finds some, but not all, of the report unauthorized. There will be no opportunity for the grand jury to rewrite its report to include those portions of its report considered improper by the superior court but proper by the appellate court.

Conclusion

People v. Superior Court gives California superior courts the narrow authority to review the legality of grand jury reports. Although this reviewing authority is strictly limited to ensuring that reports are within the jury's legal authority, it has the effect of diminishing the independent, watch-dog nature of the California grand jury. This authority gives superior court judges the power to censor the work of grand jurors and makes appeals from such censorship difficult to initiate. If grand juries are to fulfill their intended function of monitoring county government affairs, courts in the future must restrict the holding of *People v. Superior Court* to the examples of unauthorized conduct described therein. In addition, grand juries should minimize the danger inherent in judicial review by leaving detailed instructions concerning their desires in the event that their appeal is eventually affirmed in whole or in part; they should quickly appeal adverse rulings of the superior court and preserve copies of their rejected reports. Then, perhaps, the holding in *People v. Superior Court* will perform its intended function.

Mary B. Seyferth

II

COMMUNITY PROPERTY

COMMUNITY PROPERTY STATUS OF MILITARY BENEFITS

In re *Marriage of Fithian*;[1] In re *Marriage of Milhan*;[2] In re *Marriage of Loehr*;[3] In re *Marriage of Jones*.[4] During the period immediately prior to California's statehood (1822-1846)[5] the govern-

1. 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974) (Mosk, J.) (unanimous decision), *cert. denied*, 419 U.S. 825 (1974).

2. 13 Cal. 3d 129, 528 P.2d 1145, 117 Cal. Rptr. 809 (1974) (Burke, J.) (unanimous decision), *cert. denied*, 421 U.S. 976 (1975).

3. 13 Cal. 3d 465, 531 P.2d 425, 119 Cal. Rptr. 113 (1975) (Tobriner, J.) (unanimous decision).

4. 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975) (Tobriner, J.) (unanimous decision).

5. This period encompasses the time from Spain's renunciation of all sovereignty

ance of marital property was guided by the Spanish Code, the *Novisima Recopilacion* of 1805, as modified by Mexican legislation.[6] The *Novisima* provides:

> Declaring (maintaining) the laws of the Fuero and what is contained in the book of Estilo de Corte, and the other laws which govern the method which is to be had touching property earned between husband and wife during marriage, I order and ordain that all and any property resulting from military service (bienes castrenses), royal offices, and gifts that shall have been gained and improved, and held during the marriage between the husband and wife by one of them, be and remain the property of the one that may have earned the same without the other having any part thereof, as required by the laws of Fuero.[7]

In this series of dissolution cases, the California Supreme Court has resolved any doubts concerning the continued viability of such a policy. Exclusion from the marital community of the recompense paid the sovereign's legions is no longer the rule in California.

Fithian began this line of decisions by establishing that military retirement pay is a community asset to the extent attributable to employment during marriage. As in the case of benefits ensuing from a private or state employment relationship, however, the right to receipt of the subject benefits must completely accrue prior to dissolution. If the serviceman has not performed all conditions necessary to qualify for receipt of retirement pay prior to termination of the marriage, his interest in any future payments is considered a mere expectancy and does not become a tangible asset of the community. In arriving at this result, the court quickly dismissed the husband's contention that his retirement pay constituted consideration for present and future obligations to the government.[8] This characterization was found untenable since the amount of retirement benefits received bears no relation to any continuing duties owed the government, and should the veteran be recalled to active service, he receives compensation according to the active duty pay scale. The husband's alternative contention, namely, that retirement pay is a gratuity and hence the separate entitlement of its recipient, was also readily rejected by the court.[9] In the view of the

over California in favor of Mexico to the raising of the American flag by Commodore Sloat over Monterey on July 7, 1846.

6. P. CONMY, THE HISTORIC SPANISH ORIGIN OF CALIFORNIA'S COMMUNITY PROPERTY LAW AND ITS DEVELOPMENT AND ADAPTATION TO MEET THE NEEDS OF AN AMERICAN STATE 3 (1957).

