rights and Community Property:
preempts state community property law otherwise applicable to private pensions. The extreme position is that all community property laws are preempted, including those defining community property, with the result that all pension rights are owned as "separate" property. 334 Others have urged that the preemption is limited to the effect of the provision requiring private pension plans with annuity features to offer an optional joint and survivor annuity to benefit the employee's widow or widower as well as the employee. It has been contended that this provision imposes as a matter of federal law the Benson-Waite terminable interest theory on private pensions so that post-death benefits are treated either as separate property or as community property to which the anti-gift rule does not apply. 337 (The difference between these two versions of the preemptive effect of the provision for optional joint and survivor annuities is the difference between the broad and narrow reading of Waite at divorce; i.e., preempting only the anti-gift rule allows valuing all the pension benefits as community at divorce in making a fifty-fifty division.)

This section of the Article analyzes each portion of ERISA that might be relied on in formulating a preemption argument. As was the case with the Social Security Act, to find a preemption of state law under ERISA requires satisfying four tests. First, in light of the residual powers retained by the states in the tenth amendment, is there a federal source of power in the commerce clause or other grant of power to the federal government enabling Congress to delineate marital property rights in retirement benefits? Second, if such power exists, has Congress expressed an intent to exercise it—does ERISA speak with the requisite "force and clarity" to disclose intent to displace state law in an area, marital property rights, traditionally subject to exclusive state regulation? Third, if preemption is intended, how much state law must yield—in particular, does the basic California definition of community property and the fundamental equal ownership principle fall or is preemption confined to

From: French to Brown, 4 W. St. L. Rev. 91, 100-04 (1976), revised & reprinted as Doyle, ERISA and the Non-Employee Spouse's Community Interest in Retirement Pay, 4 Community Prop. J. 3 (1977) (ultimately rejecting the contention that ERISA preempts state community property law); cf. Calof, note 4 supra (ERISA may impose on California uniform federal rules concerning pension rights).

Litigants have pressed the contention that by federal preemption ERISA makes pension rights separate property in In re Marriage of Pardee, 408 F. Supp. 666 (C.D. Cal. 1976), and In re Marriage of Sommers, 53 Cal. App. 3d 509, 126 Cal. Rptr. 220 (1st Dist. 1975). 334 See the authorities cited in note 333 supra. It seems that all who so argue fall into the error of assuming that "separate" means "separate" in the California law sense of property giving the other spouse no rights at divorce, a wholly illogical assumption. See notes 320-30 & accompanying text supra.


336 See, e.g., Thiede, note 4 supra.

337 See Mansour, note 333 supra.
statutes governing management and control? Fourth, if there is preemption of state law, does it work a taking of property rights conferred on a married person by state law, and, if so, is the taking nevertheless constitutional because it is necessary to attain a federal interest and because just compensation is assured?

Analysis of constitutional questions here will be narrow because a reading of ERISA shows almost no intent to preempt state law. With respect to some issues concerning IRA's, the "unequivocal mandate" needed for preemption does appear; and the effect, if not the language, of the provision requiring some ERISA benefit plans to offer joint and survivor annuities, is to create a conflict with state law barring gifts of community property and conferring testamentary power over a half interest of community owned assets. 338 Perhaps the joint and survivor annuity provision can be construed to avoid such conflict. If not, serious constitutional questions are raised with respect to the issue of a federal source of power to supply the controlling law and the issue of whether there is a taking of property without just compensation.

1. Intent to Occupy the Field

Since the scope of intended federal preemption limits the constitutional issues raised, Congress' preemption is considered first. Without question, ERISA does express with force and clarity an intent to federally preempt a considerable body of state law respecting employee retirement plans. Section 514 of ERISA339 provides in part:

(a) [T]he provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b)

. . . .

(c) For purposes of this section: (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . .

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

It has been held,339 and properly so, that this strong language341

evidences intent to “occupy the entire field of employee benefit plan regulation.” The next question is which, if any, of California’s community property laws are within this “field.”

A literal interpretation of subsection (a) of ERISA section 514 could include the community property statutes within the field. For example, a holding by California that, to the extent of participation in a pension plan during marriage, benefits paid to an employee after his retirement are community property owned by him and his spouse undoubtedly “relate[s] to any employee benefit plan.” The same could be said of a state law which, in dividing property between spouses at divorce, considered the value to an employee spouse of his interest in an ERISA governed plan. Such use of the data “relate[s]” in a broad sense to the plan.342

This broad reading of “relate[s] to” however, leads to absurd consequences: Huge chunks of state law would be displaced, resulting in the creation of a vacuum343 which would have to be filled by the tedious and unending task of fashioning a federal common law rule to answer all questions “relat[ing],” however remotely, to employee benefit plans. For example, if it were contended that an employee was insane or otherwise lacked capacity to contract when he signed up as a participant in the plan or made elections under it

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343. On the difference between preemption due to conflict and preemption due to occupying the field, see Brummond, supra note 264, at 93-95; Hirsch, supra note 264, at 515.

341. There is a basis in the legislative history for a broad reading of the provision preempting state law. Discussing the conference report on ERISA, Congressman Dent said:

[I] wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation . . . . The conferees . . . applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof—including any professional society or association operating under color of law—which would affect any employee benefit plan as described in section 4(a). . . .

120 CONG. REC. 29197 (1974).

342. It should be clear, however, to attorneys for participant employees who plan to make this type of argument of total preemption that the same broad reading of “relate[s] to” would preclude use of the California rule that separate property cannot be valued at divorce in making a division of assets between husband and wife. Any state rule, whether directing the divorce court to look or not to look at the value of participation in the plan, “relate[s] to” the plan in this broad sense. Attorneys making such an argument would have to invite formulation of a federal rule concerning the impact at divorce of the existence of some benefits to an employed spouse due to participation in an ERISA-governed plan.

343. Such a large regulatory vacuum is a basis for a restricted interpretation of the scope of federal preemption. See Brummond, supra note 264, at 118-20.
for certain optional benefits, state laws on insanity and capacity to contract would, if utilized to solve the question, "relate to" the plan.

An employer's discharging a participant employee for cause would most certainly "relate to" the plan by causing discontinuance of the employee's participation (except as to already vested rights). The very broad reading of "relate[s] to" could preempt almost the entire California Labor Code, requiring a federal common law to be created to replace it. Does Congress intend the federal courts to write a new federal common law of employment contracts and labor law for ERISA covered employees?

To avoid such a burden on the federal courts, a result Congress surely did not intend, the more restrictive language of subsection (c)(2) can easily be read to qualify the "relate to" language of subsection (a). That language is: "which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." Such "terms and conditions" constitute the

344. Under ERISA, discharge for cause would result in a loss of nonvested credits toward pension rights (recognized as property under Brown), although a plan is not ERISA-qualified if there is a pattern of dismissal of employees before benefits accrue. I.R.C. § 411(d)(1)(A). Vested rights are not lost upon discharge for cause, however. I.R.C. § 411(a).


346. See Brummond, supra note 264, at 66-67, observing that ERISA is at the very least unclear as to the meaning of "relate to" especially with respect to laws that do not conflict with any federal purpose of ERISA. He predicts that § 514(a) will be narrowly construed as directed at laws concerning the areas of Congress' prime concern, such as vesting, deficient funding, portability, and fiduciary standards. Id. at 97-122. See also Brummond, The Legal Status of Uninsured, Non-Collectively Bargained Multiple-Employer Welfare Trusts Under ERISA and State Insurance Law, 28 SVR. L. REV. 701 (1978); Note, Pension Rights and Community Property From French to Brown, 4 W. ST. U. L. REV. 91 (1976), revised & reprinted as Doyle, ERISA and the Non-Employee Spouse's Community Interest in Retirement Pay, 4 COMMUNITY PROP. J. 3, 11 (1977).

A Senate Report on ERISA suggest that only preemption of statutes and rules directly regulating pension plans were envisioned.

Both House and Senate bills provided for preemption of State law, but—one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs. The conferences—recognizing the dimensions of such a policy—also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is deter-
preempted field of law; thus matters that are "remote" with respect to this field are not preempted. Community ownership of benefits paid ordinarily will not relate to a term or condition of a plan; certainly consideration given by a divorce court to the effect of the value of a participant's interest in the plan on what constitutes a permissible division of property will not relate to a term or condition of the plan.348

2. ERISA's Anti-Assignment Provision

Section 206(d)(1) of ERISA349 provides: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Anti-assignment or "spendthrift" clauses of similar breadth were not found bases for preemption in cases dealing with federal military, Railroad Retirement Act and civil service benefits.350 Such a clause can therefore have no greater effect with respect to ERISA. It has been noted that the overwhelming weight of authority is that such a provision may be a bar to a spouse claiming a remedy as a creditor of an owner of benefits, i.e., of the employee or participant, but is not directed to a case where he or she is declared to be a co-owner.351 Moreover, even if a spouse claiming

minded that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made.

In view of Federal preemption, State laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans—unless a criminal statute of general application—establishing State termination insurance programs, etc., will be superseded. It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.


348. Due to the joint and survivor annuity provision of ERISA, the effect of California's anti-gift and testamentary powers statutes is a more difficult question. See text accompanying notes 380-95 infra.


350. See notes 270, 279 & accompanying text supra. Note that the anti-assignment clause in Wissner was broader and was, of course, directly tied to a provision empowering the armed serviceman to name a beneficiary of federally created NSLI proceeds. See text accompanying note 239 supra.

351. See note 270 & accompanying text supra. The remedy in Fithian of a fractional award is thus available with respect to benefits payable under private pension plans. See also Collogos v. Collogos, 46 U.S.L.W. 2437 (N.Y. Sup. Ct. 1978) (ERISA anti-assignment statute does not bar wife as alimony creditor).
as co-owner were considered to take by "assign[ment] or alienat[ion]" (the statutory terms) under a divorce decree awarding her a percentage fraction of future retirement benefits, ERISA section 206(d) could not possibly bar the court from proceeding in Milhan fashion by valuing the rights in the retirement plan, awarding them as community property to the employee spouse and awarding other assets of offsetting value to the nonparticipant spouse.

3. ERISA Provisions Providing for Benefits for an "Employee" or "Participant"

Section 3 of ERISA\(^ \text{352} \) defines "employee" and "participant" as the person who is working for the employer providing the pension plan. No mention is made of the person’s spouse. Only an "employee" may participate in the qualified plan; an attempt to enroll his or her spouse as a participant would violate ERISA.\(^ {353} \) The Act repeatedly provides protection for and benefits payable to the "participant."  

These provisions of ERISA do not preempt any state community property law. Analogous provisions in the statutes governing federal military pensions were held to be no bar to applying state law to make benefits paid community property.\(^ {354} \) The same is true with federal civil service pensions which have been held to be community property and divisible as such at divorce.\(^ {355} \)

4. Death Benefits Payable to Designated Beneficiaries

Subsection (8) of section 3 of ERISA\(^ {356} \) defines "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." While ERISA repeatedly provides procedural protections for such beneficiary,\(^ {357} \) at no point in the Act is there any mention of the extent of benefits the designee may receive or of the circumstances under which he or she is entitled to benefits. A


\(^ {354} \) See text accompanying notes 265-70 supra.


California married person can lawfully name a designee to take by way of will substitute so much of plan benefits as are attributable to separate property contributions and to half the community contributions. Given ERISA’s total silence as to the extent a beneficiary can take under a plan, there is no “term or condition” of an ERISA plan with which this state law could conflict. One commentator takes the view that since the right under ERISA to provide for payments of benefits to the designee of the participant “emerges by implication” only, there is simply not the requisite unequivocal mandate or language of force and clarity to hold preempted the California rule not allowing the designation to affect the nonemployee spouse’s community interest.\textsuperscript{358} I agree with this analysis.

5. The Joint and Survivor Annuity Provision of ERISA

Section 205 of ERISA,\textsuperscript{359} is a complex provision which requires pension plans regulated by the Act which choose to make annuity benefits available to the participant and provides “for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity.”\textsuperscript{360} A qualified annuity is “for the life of the participant with a survivor annuity for the life of his spouse which is not less than one-half of . . . the amount of the annuity payable during the joint lives of the participant and his spouse . . . .”\textsuperscript{361} The plan may provide that one claiming as a surviving spouse must have been married to the participant for a year before his death.\textsuperscript{362}

Where the ERISA governed plan makes retirement benefits available to a participant no earlier than his normal retirement date, the plan must provide that the joint and survival annuity is automatically applicable but that the participant must have

a reasonable period (as described by the Secretary by regulations) before the annuity starting date during which he may elect in writing (after having received a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election under this subparagraph) not to take such joint and survivor annuity.\textsuperscript{363}

\textsuperscript{358} Note, Pension Rights and Community Property from French to Brown, 4 W. St. L. Rev. 91 (1976), revised & reprinted as Doyle, ERISA and the Non-Employee Spouse’s Community Interest in Retirement Pay, 4 Community Prop. J. 3, 12-15 (1977). The writer seems to assume the correctness of my argument that Benson-Waite cannot apply to federally created pensions absent preemption. See text accompanying notes 208-17 supra.


\textsuperscript{360} I.R.C. § 401(a)(11)(A); 29 U.S.C. § 1055(a) (Supp. V 1975). The former makes a plan without such provision not qualified for income tax exemptions and deductions given qualified retirement plans.


Where a plan provides for the payment of benefits before retirement age, however, the joint and survivor annuity (called "early survivor annuity") is not automatic; rather the participant must be given "a reasonable period during which he may elect the qualified joint and survivor annuity form." All elections under ERISA by the participant are revocable.

The plan may "take into account in any equitable manner (as determined by the Secretary) any increased costs resulting from providing joint and survivor annuity benefits." It was anticipated by Congress that the effect of this provision would be to reduce the payments made to the participant during the joint lives of himself and his spouse from what they would be had he elected against the joint and survivor feature.

a. Effect on Remedies at Divorce. ERISA section 205 does concern terms and conditions of a retirement plan with respect to the rights of a spouse married to the employee-participant at his death. The legislative history indicates that no thought at all was given to the effect of the provision in the context of division of property at divorce. Under California law all of the pension plan

370. During the debates on ERISA, various members of Congress commented on the existence of the joint and survivor annuity section, generally commending it for extending retirement protection to spouses but not relating it to state law applicable at divorce which, it could later be contended, was preempted. Examples:

[1] "The protection offered by this legislation extends not only to the employee but also to his spouse. Plans are required to give the covered individual what amounts to an option to receive his retirement benefits in the form of a joint and survivor annuity . . . ."


[2] Another significant feature of the conference agreement, originally contained in the Senate bill in order to protect spouses of deceased participants, would require each plan that provides for a retirement benefit in the form of an annuity to provide for a joint and survivor annuity for married participants, which, upon reaching retirement, may be waived only if the participant so elects in writing.


[3] "Widows are the oldest and the poorest of the aged. . . . What I seek to do is to see that the widows' benefit is 50 percent of her husband's annuity which has not been actuarially reduced [a position Congress rejected ultimately]. A family works as a single unit. The wife contributes at home so the husband may work. Therefore, it is altogether fitting and proper that in the case of a deceased husband, the widow should receive 50 percent of his benefit."

119 CONG. REC. 30399 (1973) (remarks of Sen. Hartke). Note that he seems to envision the widow's pension being enjoyed by the participant's life-long spouse and not a second wife married late in the employee's work career or even after his retirement.
benefits attributable to labor or payroll deductions during marriage would be treated as community property at divorce. The terminable interest rule of Benson-Waite cannot apply to private pensions on the theory of implied amendment or partial repeal of the basic community property statutes, since only the state legislature can achieve such a result. A federally created version of the terminable interest rule could be applicable to plans governed by ERISA if that Act, by providing for joint and survivor annuities in certain types of benefit plans, intended to preempt state law recognizing a community interest even in benefits payable after the death of either spouse and if such intent could be constitutionally implemented. However, there is simply nothing in section 205 of ERISA (or in any other section) even approaching the "unequivocal mandate" expressed with force and clarity that must appear to support a conclusion that Congress intended a preemption that would impose a terminable interest theory on privately created pension plans in California. An intent that a surviving widow receive certain sums when ultimately paid out does not equate to an intent that the contract right to such an annuity is not community property at divorce.

Certainly, then, nothing in ERISA indicates any congressional objections to a California divorce court's making a division of property by valuing all benefits under the pension plan attributable to labor or payroll deductions during marriage, awarding them to the participant spouse, and awarding the other spouse an offsetting amount of other community property, i.e., using the Milhan remedy and extending it to post-death benefits, including a future widow's annuity. If the participant spouse has not, at the time of divorce, made an election so that a surviving spouse's annuity will be payable, the participant nevertheless has such a power of election, a contractual property right of value that should be taken into account in valuing all the community interest in the retirement plan. The joint and survivor annuity should be valued even if W

Consideration was never given to the problem of successive wives.


371. See note 213 supra.

372. Given the allowance in ERISA for making actuarial adjustments of the benefits payable during the joint lives of the participant and his spouse, in the event
has consented in writing or otherwise to this feature of the plan, for such consent merely authorizes a management and control election by $H$ that may result in the payment of community earned benefits to a second wife. It does not translate into an agreement by $W$ to transmute the widow's pension feature of the plan from community to $H$'s separate property.

Because of doubts about $W_h$'s ability to obtain control of sums that may subsequently be paid to $W_2$ under a surviving spouse's annuity, $W_h$ at divorce would be best advised to seek a Milhan-type award under which $H$ receives all the community interest in the ERISA governed retirement plan and $W_h$ an offsetting amount of other community property of equal value. If there is not enough community property to make an offsetting award and no separate property that the court can award or the parties are willing to substitute in lieu thereof, the nonemployee spouse may want to proceed to seek the typical fractional share award of future benefit payments $H$ may receive and even of future benefits $W_2$ may receive.

It is arguably not a "term or condition" of ERISA protected from state law that a participant maintain after receipt all of the benefits that are co-owned by a former spouse under a divorce decree. In fact, the former spouse with a Fithian-type decree can even claim as creditor under a judgment which binds $W_2$ as $H$'s privy. The spendthrift provision of ERISA protects only against the benefits being "assigned or alienated." In this context "benefit... the joint and survivor annuity option attaches to his or her interest in the plan, see text accompanying note 368 supra, whatever election has been made may perhaps make no difference on the value of the community interest. This means the parties and the divorce court judge can look (at least presumptively) to the plan administrators to have prevented a fluctuation of value of the total retirement plan package depending on whether a joint and survivor annuity has been selected. Valuation will likely therefore be no more difficult than it is in a case where the employee's life expectancy alone is the actuarial variable affecting value.

373. If the participant spouse makes any contention of federal preemption under ERISA that disturbs the California law otherwise applicable at divorce with regard to valuation and division of marital property (recall that Benson-Waite applies only to state created pensions), counsel for the other spouse should have no hesitation in asking for an award of the participant spouse's "separate" property ("separate" is used here to mean Spanish-Mexican style separate property as defined in a community property state). That property cannot be divided by state law on the ground that, if there is preemption then there must be a body of federal common law to fill the void and that law, like marital property rules in the typical English common law state, will award a portion of one spouse's separate property to the other to avoid injustice or inequity.