7. Book 10, Title 4, Law 5. The translation of the *Novisima Recopilacion* relied upon here appears in 2 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 11 (1943). This work also contains translations from the writings of authoritative contemporary Spanish commentators.

8. 10 Cal. 3d at 603-04, 517 P.2d at 456, 111 Cal. Rptr. at 376.

9. 10 Cal. 3d at 596, 517 P.2d at 451, 111 Cal. Rptr. at 371. The argument

court, such benefits do not derive from the detached beneficence of the employer; they are part of the consideration earned for services rendered.

The only serious impediment to the result announced by the court in *Fithian* was the husband's contention that characterization of the benefits in accordance with the state law prevailing where private or state retirement pay is at issue would frustrate Congress' purpose in enacting the military retirement pay system. This assertion goes to the heart of the decision's viability, for the supremacy clause requires that federal legislation enacted pursuant to the enumerated powers prevail over an otherwise appropriate state policy. In examining the legislative history, however, the court found no express or implied intent to render retirement pay the separate property of the recipient or to preclude application of state property laws.

Jones and *Loehr* presented the issue of whether disability benefits which accrue before the serviceman has earned a vested right to retirement pay through longevity of service should also be regarded as consideration for employment and therefore an asset of the community. This is a more difficult question than the one raised in *Fithian.* On the one hand, the contingency which results in receipt of payments is not the performance of any services, but rather the occurrence of an injury or other disabling event. Yet it is undeniable that the recipient has not purchased the right to collect payments upon occurrence of such a contingency; rather, such right is part of the package of benefits which accrues to the serviceman as the result of his employment relationship. The supreme court chose to base its result on the employer's purpose for awarding disability pay and held that such payments are intended to compensate the injured serviceman for a present and future loss of earning potential and to meliorate any pain and suffering which the veteran must endure.[10] So long as the marriage is intact, this loss of potential operates to the detriment of the community, but once the marriage ceases, the loss becomes the personal burden of the disabled individual. Likewise, after dissolution pain and suffering are the unique burden of the disabled individual. Hence, disability pay was found to be an asset of the community only if received during the marriage.

In *Milhan,* the parties contested the status of a National Service Life Insurance policy purchased with community funds. It was estab-

---

that military retirement pay is a gratuity and hence the separate property of its donee has been universally rejected in other jurisdictions. *See, e.g.,* LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969); Kirkham v. Kirkham, 335 S.W.2d 393 (Tex. Civ. App. 1960); Morris v. Morris, 69 Wash. 2d 506, 419 P.2d 129 (1966).

10. 13 Cal. 3d at 461-62, 531 P.2d at 423-24, 119 Cal. Rptr. at 111-12.

lished by the United States Supreme Court in *Wissner v. Wissner*[11] that federal statutes guaranteeing to the insured in such a policy the absolute right to select his/her beneficiary preclude a state court from directing division of its proceeds. While accepting that *Wissner* prevents any order demanding the surrender or impairment of the policy, the California Supreme Court held that the insured may be compelled to "reimburse" his/her spouse in the amount of half the value of the policy attributable to community funds.[12] This adjustment in the allocation of other assets available upon dissolution of the marriage effectively requires the insured to buy out the one-half ownership interest of the other partner in the policy.

This Note will discuss the development of community property law in California relevant to these four cases, respond to criticism of the court's position which has been based on asserted federal preemption of state property laws in this area, suggest a new standard of necessity and propriety in judging the ability of Congress to supersede the result in these cases, and lastly, outline the implications of the court's reasoning in fact situations as yet not directly before it.

I. State Policy

a. Retirement Pay

The result in *Fithian* did not come as a surprise to observers of community property law in the state of California. The reasons for the exclusion of military pay and other benefits from the property of the community in the *Novisima Recopilacion* have long ceased to exist. The Spanish soldier could expect to have little or no contact with his family for extended periods of time and was responsible for his own maintenance from the pay received.[13] In effect he was on a "leave of absence" from the economic interdependency of the marriage partnership. Although military assignments may still require the temporary separation of husband and wife, the impact of military service on family life is not nearly so acute as it was prior to the nineteenth century. Cohabitation and mutual economic support are generally feasible, and many military occupations carry all the incidents of an eight-to-five job. As the reason for the rule ceased, California courts gave notice of the ultimate result to be reached in *Fithian*.