374. Arguably, $H$ would represent the unknown future widow in the suit and such a decree could not be avoided by her for lack of notice or of representation by a guardian ad litem.

If $W_h$ had expressly consented to $H$'s election of the joint and survivor annuity with awareness that she might not necessarily be the surviving widow who ultimately is paid benefits, an argument could be made that $W_2$ had thereby waived a claim to receive possession of a portion of the sums to be paid to the widow, $W_2$.

375. See text accompanying note 350 supra.
fits” probably means future rights only and not cash on hand after payment; “assigned or alienated” would seem to refer only to voluntary transfer. If a former wife proceeding under an alimony decree can reach pension payments in the hands of a participant former husband despite section 206, surely a former wife proceeding under a judgment dividing community property can do the same, there being a difference not in substance but merely in the form of remedy.

At the present time, however, one must equivocate, recognizing some uncertainty as to just how broad the field of “terms and conditions” of retirement plans—the area preempted by ERISA—will be found to be by the California Supreme Court or, if it decides to adjudicate the issue, the United States Supreme Court.

Also uncertain is the ultimate decision of whether ERISA will be read to preempt the state remedial laws that would permit the divorce court to declare the nonemployee spouse owner of a fractional portion of all future widow’s pension payments if the employee spouse—assume for convenience it is H—elects that option. Looking only at section 205 of ERISA, the joint and survivor annuity section, the case against preemption is stronger than was presented in Carlson involving EGLI. Section 205 does not, on its face, purport to assure the ERISA pension participant the same broad freedom in selecting a beneficiary of post-death benefits as the EGLI statute. Moreover, a case involving alleged federal preemption under ERISA will, like Carlson and unlike Wissner, not offer the strong federal interest involved in national defense and prosecution of a war as a basis for finding an unequivocal mandate. On the other hand, unlike the EGLI statutes involved in Carlson, ERISA contains the broadly worded state law preemption section which preempts the field; thus, the issue under ERISA—what is the “field”?—is different from that presented in Carlson. That is, unlike EGLI, ERISA contains the language of “force and clarity”; it is unclear only as to which state laws it is directed.

b. Effect on Anti-Gift Statutes. If the divorce court attempts to value the surviving spouse benefit as community property at divorce, the participant spouse may counter that by electing a joint

376. Compare the broad spendthrift clauses applicable to NSLI insurance, see text at note 239 supra, and to Social Security Act benefits, see text accompanying note 416 infra, for the language Congress will use when it was to bar an attacking judgment creditor.

377. If this is not so, then ERISA has such an impact in Texas where, as a matter of state law, alimony is prohibited and divorcing wives must look to a division of property for the support remedy that might be provided by a federal common law permitting alimony by preemption in order to prevent serious inequity and unfairness.

378. See text accompanying notes 272-76 supra.

379. See text accompanying note 339 supra.
and survivor annuity he has given away the value of his interest in the pension plan apportionable to the surviving spouse annuity, that federal preemption makes California's anti-gift statute requiring the consent of the nondonor spouse inapplicable, and that a federal rule applies allowing such a reasonable gift without W's consent.

With respect to the early survivor annuity option for a participant qualifying for benefits before his normal retirement date, this argument will fail. The regulations promulgated pursuant to ERISA have interpreted the power of election with respect to joint and survivor annuity benefits as not being an unfettered right. With respect to the option at normal retirement age not to take the joint and survivor feature, the regulations provide: "A plan will not fail to meet the requirements of this section merely because the plan requires the participant to obtain the written approval of his spouse in order for the participant to make this election or if the plan provides that such approval is not required." In other words, ERISA is construed as not itself controlling how an election shall be made against a joint and survivor annuity. The states are invited to impose a written consent requirement such as that found in California Civil Code section 5125(b). Although the regulations do not speak to the question of spousal consent in the case of the early survivor annuity option to a participant not yet at normal retirement age, surely no distinction could be drawn between it and the election at normal retirement age on the issue whether ERISA itself prohibits a plan that requires spousal consent. Thus, both the regulations and the statute are silent as to method of consent to take the early survivor annuity. There is arguably no "term or condition" of freedom of spousal consent with which California law conflicts, and in California an unconsented to election to take the early survivor annuity can be declared void at divorce, keeping the full value of benefits as community property for valuation purposes at divorce. Alternatively, if the method of election is to be considered part of the "entire field" that has been preempted, the courts must fill the void in the statute and regulations with a federal common law rule as to the method of consent. Certainly the rule selected will not be one which enables the participant to deprive his spouse of her property rights conferred by state law.

380. CAL. CIV. CODE § 5125(c) (West Supp. 1977).
381. See notes 359-66 & accompanying text supra.
383. If H, knowing a divorce is imminent, elects an early survivor annuity without W's consent, she may be able to obtain relief not only on the theory of gift but also on the theory that this was bad faith management of a community asset by H. See CAL. CIV. CODE § 5125(e) (West Supp. 1977). Likewise, a decision by H at normal retirement age not to opt against the joint and survivor annuity could, under the circumstances, be held to be bad faith management.
384. See the discussion of the respect to be given to state property law in such a
sideration, the federal common law rule might require either the nonemployee spouse's consent or uphold the election without her consent while giving a right of reimbursement at divorce to prevent a taking of property rights.

As to the participant's election at normal retirement age, a clear conflict between federal and state law exists. Under the Act, the joint and survivor annuity is automatically a feature of the ERISA governed annuity-style pension unless the participant elects against it. Under state law the nonemployee spouse would have the power to void (at least as to her community half interest) an election by the participant that diverts community assets to establish benefits for a widow who may be someone other than the present wife. It must be conceded, too, that the automatic selection provision is one of the "terms and conditions" within the preempted field.

This attempted preemption may well be unconstitutional. First, the federal government can get just so much mileage out of the commerce clause as a source of power to preempt state community property law. Unquestionably the commerce power enables the Congress to set standards for a strong, nationwide retirement plan system to protect the country's work force. To add a provision which enables the husband to defeat state law established to protect his wife's property rights, however, simply does not strengthen ERISA's pension regulation scheme. It seems unlikely that the federal interest invoked under the commerce clause is affected by a rule that either does or does not allow states to apply anti-gift provisions to survivor annuity benefits. Taking $W_1$'s property and giving it to $W_2$ is so unrelated to interstate commerce that Congress should be held to lack the power to impose such a scheme.

Assuming that the commerce clause can be stretched to provide a federal source of power to preempt Civil Code section 5125(b), the question next arises whether there is a taking of the nonemployee spouse's property interests without due process of law and just compensation. First, it seems clear that ERISA does not envision a preemption so broad that it attaches to the monies paid into the fund at the moment of payment by an employer or to labors at the moment they are rendered so that state property laws never attach to such assets. On the contrary, it is clear that Congress considered that state community property principles did attach to the contributions paid into a plan. One of the very few points in the legislative history of ERISA to consider the impact of community property laws on the legislation concerned Title II of the Act, relating to taxation of pension benefits. With respect to taxation of lump sum distributions from a plan at retirement age, ERISA provides that the income tax rate shall be the schedule for unmarried

situation by the United States Supreme Court in the Yiatchos case at text accompanying note 260 supra.
persons and then expressly preempts community property law that would permit avoidance of this rule in community property states by splitting the income.\(^\text{385}\) However, lump sum benefits attributable to certain pre-1974 payments into the fund are taxed at capital gain rates. The House Report on ERISA expressly states that these payments will be treated as community property in community property states.\(^\text{386}\) Thus Congress assumes state law will vest an interest in the benefits in the participant’s spouse to divert property interests of the nonemployee spouse conferred by state law to either the employee spouse or to a future second wife is clearly a taking of property by force of federal law.\(^\text{387}\) In *Yiachos*\(^\text{388}\) the Supreme Court recognized that a congressional statute allegedly preemption state community property law cannot ordinarily operate in such manner.\(^\text{389}\) Since Congress’ war and defense power is not available as a basis for taking under ERISA, not only would the commerce clause have to be seen as conferring eminent domain power as exercised in ERISA, but some public purpose would have to be found, and just compensation would have to be paid to \(W\). Just compensation would not even arguably be present unless the federal common law (created from scratch or borrowed from California law) authorizes remedies at divorce such as *Milhan*-style valuation.


\(^{386}\) "The capital gain portion of the lump sum distribution in a community property state is to continue as under present law to be included one-half in the income of the retiree and one-half in the income of the spouse." *H.R. REP. NO. 807*, 93d Cong., 2d Sess. 152 n. 5 (1974). In context it seems the spouse referred to is the person married to the retiree when contributions into the pension fund were made.

In addition, other tax statutes recognizing that private pension plan benefits may be community owned. *See* I.R.C. § 2039(d), excluding from the gross estate of the nonemployee spouse dying before the participant spouse the decedent’s community half interest in retirement benefits traceable to the other spouse’s community contributions but not to employer contributions. *See also* I.R.C. § 2517, as amended by Tax Reform Act of 1976, Pub. L. No. 94-455, § 209(c)(4)(A)(iii), 90 Stat. 1896 (adding subsection (c)), providing a gift tax deduction for the nonemployee spouse’s half interest in benefits paid to a designee of the predeceasing participant spouse. (This relief seems primarily intended for Texas where the donor spouse can make reasonable quasi-testamentary gifts of community assets without consent of the other spouse, but it would also be beneficial in California where the surviving spouse has in fact consented, where she chooses at her husband’s death not to exercise her power to void, or perhaps where *Benson-Waite* eliminates her power to void, although in the latter situation the property designated away probably is all separate property, anyway.)

\(^{387}\) Note that the fact that the widow’s pension need only be half the size in monthly payments of the participant’s lifetime pension does not mean there is no taking. It cannot be said that the widow’s pension constitutes part of \(H\)’s half of the community ownership of the retirement plan package if at the same time the position is taken that \(H\) and \(W\) are equal owners of benefits payable in \(H\)’s lifetime.


\(^{389}\) *See* text accompanying note 260 *supra*. 
and division of property or a reimbursement claim. In some cases where there are no assets of value at divorce except ERISA governed pension rights this might require giving $W$ a fractional award of more than fifty percent of payments $H$ (assuming he is the participant) may receive in his lifetime to make up for the potential widow’s pension.

In divorce cases where the nonparticipant spouse cannot be made whole by a Milhan-type division of property or a reimbursement remedy, it is highly likely that ERISA section 205 will be held unconstitutional either because the commerce clause provides no power to authorize a husband to give away the wife’s property or because there is a taking without compensation in violation of the fifth amendment.

c. Effect on Testamentary Power Statute. Since Benson-Waite cannot apply to private pensions, Probate Code section 201 would ordinarily give the nonemployee wife testamentary power over half the community interest in $H$’s ERISA governed pension. It is possible, however, that ERISA will be construed as mandating as one of its “terms and conditions” that no benefits be bequeathed by the nonemployee spouse. No language in ERISA expressly addresses the issue, and I suspect Congress never even considered it. Nevertheless, the language of the anti-assignment section of ERISA seems literally to prevent $W$’s will from operating on future benefits (but not on her community half of benefits already paid and on hand at her death). Assuming that this section coupled with section 514 provides the necessary unequivocal mandate to preempt Probate Code section 201, the question of the constitutionality of doing so is presented. There is no due process “taking” problem as California does not give $W$ a property right in testamentary power over her half of the community property. The state could make $H$ her forced heir as to her community interest in his pension without violating due process; so can Congress if it has a source of power to exercise, and whether it has such power is the constitutional issue. The war and national defense power has been held to give Congress authority to enact succession statutes applicable to veterans. That the commerce clause authorizes enacting descent statutes for wives of workers seems, to me, unlikely. This issue, however, awaits the decision of the United States Supreme Court.

390. Note that under state law, $H$’s separate property can be reached if reimbursement is claimed and, under applicable federal common law, if ERISA preempts any state law rules and thereby interferes with the equitable operation of state law on division of property at divorce it may well be that separate property can be reached to effectuate an even division under Milhan. (Again, that may cause a taxable event.)

391. See text accompanying note 350 supra.
392. See text accompanying note 339 supra.
In summation, ERISA is likely to have very little preemptive effect on state community property law. In only a few sections of the lengthy Act and, apparently, only a few passages in its also very lengthy legislative history did Congress expressly address the interaction of ERISA and community property law and provide for the state law to yield. These sections concern taxation and IRA accounts. In addition, however, although Congress probably did not have community property laws in mind in enacting sections 205, 206 and 514, their combined operation perhaps preempts the state law requiring the nonemployee’s spouse to consent to the provision automatically selecting for the employee, at normal retirement age, the optional surviving spouse’s annuity; and the state law giving the nonemployee spouse testamentary power over half the community interest in the plan existing at her death seems to be intended to be preempted. Assuming such intent, both attempted preemptions may be unconstitutional.

IV. REMEDIAL PROBLEMS IN TREATING FEDERAL SOCIAL SECURITY AND SIMILAR BENEFITS AS COMMUNITY PROPERTY AT DISSOLUTION OF THE COMMUNITY

This Article has thus far shown that neither state nor federal law bars recognition of a community interest in federally created retirement benefits such as OASDI. Rather, when contributions of community funds or community labors have qualified a married person for benefits, a community interest in those benefits exists.

394. See note 376 supra.
395. See I.R.C. §§ 219(c)(2), 402(e)(4)(G). In determining the size of an IRA tax deferred deposit from earnings a taxpayer can make each year, fixed on a percent of salary up to a maximum $1500, the wage earner is treated in applying the percent-of-salary formula as owning all his earnings. See I.R.C. § 219(b)(1). His spouse is treated as owning none, notwithstanding contrary community property laws. See I.R.C. § 402(e)(4)(G). See also discussion in H.R. REF. NO. 807, 93d Cong., 2d Sess. 128 (1974).

Note should also be made of I.R.C. § 219(b)(1)(A), requiring that an IRA account, created for a husband and wife under a special rule allowing increased contributions to be tax deferred when only one of them has income as a wage-earner, must create "an interest having the same effect as a joint tenancy with right of survivorship." In California one spouse alone cannot transmute community property to joint tenancy property. Since the cited Internal Revenue Code section does not speak with force and clarity or contain an unequivocal mandate to preempt this rule of state law, W's will can bequeath half of the community interest in such an IRA account, unless she has agreed to give up her testamentary power over such community assets by transmuting them to joint tenancy. In California, written consent is probably required. See Estate of Baglione, 65 Cal. 2d 192, 417 P.2d 683, 53 Cal. Rptr. 139 (1966); California Trust Co. v. Bennett, 33 Cal. 2d 694, 204 P.2d 324 (1949); CAL. CIV. CODE § 683 (West Supp. 1977). Note that W's signature on a tax return where an IRA deposit deduction is taken could conceivably serve as the required writing.

In Louisiana it may be impossible for spouses to set up an IRA account under I.R.C. § 219(b)(1)(A), since a community property to joint tenancy transmutation is usually not allowed.
under ordinary principles of California community property law. Part IV of the Article addresses serious problems of remedy that arise from recognition of community ownership in future benefits including the following: (1) the difficulty of placing a value on a future OASDI benefits subject to numerous contingencies, and (2) whether federal preemption prohibits the operation of a divorce decree or a decedent’s will on future benefits payable according to the terms of the federal program to neither H nor W but to a third party. While emphasis in Part IV will be on the OASDI program because of its numerous contingencies and possibilities for payments to third parties, similar problems, although generally less extreme, may arise with respect to other federal schemes. This section considers separately the problems of remedy at dissolution by divorce and at dissolution by death of the nonparticipant spouse. Each discussion considers problems with respect to both future OASDI benefits and sums (or other assets) on hand which are traceable to OASDI benefits previously paid.

I conclude that, with respect to community created benefits already paid to a spouse and on hand at dissolution by death or divorce, ordinary principles of state community property law apply. That is, even the spouse who was not payee of the funds may bequeath half of them, and a divorce court may divide such sums.

In a few situations involving rights to benefits yet unpaid, however, some aspects of state law are preempted. With respect to benefits that accrue in the future, a divorce court may attempt to find a lump sum value for the community interest, but usually this will be impossible and the nonpayee spouse will have to be awarded a fractional interest in future benefits paid to the other spouse. It is likely that federal law bars an award at divorce of a fractional share of future community owned benefits payable to third persons; very likely, it bars the noninsured spouse from bequeathing any part of future benefits. In these situations, where a lump sum value cannot be computed, a remedy may be available through reimbursement to the community for the value of labor or contributions that generated the benefits. Where only testamentary power is interfered with, it may be held that no remedy is appropriate since no property right has been taken, provided Congress has the power to displace state law concerning testamentary power over assets traceable to community labor.

A. Remedial Problems at Divorce

The easiest case for valuation at divorce of a community interest in future OASDI benefits would be as follows: H and W, both sixty-five, married before H began working, and had been married for more than twenty years at the time of divorce. H is retired and, due to disability, unable to work again. W has never
worked and is unlikely to do so in the future. H is not a veteran and is sterile. There are no children of the marriage or parents of H who can ever claim OASDI benefits through him, and the chance of his remarrying and adopting children is sufficiently remote to be treated as nil. Knowing the life expectancies of both H and W, statistical tables can supply the odds of their remarrying at all after the divorce. The divorce court has ordered H to pay alimony in addition to dividing their community property.

Although the Social Security Act is set up so the future benefits received through H's having achieved insured status cannot be traced to his payment of FICA taxes, it is nonetheless clear that his labors during marriage have qualified him and his dependents for OASDI benefits.396 His primary insurance amount can be computed by determining his average monthly wage during all but the lowest paying five years of his employment career.397 Since W has been and will be under an alimony decree, receiving almost all of her support from H,398 she will be eligible for divorced wife benefits during H's life and after his death so long as she does not remarry.399

1. Lump Sum Valuation

If the divorce court takes a lump sum value approach to division of this community property—a Milhan-style decree dividing the community by awarding H all of the OASDI benefits except divorced wife benefits, which W will be awarded—the court must determine the present value of the benefits that each is to receive so that it can award to whichever of them will receive the lesser value an offsetting amount of other community property.400 Even in this relatively simple case, very difficult problems are presented. For example, what effect does the possibility that Congress might terminate, reduce, or increase divorced wife benefits have on the valuation process?401 How is the possibility of Congress’ reducing or increasing H’s own primary benefit to be taken into account?

Additionally, although tables supply the odds of W’s remarriage, they do not give odds on W’s losing her OASDI benefits by

400. Although ordinarily the divorced wife’s benefit is just half the insured’s benefit, see 42 U.S.C. § 402(b)(2) (1970), if W were somewhat younger than H her greater life expectancy, taking into account the likelihood of her continuing to receive divorced wife benefits after H’s death under 42 U.S.C. § 402(e), could result in the OASDI benefits awarded to her exceeding in value the benefits awarded to H.
401. See Status of Military Benefits, supra note 165, at 310 & n.25.
way of remarriage. W's divorced wife benefits are not cut off by all remarriages; they continue if she marries a man who himself is receiving OASDI or one who has a child under eighteen. How can this uncertainty be valued? How, too can the court adjust valuation for the uncertainty concerning the life expectancy of a second wife of H who may qualify for a wife's benefit, a widow's benefit, or even another divorced wife's benefit?