---

11. 338 U.S. 655 (1950).

12. The court left open the question of how present value should be measured. Alternate valuation methods include: (1) cost of obtaining similar coverage on the market, (2) cash surrender value, and (3) use of the insurer's interpolated terminal reserve figure. For an explanation of the last method of valuation, see 5 G. COUCH, CYCLOPEDIA OF INSURANCE LAW 54 (2d ed. 1961).

13. 1 W. DE FUNIAK, *supra* note 7, at 193.

In *French v. French*[14] the trial court included the reserve pay[15] to be received by the husband as a member of the Fleet Reserve of the United States Navy in the community assets subject to division upon dissolution. The supreme court reversed this portion of the award, finding that the defendant's 16 years of service in the Navy resulted in no vested rights to retirement benefits and that his present right to collect reserve pay was conditioned upon performance of continuing obligations to the government.[16] In reaching this result, the court indicated complete willingness to include in the property of the community a right to collect benefits not made contingent on any future event and fully accrued during marriage:

> Another point raised by the respondent is that retirement pay is community property because it is compensation for services rendered in the past. That is correct, but under the applicable statutes the appellant will not be entitled to such pay until he completes a service of fourteen years in the Fleet Reserve and complies with all of the requirements of that service. At the present time, his right to retirement pay is an expectancy which is not subject to division as community property.[17]

Thus, while the case itself did not involve the disposition of retirement benefits, the words of Justice Edmonds speaking for a unanimous court gave warning of their inclusion.[18]

It has been contended that even after a serviceman satisfies all present conditions for receipt of retirement pay, he is still only possessed of a mere expectancy, since future legislation may alter his entitlement. In *Waite v. Waite*[19] the supreme court rejected the similar contention that a judge's right to payments under the Judges' Retirement Law, California Government Code sections 75000-110, is of a purely conditional nature, since acceptance of temporary appointments in the future

---

14. 17 Cal. 2d 775, 112 P.2d 235 (1941).

15. The amount of such pay was determined under the Naval Reserve Act of 1938, 52 Stat. 1178 (now 10 U.S.C. §§ 6330 *et seq.* (1970)).

16. The obligations articulated by the opinion included two months' active duty in each 4-year period, submission to a physical examination at least once every four years, compliance with certain training requirements, and the possibility of a change in status to active duty (in which event, however, reserve pay would cease). 17 Cal. 2d at 777, 112 P.2d at 236.

17. *Id.* at 778, 112 P.2d at 236.

18. While foreshadowing the rule of inclusion announced in *Fithian, French* also outlined the primary limitation upon that rule. The right to receive benefits must fully accrue during the course of the marriage. Williamson v. Williamson, 203 Cal. App. 2d 8, 21 Cal. Rptr. 164 (2d Dist. 1962), relied upon *French* in holding that a San Francisco policeman's right to retirement pay, if and when he completed the requisite number of years' service, was a mere expectancy not subject to order of the court in dissolution proceedings.

19. 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972).

might reduce the amount to which he is entitled and an act of the legislature may increase his benefits. The precise amount of payments to be received need not be definite so long as the right thereto has accrued.

The same year that *Waite* was decided, three intermediate decisions dealt directly with the community property status of military benefits. In re *Marriage of Karlin*[20] applied the logic of *Waite* to pension benefits conferred by act of Congress. While recognizing that such benefits are subject to modification by Congress,[21] the court of appeal held that nonetheless the pensioner possessed a present right to payments permitted under governing law. Such right having accrued during marriage as a result of employment, it constituted community property. *Brown v. Brown*[22] reached the same result without addressing the potential impact of Congress' ability to modify or withdraw such benefits upon vesting of the right to their receipt during marriage. *Bensing v. Bensing*[23] held that a husband's right to Air Force retirement pay vested upon completion of the requisite period in the service. Therefore, even though the catalyst to receipt of the payments, his retirement, had not yet occurred at the time of the divorce, his right to eventual payment was a community asset.