In a case where H is a substantially younger man, the difficulties of valuation are greatly compounded. First, how can the court even begin to guess what his primary insurance amount, based on average monthly wage, will be? If he has worked at an FICA taxed job for fewer than ten years, the chance that he may never achieve insured status must go into the valuation. (If he is insured for disability benefits purposes, the odds on his becoming disabled could, conceivably, bear on value.) Moreover, an extremely difficult problem of apportionment is raised when H is going to continue to work after the divorce. As pointed out by the respondent in Marriage of Kelley, only ten years (forty quarters) of post-divorce labor, which will be separate labor with respect to the dissolved marriage, is necessary to qualify H for insured status, arguably making all the labors during marriage quite superfluous. 402 Certainly that would be so if the marriage lasted five or fewer years all of which years were among H's five lowest paying 403 such that they never entered the primary insurance amount calculation.

Similar problems are faced if sufficient labor was done before marriage to qualify as insured. It could reasonably be contended that the only effect of post-nuptial labors would be to increase the primary insurance amount. Incredibly, the labor during marriage would actually be harmful to the value of future OASDI benefits if it lowered the employee's average monthly wage and thus his primary insurance benefit. In such a case, it is barest fiction to say the community labor has contributed to the earning of OASDI benefits, but it would seem unfair to the community to give it no return for this labor, since, along with the community labor, FICA taxes were paid with community funds. 404

Because OASDI is not set up like a private insurance or annuity contract where each contribution of consideration by the insured is clearly buying at least some protection, it seems impossi-

402. Respondent's Brief at 56, In re Marriage of Kelley, 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (2d Dist. 1976). The respondent husband there was in fact only 50 years old, so the odds of his working another 10 years before retiring were good.

403. See note 397 supra.

404. Suppose a case where post-marriage labors at low wages actually lowered H's primary insurance amount. In such a case, a claim by the separate estate for damages done to it by the low paying community labor is not inherently illogical, although to recognize such a claim would sanction a hideous result from a policy standpoint.
ble to value accurately future OASDI benefits based on FICA taxes paid or labor provided. Any value placed by the divorce court on the package of potential future benefits would be simply conjecture.405

Assuming a lump sum value on the future OASDI benefits $H$ may receive and $W$ may receive after divorce can be reached and that the difference between the two figures represents the value to be awarded to one spouse (presumably the insured will be receiving benefits of greater value and thus will be the recipient of this award), another problem will be presented in most divorce cases—apportionment of the future benefits into separate and community portions. Such apportionment will be necessary when any labor that generates FICA taxes was done by a spouse while unmarried or, due to the retroactive operation of Civil Code section 5118,406 while the spouses were separated.407 Since the process involved is apportioning separate and community interests in an asset, potential future rights, which under the apparent meaning of Brown is deemed to be possessed during marriage,408 the burden of proof will be on the separate estate to overcome the presumption409 of community ownership. As to years of labor not necessary to qualify the spouse for insured status and not taken into account in fixing the primary insurance amount, it would appear that the separate estate cannot overcome the presumption by tracing such separate labor into future

405. It is, accordingly, quite surprising to me to learn that in Nizhenkoff the husband and wife at divorce reached a stipulation as to the value of the wife's future OASDI benefits. She was the insured, and the husband was not, apparently, eligible for benefits in his own right or derivatively through her. Of course, her age was known, as well as the fact that she was then receiving $305 per month in benefits under OASDI. The stipulation was that her future OASDI benefits were worth $30,760.00 and that "15.9% was attributable to earnings prior to marriage and 83.1% was attributable to earnings during the period of marriage." Appellant's Opening Brief at 1, In re Marriage of Nizhenkoff, 65 Cal. App. 3d 136, 135 Cal. Rptr. 109 (1st Dist. 1976). Perhaps counsel may make an apportionment based on "time," see note 32 supra, treating each quarter of labor as contributing equally to the acquisition of OASDI insured status.


407. At least it applies retroactively to the year 1872 when former Civil Code § 169 made such acquisitions and earnings of $W$ separate, and thus will include all existing marriages.

408. See note 27 & accompanying text supra.

OASDI benefits. The peculiar Social Security Act provisions that do not base the amount of benefits paid substantially on the amount of participation snarl the tracing process. The separate estate would be left with a claim against the community either for reimbursement (a difficult one to state because the separate labor was not in fact used to improve the community interest) or, in the case where full separate insured status itself is wiped out by the inability to trace, a bizarre claim against the community for having by its labor destroyed a separately owned asset. Neither claim is sound. The insured spouse surely will not be permitted to claim damages to his separate property based on his own community labors.

If a period of separate labor is necessary to qualify a spouse as fully insured, the separate estate may be able to trace ownership under the pro rata “time” apportionment theory used in pension cases where the consideration given is part community and part separate. That is, a fraction is formed by comparing years of qualifying separate and community labor and this is applied to all OASDI benefits. While it is not logical to give equal treatment to a period of separate labor relied on under the Social Security Act to prevent the spouse from becoming fully insured but, because of high wages paid, to fix the primary insurance amount, it would not be inequitable to use the formula in such manner. In reality, if not technically under the Butler-proofed federal scheme, the separate estate has contributed to the plan during each quarter of separate labor by paying FICA taxes. By the same logic, periods of separate labor relied on neither to qualify the spouse as fully insured nor to determine the primary insurance amount should be added to the separate “time” going into the apportionment fraction.

Similarly, the reality that FICA taxes paid the OASDI benefits scheme should enable California, if it wishes, to use FICA tax figures to formulate an apportionment fraction based on comparing the amount of community and separate dollars used to pay these taxes. In some cases, such a “money” apportionment has been rejected, apparently because of the simplicity of “time” apportionment technique, see note 32 supra.
tionment. But there should be no difficulty in determining the amount of FICA taxes paid, and the only party with standing to object to the use of a money apportionment should be the payor of the earlier contributions, often the separate estate through payments before marriage.\footnote{143}

2. Avoiding Lump Sum Valuation by Making a Fractional Pro Rata Award

When contractual retirement and pension plan rights are not vested and lump sum valuation is complicated by various contingencies to receipt of benefits, the solution to division at divorce is, as has been shown,\footnote{144} to award the nonemployee spouse a fractional share of future benefits, as they shall be received. That remedy, however, may not be available with respect to OASDI benefits. First, there is at least some question as to whether the United States Supreme Court would view the nonemployee spouse as a co-owner rather than as a judgment creditor, as has been noted.\footnote{145} The Court has already held that not even OASDI payments \textit{on hand} after payment can be reached by creditors.\footnote{146} Second, federal preemption

\footnote{413. The error in \textit{“time”} apportionment as used in cases such as Gettman v. Los Angeles Dept. of Water & Power, 87 Cal. App. 2d 862, 197 P.2d 817 (2d Dist. 1948), is that it fails to take into account that usually a dollar paid into the plan several years ago has contributed much more to the earned benefits than a dollar recently paid in. This is a result of the interest and profits derived from investments of the earlier dollar by the plan administrator. Thus, the estate that has made the more recent contributions will seldom be harmed by a \textit{“money”} apportionment. It is to be noted that unfairness of money apportionments to the estate making the early payments is lessened in instalment purchase cases where the buyer takes immediate possession of the item. See, \textit{e.g.}, Vieux v. Vieux, 80 Cal. App. 222, 251 P. 640 (2d Dist. 1926). \textit{Cf.} Forbes v. Forbes, 118 Cal. App. 2d 324, 257 P.2d 721 (1st Dist. 1953) (portion of mortgage on apartment house paid with separate property prior to marriage). If the possession can be turned into profits which are compounded, this tends to offset loss of interest on the payments made.}

\footnote{414. See notes 30-33 & accompanying text \textit{supra}.}

\footnote{415. \textit{Compare} the Court’s apparent misunderstanding of community property principles in Wisnower v. Wisnower, 338 U.S. 655 (1950), \textit{discussed} at notes 230-52 & accompanying text \textit{supra}.}

\footnote{416. Section 407 of the Social Security Act provides: \textit{“The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing, under this subchapter shall be subject to execution, levy, attachment, garnishment or other legal process or to the operation of any bankruptcy or insolvency law.” (emphasis added.) The first cases to construe the statute did not take the italicized word \textit{“paid”} literally, holding that the provision merely protected unpaid benefits, but that once a recipient had OASDI cash in hand creditors could reach it. See, \textit{e.g.}, Texas Baptists Children’s Home v. Corbett, 321 S.W.2d 610 (Tex. Civ. App. 1959), \textit{wrtd ref’d n.r.e.}; Ponath v. Hedrick, 22 Wis. 2d 382, 126 N.W.2d 28, 31 (1964) (dictum). Not only that, but some courts have said that \$ 407 was totally inapplicable to the alimony claim of a divorced wife. \textit{See} Brown v. Brown, 32 Ohio App. 2d 139, 288 N.E.2d 852 (1972); Huskey v. Batts, 530 P.2d 1375 (Okla. App. 1974). The United States Supreme Court established in Philpott v. Essex County Welfare Bd., 409
may bar the state from ruling that an insured’s wife has an interest in benefits paid to third parties such as his parents, children, second wife, and perhaps even in payments he himself receives, although the latter seems improbable.417 Finally, the same contingencies and valuation difficulties attending a remedy by way of lump sum valuation and a Milhan-style set-off encumber the process of determining the fractional division of benefits to be received. For example, are all quarters of work to be valued equally? Should the community share be reduced if after marriage H labors for low wages and thereby causes a drop in the primary insurance amount? If it is determined that the state divorce court cannot award W a fractional share of future widow’s and children’s benefits that third parties may receive through H’s obtaining insured status by community labor, can the court fairly value what W is deprived of due to unavailability of this remedy, in order to offset that lack of remedy by increasing her fractional interest in sums H may receive? Is W to receive her fractional share based on the full amount H could have received had he had no earnings after age sixty-five when in fact his benefits are decreased or eliminated due to his continued earnings past age sixty-five?418

If W is awarded a fractional share that is based only on payments H receives as OASDI benefits, that treats each quarter of labor (including post-divorce quarters) as equally contributing to the insured status and that reduces W’s take by the amount of any divorced wife benefits received by her, H ought to have no basis for complaint. W takes the risk, however, of inability to collect on her award due to the Social Security Act spendthrift clause (section 407) and also the risk that the community interest is substantially undervalued because dependents’ benefits that may be payable in the future are ignored.