These cases regard the "vesting" of the right to retirement benefits for purposes of establishing their community property status not as the date upon which payment can no longer be withdrawn, but rather the time when all events on which payment is contingent (under present law) have occurred. This appears most appropriate to the task at hand. In dividing the assets of the community, the court may either award the serviceman's spouse one-half of any retirement pay received in the future, or grant her a lump sum award equal to the present value of any right to future payments.[24] If the former choice is elected, the court need not concern itself with the possibility that existing rights may at some future time be altered.[25] Its concern is properly only for the amount of economic resources and assets *presently* subject to the dominion of the community. If the nature of the resource is altered in the

20. 24 Cal. App. 3d 25, 101 Cal. Rptr. 240 (4th Dist. 1972).

21. The opinion states: "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." 24 Cal. App. 3d at 30, 101 Cal. Rptr. at 243.

22. 27 Cal. App. 3d 188, 103 Cal. Rptr. 510 (2d Dist. 1972).

23. 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1st Dist. 1972).

24. The latter choice is not a viable alternative where the other assets available at the time of dissolution are insubstantial.

25. The potentiality for modification may be significant in fixing the present value of the right to future payments if the court awards a lump sum to either party liquidating that party's interest. Its relevance to this valuation question, however, does not suggest relevance to the issue of the resource's inclusion in the assets of the community.

future, each party will experience equally the impact of such alteration since each will continue to receive half of whatever payments are provided. There can be no doubt that performance of all conditions requisite to receipt of military retirement benefits under present law creates an economic resource. Neither can there be any doubt that such resource is a product of an employment relationship.[26]

In addition to the rule that "mere expectancies" are not community property, California courts have imposed a requirement that any benefit included must be the entitlement of, and subject to the dominion of, the party who allegedly earned it. Rights separately conferred by the employer upon persons deemed to be natural objects of his employee's bounty are beyond the reach of the community. *Benson v. City of Los Angeles*,[27] wherein the supreme court determined the status of benefits payable under a municipal employees' pension plan to the surviving spouse of the pensioner, is exemplary of this requirement. The deceased's first wife sought a declaration that she, not the second wife and surviving widow of the employee, was entitled to funds attributable to the period of employment during the first marriage. The court held that the first wife did have a one-half interest in all rights and benefits conferred upon her husband during marriage as a result of his employment, including retirement pay.[28] Such holding, however, did not improve her position, for all rights of the pensioner under the plan ceased upon his death. The fact that the municipality chose to separately confer certain rights upon the widow of its former employee was found irrelevant to the rights of the community.[29] The opinion suggested that the first wife could have asserted a legal right to a portion of the payments received during her former husband's lifetime.[30]

Fithian did not modify the state policy against characterization of expectancies as community property or the rule announced in *Benson v.*

26. There is substantial agreement amongst community property jurisdictions on the inclusion of military retirement benefits earned during marriage in the property of the community. Ramsey v. Ramsey, 535 P.2d 53 (Idaho 1975); LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969); Busby v. Busby, 457 S.W.2d 551 (Tex. 1970); Davis v. Davis, 495 S.W.2d 607 (Tex. Civ. App. 1973); Miser v. Miser, 475 S.W.2d 597 (Tex. Civ. App. 1971); Mora v. Mora, 429 S.W.2d 660 (Tex. Civ. App. 1968); Kirkham v. Kirkham, 335 S.W.2d 393 (Tex. Civ. App. 1960); Morris v. Morris, 69 Wash. 2d 506, 419 P.2d 129 (1966).

27. 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963).

28. *Id.* at 359, 384 P.2d at 651, 33 Cal. Rptr. at 259.

29. *Accord, In re* Marriage of Bruegl, 47 Cal. App. 3d 201, 120 Cal. Rptr. 597 (4th Dist. 1975); *In re* Marriage of Peterson, 41 Cal. App. 3d 642, 115 Cal. Rptr. 184 (2d Dist. 1974).

30. 60 Cal. 2d at 360, 384 P.2d at 652, 33 Cal. Rptr. at 260. Phillipson v. Bd. of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970), acted upon the implication in *Benson* by conclusively stating that retirement benefits payable to a state employee (whether attributable to his own contributions or an accrued right to contributions of the employer) are subject to division upon divorce.