U.S. 413 (1972), that a judgment creditor (who was not a divorced wife) could not levy on OASDI funds already paid out to a beneficiary and placed in a bank account, at least so long as there had been no commingling that complicated tracing back to the OASDI source. (That is, of course, what § 407 literally says, but surely elderly people will be harmed by the decision since vendors have good reason now to deny them credit even through OASDI receipts keep them nominally solvent.) It has been held that the § 407 bar to creditors’ reaching OASDI sums on hand is lifted when the payee dies. In re Estate of Vary, 258 N.W.2d 11 (Mich. 1977).

417. See text accompanying notes 296-301 supra.

418. Compare the Wilder and Smith pension cases, see note 31 supra, where W began collecting a fractional share of what H could have received had he retired although he chose not to retire. It would seem that if H must be deemed to be receiving OASDI benefits not paid to him because of his post-65 earnings, in a case where what H owes W is reduced by any divorced wife payments she receives under his insured status, she should be viewed as continuing to receive such benefits even though in fact a remarriage by her has cut them off. The better rule, however, is to determine the rights of H and W based solely on what each in fact receives.
3. A Solution in Reimbursement

Since a lump sum valuation of future OASDI benefits may be impossible and a fractional award of future benefits inadequate or uncollectible, the wife of the insured spouse may seek a different remedy. Rather than claim a community interest in the future OASDI benefits, she may instead seek reimbursement for $H$'s having diverted community assets (his labors) into property that she cannot fully share in at divorce.\textsuperscript{419} Since these labors also generated community owned income, $H$'s hourly wage is not the appropriate measure (as it would be if the income itself were separate). Logically, however, the element of $H$'s labors that produced OASDI benefits is equal in value to FICA taxes paid.\textsuperscript{420} Only the accounting techniques intended to save the OASDI provisions from constitutional attack by depicting them solely as an exercise of the federal spending power bar the finding that OASDI benefits are acquired by FICA taxes.\textsuperscript{421}

The starting figure for the reimbursement calculation, then, will be all FICA taxes paid during marriage which, as payroll deductions, are clearly community property.\textsuperscript{422} The figure should then be reduced by the amount of FICA taxes paid by $W$ during marriage. It must be further reduced—and here enters a valuation difficulty—by the value\textsuperscript{423} of any divorced wife benefits $W$ may

\textsuperscript{419} I do not think that $H$ can successfully counter a claim for reimbursement by arguing that the future OASDI benefits are in fact community property. The reason for the doctrine is to prevent unfairness to the spouse not responsible for the particular investment made with the community asset. See \textit{In re Marriage of Warren}, 28 Cal. App. 3d 777, 104 Cal. Rptr. 860 (2d Dist. 1972). Although the reported cases have involved unfairness through the building up of a separate estate that is not divisible at divorce in California, the same logic would apply in the event of the building up of a nominally community owned asset which nevertheless could not be divided between the spouses at divorce.

\textsuperscript{420} This seems to be the theory of the nonemployee spouse in \textit{Kelley}, where the record she took up on appeal consisted of a finding of fact by the trial judge that during marriage $H$ "contributes $5,696.75 to Social Security from his wages, the contributions being governed by the federal law which does not recognize their community nature." Appellant's Opening Brief at 9, \textit{In re Marriage of Kelley}, 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (2d Dist. 1976).

\textsuperscript{421} Throughout the Social Security Act there is a direct correlation between an employee's paying FICA taxes and his insured status. It is only in form in the vast majority of cases, not in substance, that the underlying labor that generated the tax, rather than the tax payment itself, counts towards attaining fully insured status. See, e.g., I.R.C. § 1402(g), exempting from self-employment taxes those with certain religious beliefs and 42 U.S.C. § 402(v) denying OASDI benefits to persons who claim such exemptions although they may have otherwise engaged in the 40 quarters of qualifying labor. Note, too, that the average monthly wages in excess of the amount (currently $1100 per month, see I.R.C. §§ 1402(b), 3121(a)) subject to FICA taxes are not considered in determining the average monthly wage used to fix a primary insurance benefit. See 42 U.S.C. § 415 (Supp. V 1975).

\textsuperscript{422} Conceivably, a self-employed $H$ could have drawn on separate funds in a bank account to pay his self-employment taxes where he is not a wage earner, but the burden would be on him to establish that fact.

\textsuperscript{423} That is, the discounted present value of the contemplated flow to $W$ of OASDI benefits in her divorced wife status.
receive, a calculation complicated by the possibility of W's remarriage under circumstances such that her benefits as H's divorced wife will be cut off. The existence of divorced wife benefits for W so undercuts her case based on H's diverting community assets that produce no benefits in which she can share that all doubts in valuing the offset for her divorced wife benefits ought to be resolved against W.

Should interest be awarded on the sum reimbursed? As has been noted, there is as yet little authority for awarding interest, apparently because it was not given at Spanish-Mexican law for reasons not obtaining in California (or in any state with respect to OASDI benefits). Even the amount of simple interest at the legal rate on FICA taxes paid over many years of a long marriage could be astronomical. Probably, therefore, the courts will not award interest on the sum reimbursed. Since the reimbursement claim is in effect a creditor's claim against H by the community (hence in favor of W as to one half), H's separate property, as well as property that becomes his by division of the community at divorce, is liable.

4. OASDI Benefits on Hand at Divorce

If during marriage one of the spouses (or both) has begun receiving OASDI payments, sums paid or assets purchased therewith may be subject to division by the divorce court. Uncertainties as to value are now mercifully eliminated as a problem. What the court must do, as in Estate of Ney, is determine whether

424. See note 178 supra.
425. That is, where separate property was improved with community funds, the rents and profits from the improved separate estate (usually land in the early cases) were community owned. See note 178 supra.
427. See, e.g., Guerrero v. Guerrero, 18 Ariz. App. 400, 502 P.2d 1077 (1972), where contractual insurance rights had been purchased with OASDI disability payments in a state which, like California, treats tort personal injury awards during marriage as community property. The Guerrero court, like Rev. Rul. 63-167, 1963-2 C.B. 17 (Texas community property law), treated the OASDI benefits as community property of the marriage between the insured and his spouse at the time of receipt. Apparently the Arizona court felt it could not trace the benefits back to labor by H that qualified him for insured status but viewed OASDI as a sort of remunerative gift: "[T]he purpose of the payment of these disability benefits under the Social Security Act is to take the place of the income from labor which the husband otherwise would have been receiving . . . . Since his social security disability payments take the place of these wages, it is clear that such payments are community property." if received during marriage. 18 Ariz. App. at 402, 502 P.2d at 1079.
428. Again a caveat is in order as to whether 42 U.S.C. § 407 (1970) will apply to a judgment dividing OASDI benefits on hand between H and W as co-owners or whether Philpott v. Essex County Welfare Bd., 409 U.S. 413 (1972), see note 416 supra, is limited to creditors.
429. 212 Cal. App. 2d 891, 28 Cal. Rptr. 442 (1st Dist. 1963), cited with approval
the source of the funds is separate property, community property or mixed. The typical problem will arise when $H$ has engaged in qualifying quarters of labor both before and during marriage. It has been noted that there are two possible solutions to this problem: (1) placing the burden on $H$ of showing how his separate labor was essential to the creation of the benefits (as, for example, by proving that he did not have forty quarters of labor under section 415 of the Social Security Act during marriage), finding no separate interest if $H$ cannot discharge this burden, or (2) achieving a rough justice by treating all quarters of labor as contributing equally to insured status.\footnote{See text accompanying notes 406-10 supra.}

A different problem is presented upon the divorce of a recipient of OASDI benefits who is neither the insured wage earner nor his spouse during all his periods of FICA taxed labor. For example, a dependent parent of a deceased who was fully insured may receive benefits while married and then, while the benefits are on hand, divorce. Or, an insured’s widow or divorced wife who has remarried under such circumstances that OASDI benefits based on the insured status of the former husband are not terminated, may divorce.\footnote{See text following note 401 supra.}

Such recipients have neither earned the benefits themselves, nor has a spouse earned them. Even though received during marriage by the payee and thus presumptively community, the benefits....
could be proved separate property either by showing they are a gift or by tracing them to property rights owned before marriage. When the payee is a remarrying widow or divorced wife of the insured, the theory that she owned a separate property right when she remarried is appropriate. As we have seen, the federal cases preclude calling it a right arising from contract. 433 However, there is little likelihood of repeal of the OASDI program, and federal law does recognize certain causes of action that prevent discriminatory administration of or changes in statutory provisions for payment of benefits. Since California will treat this bundle of rights as property at divorce, logic would also seem to compel recognizing the existence of such a right as property of the fully insured’s divorced wife when she remarries but does not terminate her benefits. The remarrying widow cannot be distinguished from the divorced wife.