City of Los Angeles that the spouse gains a vested interest only in entitlements of the employed partner, subject to the dominion of that individual during his/her lifetime. These well-established state policies were applied directly to military retirement benefits. Part IV of this Note, however, will discuss certain ways in which the rationale applied in *Fithian* may require modification of these policies.

b. Disability Pay

Initially, disability pay must be distinguished from the retirement benefits involved in *Fithian*. A member of the armed forces may be retired due to physical disability if the disability is permanent and (1) he has served at least 20 years, (2) his disability is at least 30 percent and he has served at least 8 years, or (3) his disability is at least 30 percent and resulted from the performance of active duty.[31] "Retired pay" to be received in such event is computed in one of two manners. As the serviceman elects, he may receive either his monthly basic pay multiplied by 2½ percent for each year of service, or his monthly basic pay multiplied by the percentage of his disability. Monthly retired pay, however, may not exceed 75 percent of the disabled serviceman's monthly basic pay.[32] The supreme court has denominated pay reeeived under the first method of computation "retirement pay" since its amount bears no relation to the extent of disability and is roughly equivalent to the pay the serviceman would have reeeived if he had retired voluntarily with twenty years service.[33] Pay received under the second method of computation has been referred to as "disability pay" because its amount is determined by the extent of the serviceman's handicap and its receipt is not dependent on accrual of the right to retirement benefits. It was the community property status of this latter benefit which was contested in *Jones* and *Loehr*.

31. 10 U.S.C. §§ 1201, 1204 (1970).

32. 10 U.S.C. § 1401 (1970). In addition to the eligibility criteria outlined in the text, the secretary of the branch concerned may place a temporarily disabled serviceman on the retired list, with pay computed in the same manner, if he determines that the disability may be permanent. 10 U.S.C. §§ 1202, 1205 (1970). The serviceman retired under these sections is guaranteed minimum pay equal to 50 percent of his monthly basic pay. *see* 10 U.S.C. § 1401 (1970).

33. *See* 10 U.S.C. § 1401 (1970), *incorporating* 10 U.S.C. § 1293 (1970) (voluntary retirement of warrant officers after 20 years of service); 10 U.S.C. § 3991 (1970), *incorporating* 10 U.S.C. §§ 3911 (voluntary retirement of regular or reserve commissioned officers of the Army after 20 years of service), 3913 (retirement of Army officers with 20 years of service not recommended for promotion), 3914 (voluntary retirement of Army enlisted personnel with 20 to 30 years of service) (1970); 10 U.S.C. § 6323(c) (1970) (voluntary retirement of Naval officer with 20 years of service); 10 U.S.C. § 8991 (1970), *incorporating* 10 U.S.C. §§ 8911 (voluntary retirement of regular or reserve commissioned officers of the Air Force after 20 years of service), 8913 (retirement of Air Force officers with 20 years of service not recommended for promotion), 8914 (voluntary retirement of Air Force enlisted personnel with 20 to 30 years of service) (1970).

Military disability pay may be considered analogous to workmen's compensation disability benefits since they are both designed to meet a similar need. Two California cases have held that workmen's compensation benefits constitute community property.[34] Both of these decisions, however, dealt with the status of benefits already received during the course of the marriage. California Civil Code section 5126 suggests that these cases are not necessarily applicable to benefits not yet received at the time of dissolution. Section 5126 provides that amounts received in satisfaction of a judgment for damages ensuing from personal injuries are the separate property of the injured spouse if received after an interlocutory decree or final judgment of dissolution.[35] If assets of the community or separate funds of the other partner were expended for expenses included in the award of damages, reimbursement may be compelled.[36] Although the veteran's claim to disability pay is not a judgment, the nature of the claim makes the policy behind the statute equally applicable. Justice Traynor observed in *Washington v. Washington*,[37] which preceded codification of the rule, that damages for future expenses, future pain and suffering, and future loss of earnings are properly the separate recompense of the injured party after a divorce. After the marriage has ceased, the individual, not the community, carries the loss.[38] Disability benefits are an attempt to compensate for such loss.