An additional reason for treating the benefits as separate property is that the money received is quite clearly in lieu of or in addition to alimony, separate maintenance, widow’s allowance or other forms of direct monetary support. Certainly if W, upon remarrying, successfully sued to recover from her former husband alimony arrears owing on her remarriage, the payment would be her separate property because it would be traceable to a pre-marriage source. When an insured’s parent remarries in such circumstances that the parent’s benefit annuity is not cut off, 434 the same theory should apply—the payments later received have a pre-marriage source.

The same analysis, however, does not stand up when the deceased insured’s parents are married to each other, receive benefits, and then are divorced with some OASDI funds or assets purchased therewith on hand. In California it may make little difference for purposes of division of property whether the pertinent assets are treated as community owned subject to fifty-fifty equal division or as tenancy in common property. Only if Mother and Father received separate OASDI checks and did not commingle the funds, such that it may be established that the monies on hand were paid to one of them alone, would the characterization be significant for property division purposes in California. However, characterization would be important in other states where community property is subject to an unequal division and separate property cannot be divided.

Unless the insured child is born before his parents legitimated him by marriage, the parents cannot trace the OASDI

433. See notes 39-91 & accompanying text supra.
434. Under 42 U.S.C. § 402(h)(4) (1970), an insured’s dependent parent who marries after the death of the insured does not have his or her OASDI benefits cut off if the person he or she marries is also eligible for OASDI benefits under various provisions listed in the subsection.
benefits they are receiving to a separate source. The benefits might be separate property on a theory of gift—either a direct gift from the government, or as government funds provided in lieu of gifts the insured might have made had he not died. They might be characterized as a "remunerative" gift and, hence, community property, or even a donative gift to the community. If viewed as in lieu of support owed a parent by his child, the benefits on hand raise a characterization problem without precedent.

The notion of donative gift from the government must be at once rejected. There is no donative intent. Moreover, the very purpose of recognition of separate property in Spanish law was to keep family property in the bloodline—that is, to allow H's son to inherit all the family wealth that H himself inherited from his father.435 While a reward for services in the form of an inheritable estate conferred on a public servant by the government (the king) might be separate property for this reason,436 welfare payments intended to be used for personal maintenance are not the same type of benefit.

With respect to the theory that the benefits are a gift from the insured child, donative intent is, again, lacking. Such intent is commonly required under the statutes making "gifts" separate property.437 If the payments are treated as being in lieu of support

436. 1 J. FEBRERO, LIBRERIA DE ESCRIBANOS, tit. II, capitulo X, §§ 13, 14, 16 (remunerative gifts), 15 (army bonuses) (E. Tapia ed. 1834) (popularly known as Febrero Mejicano); J. Escrache y Martin, Diccionario Razanado de Legislacion Civil, Penal, Commercial y Forense 71, ¶ 9 (remunerative gifts); ¶ 10 (army bonuses (1st ed. 1831)); De Funiak & Vaughn, supra note 165, at § 70. Noe v. Card, 14 Cal. 576, 611 (1860); Frique v. Hopkins, 4 Mart. (n.s.) 72, 73 (La. 1826). If a bonus paid for services was substantially in excess of their value, donative intent would be found and the excess would be a gift. De Funiak & Vaughn, note 165 supra. Such inference is impossible, surely, when sums are paid over. This policy explains why a family estate newly acquired by governmental grant was, in cases such as Noe v. Card, 14 Cal. 576 (1860), properly held to be separate property of the grantee, despite onerous conditions that he improve the premises.

437. At Spanish law, gifts were of three types: donative, remunerative, and onerous. G. McKay, A Treatise on the Law of Community Property § 263 (2d ed. 1925); De Funiak & Vaughn, supra note 165, at § 70. Statutes such as Cal. Civ. Code §§ 5107, 5108 (West 1970), defining gifts to be separate property probably have in mind only donative gifts, as the remunerative and onerous gifts are almost unknown today. As noted by De Funiak & Vaughn, supra note 65, § 70, at 158, even the remunerative gift made because of services rendered had a donative element involved, as the value of the donation exceeded the value of whatever services had been rendered. Aside from land grant cases in which property became separate under Spanish-Mexican law even though there was apparent onerous consideration in the "donee's" understanding to settle and improve the land reflecting a policy that settlers of the New World would be able to acquire family estates that would remain in the settler's bloodline, see Basanoff, note 435 supra, the cases, old and new, make some donative intent an essential of a separate property gift. See Peck v. Vandenberg, 30 Cal. 11 (1866); Noe v. Card, 14 Cal. 576 (1860); DeBoer v. DeBoer, 111 Cal. App. 2d 500, 244 P.2d 953 (2d Dist. 1952); Estate of Baer, 81 Cal. App. 2d 830, 185 P.2d 412 (2d Dist. 1947); Estate of Walsh, 66 Cal. App. 2d 794, 152 P.2d 750 (1st Dist. 1944) (Christmas "gift" not separate property as donative intent for gift not proved); Gallagher v. Gallagher, 98 Cal.
which would have been paid by the child not donatively but because state law imposed a support obligation, the payments appear neither onerous (they are not earned, unless one says they are earned by the labors of the parents in raising their child) nor lucrative (there is no donative gift or family property-type settlement). In such a case, the only solution may be to apply the presumption of community ownership of items acquired during marriage or possessed at dissolution thereof which cannot, by tracing, be shown to have been purchased with separate property or cannot be shown to be gifts or inheritances.

B. Remedial Problems When the Community Is Dissolved by Death

Under California law, a spouse is entitled to bequeath upon his or her death a one-half interest in each item of community property. It has been shown that the Benson-Waite doctrine which eliminates such testamentary power in the case of a so-called community interest in state created pensions is inapplicable to federally created retirement rights. Logically, the same property right in favor of the community that is recognized at divorce should also exist at death with respect to OASDI benefits and similar federal payments. Of course, with respect to money on hand, the characterization problem upon dissolution by death is no different than it is upon dissolution by divorce. There is no federal bar to applying state law principles to label the funds either community or separate or a bit of both (due to tracing to both community and separate labor). The only question is whether the spendthrift provi-

App. 180, 276 P. 634 (3d Dist. 1929).

Moreover, even in the case of donative intent, at Spanish law if the husband and wife were co-donees, the gift was taken as community property and not as tenancy in common property. See In re Salvini's Estate, 65 Wash. 2d 442, 397 P.2d 811 (1964), applying statutes indistinguishable from Cal. Civ. Code § 5107 and 5108 (West 1970) insofar as they define separate property. Although Salvini is not followed in Texas, see, e.g., Bradley v. Love, 60 Tex. 472 (1883), there is no direct California precedent against it. Cf. Andrews v. Andrews, 82 Cal. App. 2d 521, 186 P.2d 744 (3d Dist. 1947), where the point was not raised. Presumably, contemporary California courts would follow Salvini.

438. In Bohan v. Bohan, 56 S.W. 959 (Tex. Civ. App. 1900), no writ, the court had to characterize the wrongful death recovery paid to a parent because of death of her son. The court found the recovery to be in lieu of gifts the child would have made to the parent. The possibility of a source in a legally imposed support duty was not discussed. The property was found to be separate.


440. That is, California follows the item rather than the aggregate theory of community ownership rights at dissolution of the community by death. These concepts are discussed in In re Estate of Patton, 6 Wash. App. 464, 494 P.2d 238 (1972); Reppy & De Funik, supra note 3, at 435-45, 464-65. For California law, see Estate of Resler, 43 Cal. 2d 726, 278 P.2d 1 (1954); Dargie v. Patterson, 176 Cal. 714, 169 P. 360 (1917).

441. See text accompanying notes 208-17 supra.
sion, section 407 of the Social Security Act, bars the will of the nonpayee spouse from acting on any of the benefits on hand. Probably it is not a bar. With respect to unpaid future benefits, ascertaining the community’s lump sum value or fractional interest contingent benefits is a complex task. But, assuming a community interest can be found, the question at the death of a spouse is, again, the effect of section 407. If the fully insured spouse is the decedent, may his will act on a community interest in widow’s benefits which the surviving spouse may receive in the future? If the noninsured spouse dies, may her will bequeath half the community interest in sums payable in the future to the survivor or to his dependents? Almost certainly section 407 gives a negative answer to both such questions.

If it be held that the Social Security Act prevents the will of the deceased spouse from operating upon future benefits payable to dependents of the insured spouse, as is very likely, and even on payments to the surviving spouse himself, which is probable, the state law, or even federal common law, may provide a remedy to the decedent to take account of this distortion of her testamentary rights. 442

Two such remedies may be available. First, the community may be granted a reimbursement claim based on FICA taxes paid at dissolution by death, similar to that discussed above with respect to remedies at divorce. 443 W’s half of such claim may then be reduced to cash as a creditor’s claim upon which her will may be permitted to operate. A second possible remedy available when normal rights of testamentary power are disturbed by federal preemption is to convert to the aggregate system of community ownership rights at dissolution. 444 This system would allow W’s will to operate on half of the aggregate community property, selecting entire assets to bequeath rather than a half interest in each asset. This approach, however, would be inconsistent with present California law which imposes a surviving spouse’s election (often called the “widow’s election”) in every case in which a will or will substitute attempts to operate on an entire item of community property not just the testator’s half interest. 445 In addition, one could not determine the

442. It has been shown, see note 256 supra, that Congress’ depriving W of testamentary powers — in effect making H her forced heir—is not a violation of the fifth amendment due process clause because California does not treat testamentary power as a proprietary right.

443. See notes 419-22 & accompanying text supra.

444. See REPPY & DE FUNIAK, supra note 3. The one community property state that may use the aggregate theory is Arizona, and the case that applies it involved disruption of item theory rights by the deceased’s will substitute—a community owned life insurance policy with a third party named recipient of all the proceeds. Gaetje v. Gaetje, 8 Ariz. App. 47, 442 P.2d 870 (1968).

445. The election enables the survivor to forego all benefits under the will (and perhaps of will substitutes) and to instead remove from operation of the will any
value of assets which, in the aggregate, the decedent’s will could
bequeath without handling the numerous and complex contingencies of OASDI discussed above with respect to the lump sum
valuation remedy at divorce.446 Finally, the aggregate theory is
unfair to the surviving spouse, for it apparently allows the first to
die the choice of which entire assets will be bequeathed (which
might be a community business at which the survivor spouse work-
ed). It is, in addition, unworkable for lack of any abatement solution
when the will purports to bequeath assets worth more than half the
value of the community.

Under existing California law, then, the only solution to reduc-
tion in testamentary powers of the decedent spouse by federal
preemption under the Social Security Act is reimbursement. This
remedy, however, could cause considerable hardship to the surviv-
ing spouse. At present, there is no authority concerning what
remedies, if any, are available to a testate decedent’s estate when
the nature of certain community property makes the decedent’s
interest in it not subject to testamentary power. When the decedent
himself has deliberately created this situation, presumably the estate
has no standing to seek any remedy and the will does not operate on
any interest in the property. When the other spouse or federal law
has created the problem, some sort of remedy can certainly be
claimed on equitable grounds. But since testamentary power is not a
property right, and since fashioning a remedy would cause the
probate court great valuation problems, the courts likely will claim
discretion to deny relief.

When the spouse dies intestate, community owned interests in
OASDI funds on hand and in future benefits pass to the surviving
spouse under Probate Code section 201. Certainly, however, by
force of federal law where the decedent is the insured, at least his
one-half interest in future benefits payable after his death to third
party dependents passes to them and not to the surviving spouse. If,
as seems likely, the survivor’s community interest in these third
party benefits cannot be claimed by the survivor to the detriment of
the payee, the surviving spouse may assert a creditor’s claim for
reimbursement against the estate of the decedent. Whether to grant
such reimbursement should be discretionary, based on the equities
as to the claimant.

446. See notes 400-13 & accompanying text supra.
CONCLUSION

The logic of *Brown* compels, and only rarely will any federal provision prevent, a broadened recognition by California courts of community interest in future retirement benefits generated by a married person’s labors or by contributions from community funds. *Brown*’s expansion of the community property concept does, however, create several new problems and forces re-examination of pre-existing ones (such as the terminable interest rule). This Article has suggested possible solutions to the problems under the existing federal and state statutory framework. But legislative solutions would lift most of the extremely complex problems from the courts.

First, although congressional action is unlikely, one can at least ask for it and point out the type of statutes that would be of great use to community property states. With respect to retirement programs operated under the taxation and spending powers, such as OASDI and the Railroad Retirement Act, Congress should by statute make clear that it has no wish to prevent the states from *valuing* at divorce, in order to determine the total community wealth at issue, either the “taxes” paid or the lump sum total of future benefits payable to all distributees. This would remove any possible doubt about the constitutionality of a *Milhan*-style remedy awarding all the benefits to the plan participant and offsetting other properties to his spouse. Spendthrift clause provisions such as section 407 of the Social Security Act should be amended to state expressly that community property states may award to a participant’s spouse, and compel him to pay to her, an appropriate community property fractional interest in future payments determined under state law. Presumably, Congress at the same time would want to state expressly that it wished to preempt any state law that might allow the spouse to reach a share of future payments made to the participant’s parents, children, second wife, etc. To forestall claims that this works an unconstitutional “taking” through the use in combination of the taxing and spending powers, Congress should expressly state that there is no federal concern as to whether or not a state court at dissolution of the community by death or divorce adjusts marital property rights by ordering reimbursement for a portion of community sums spent on the “taxes” which correspond under federal law to labors that produce no benefit for the participant’s spouse. Congress may also wish to state its intent that the will of no individual, participant or nonparticipant, be permitted to bequeath any interest in future unpaid benefits.

Second, statutes creating contributory retirement plans such as federal civil service must be amended. They should include all of the proposals made above for OASDI and the Railroad Retirement Act. Additionally, with contributory plans, Congress should either (1) attempt to expressly preempt any state law anti-gift provisions
that would preclude the participant from contributing community earnings to generate benefits for children, parents, and a second spouse without consent of the present spouse, or (2) enact a new benefit plan where the participant alone earns rights to future payments (at a considerably higher level) unless consent of his spouse is obtained. Perhaps if the first approach is adopted, problems of unconstitutional taking can be overcome by expressly giving the spouse a cause of action for reimbursement at divorce and by preempting her nonproprietary testamentary power under state law over her community share of benefits. I still find it hard to believe, however, that the commerce power gives Congress a basis to preempt protective statutes that are part of state marital property schemes such as Civil Code section 5125(b), even if full compensation is assured. To the extent that a state treats a deceased spouse as owning any interest in the various plans, Congress should provide a specific estate tax exemption.

It is unlikely Congress will act, and, hence, ameliorative legislation will be up to the state legislatures. The California legislature should by statute abrogate most of the terminable interest rule. This legislation should declare that whether a pension plan is created by federal law, state law, or private contract, a participant’s spouse has a community interest in all benefits unless they are traceable to separate labor or separate contributions in money. The beneficial aspects of the terminable interest rule can be preserved by codifying the “narrow” version of Waite. That is, Civil Code section 4800 should be amended to require the divorce court to value as best it can post-death benefits under the plan and award them to the participant spouse. An offsetting award of property of equal value should be made to his spouse, drawn from (1) community assets which otherwise would go to the plan participant, (2) the participant’s interest in property the spouses hold as joint tenants or tenants in common, and, if it is still necessary to reach other property to make the offsetting award, (3) the participant’s other separate property (except post-death benefits in the pension plan). Probate Code section 201 should be amended[47] to remove the

447. If the Legislature does take up amendment of Probate Code § 201, issues outside the scope of this Article, but closely related to it, should also be considered. Under present law, a married person who dies while feuding with his or her spouse is free to use the statutorily granted testamentary power over a half interest in the community estate to cause, out of spite, problems of partition of the community to the other spouse that could most likely be avoided by a thoughtful reform of the testamentary powers statute. For example, an angry wife could write a will bequeathing to her favored relative or friend half of her husband-attorney’s law practice, developed by him during marriage, consisting of half of all community tangible assets such as library books, office furniture, etc., half of all book assets such as accounts receivable, and even half of all intangible assets such as the attorney’s good will. The legislature could consider giving the surviving spouse, in such a situation, some aggregate theory election that would enable him to maintain such assets in value to community assets, equal in value to less than half the total community, as are especially personally significant to him.
testamentary power over her community interest in future benefits now given the spouse of the participant when she predeceases him. The amendment should state that such interest passes by intestate succession to the surviving spouse. (In my opinion the equities do not suggest giving the decedent an offsetting increased testamentary power over other assets.)

State legislation dealing with how the local courts are to respond to any federal preemption is also needed. Civil Code section 4800 should be amended to provide that if the divorce court finds that property which would be community owned under state law is, due to federal statute, not capable of being awarded to one of the spouses in whole or in part, an offsetting amount of other property should be awarded in lieu thereof. The provision for invading separate property of the spouse owing the offsetting award, suggested above for post-death benefits under state law, is also appropriate for the provision enacted to handle federal preemption problems. The amendment should further state that if the divorce court finds it impossible to make a realistic determination of the interests that it cannot divide due to federal preemption, it may award the entire pension or retirement plan interest or other federally created interest to the participant and give reimbursement to his spouse in the amount of half of all community contributions made to acquire the benefits or asset and half the value of “taxes” paid under the OASDI and Railroad Retirement Act type plans.448

The amendment proposed to Probate Code section 201 to handle the Benson-Waite problem will also eliminate any state-federal conflicts with respect to a decedent’s interest in OASDI and other federally created retirement benefits.449 The state, like Congress, should make clear that all such interests deemed to pass by intestate succession to the surviving spouse are not subject to inheritance taxes.

To codify what is suggested in Brown, Civil Code section 5125 should be amended to eliminate equal management powers by the participant’s spouse over the community interest in all types of retirement plans, federal, state, and private. The state legislature ought to consider a gesture of goodwill to the Congress in the form of an amendment to Civil Code section 5125(b) that would elimi-

448. With respect to noncontributory plans such as military retired pay schemes, reimbursement is impossible and third party interests in which federal law prohibits a divorce court to give W a fractional interest will simply have to be valued as best the court can.

449. Under the presently existing OASDI benefits scheme, when W predeceases H it is impossible that third parties such as parent, child, second wife, etc., will be receiving benefits. Conceptually, H does take the entire property (in the nature of a forced heir’s inheritance), although subsequent events may give third parties a derivative claim arising out of the rights H has inherited.
nate doubts about the constitutionality of some provisions of federal contributory schemes such as the Civil Service Retirement Act. It seems very reasonable to me to provide that the anti-gift statute does not apply to community contributions in labor or money that generate benefits for children, parents, and future spouses of the participant.450 This would leave the Spanish-Mexican rule operative and give the participant’s spouse a cause of action against the participant (or his estate) at dissolution of the community if the overall effect were an unreasonable diversion of community funds away from the claimant spouse to third parties, an extremely unlikely occurrence.

450. The amendment should withdraw the anti-gift rule only insofar as the employee has no choice under his statutorily controlled retirement plan but to make, if he participates, third parties such as children, parents, and future widows beneficiaries. To the extent that the participant has an election to make under the plan to select beneficiaries to receive payments after his death (or earlier, if any plan should so provide) the present California law that prohibits him from making a designation that would defeat his spouse’s community interest should be retained.