---

34. Northwestern R.R. v. Industrial Accident Comm'n, 184 Cal. 484, 194 P. 31 (1920); Estate of Simoni, 220 Cal. App. 2d 339, 33 Cal. Rptr. 845 (2d Dist. 1963).

35. The statute provides:

> All money or other property received by a married person in satisfaction of a judgment for damages for personal injuries or pursuant to an agreement for the settlemeut or compromise of a claim for such damages is the separate property of the injured person if such money or other property is received as follows:
>
> 1) After the reudition of a decree of legal separation or a final judgment of dissolution of a marriage.
> 2) While either spouse, if he or she is the injured persou, is living separate from her husband [sic].
> 3) After the rendition of an interlocutory decree of dissolution of a marriage.

CAL. CIV. CODE § 5126(a) (West Supp. 1975).

36. CAL. CIV. CODE § 5126(b) (West Supp. 1975).

37. 47 Cal. 2d 249, 302 P.2d 569 (1956).

38. It should be noted that the rationale relied ou in *Washington* goes further than the result in that case (which held that a cause of action not yet reduced to damages becomes the separate property of the injured spouse upon divorce) or the requirement of Civil Code section 5126. If a disabled employee received a lump sum payment prior to dissolution, as compensation for his future loss of earnings as well as for pain and suffering, such amount would constitute community property under section 5126. A part of this benefit, however, was clearly intended to compensate the disabled individual for losses to be experienced *after* dissolution. Justice Traynor's reasoning requires that the disability payment be appportioned between the period of disability elapsing prior to divorce and the period for which such disability may be expected to continue. The *Wash-*

Although the court's result in *Jones* and *Loehr* depended on the federal government's purpose in creating disability benefits, it was not based on any provision of federal law precluding characterization of the subject benefit as community property. The court merely sought to ascertain the nature of the property interest which the federal government, as an employer, had intended to confer. Without expressly describing it as such, the court's reasoning suggests that disability pay is a gratuity, a product of the employer's beneficence (or in some cases, the employer's compliance with legal obligations owed *indirectly* to the employee as a result of state or federal requirements necessitating that some protection in the event of disability be afforded to employees). If the injured party is married, both he and his spouse are regarded as the beneficiaries of the employer's donative intent or legal obligations. Upon dissolution, the injured individual is considered the sole beneficiary. Since the result was not based on any preeminent provision of federal law, the court's reasoning is equally appliable to disability benefits ensuing from a private or state employment relationship if created with similar intentions.

c. Proceeds of Military Life Insurance Policies

The development of state community property law with regard to military life insurance policies has been drastically affected by *Wissner v. Wissner*.[39] In *Wissner* the Supreme Court reversed the decision of a California court of appeal ordering the beneficiary of life insurance proceeds under the National Service Life Insurance Act[40] to pay half the proceeds, as community property, to the deceased soldier's widow. The Court found two express sections of the National Service Life Insurance Act to be in direct conflict with such an order. Provisions guaranteeing the insured the absolute right to select his beneficiary[41] and providing that 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,"[42] were held to preclude the court's efforts to trace plaintiff's vested interest in community funds expended for premiums on the policy to its ultimate proceeds. Once the majority was confident of a direct conflict between the provisions of the federal act and application of state property law, it had no qualms about

ington rationale requires that any payment attributable to this second period be characterized as the recipient's separate entitlement.

39. 338 U.S. 655 (1950).

40. National Service Life Insurance Act, 38 U.S.C. §§ 701 *et seq.* (1970).

41. 38 U.S.C. § 717(a) (1970). At the time of the decision this provision was located at 38 U.S.C. § 802(g).

42. 38 U.S.C. § 3101(a) (1970). At the time of the decision this provision was located at 38 U.S.C. § 454a.

upholding the constitutionality of the insurance plan as a proper incident of the powers "to raise and support Armies"[43] and "to provide and maintain a Navy."[44] The constitutionality of the plan accepted, the plaintiff's one-half ownership interest in the policy immediately fell prey to the supremacy clause.[45]

The dissent in *Wissner* made a strong argument that any conflict between the provisions of the federal insurance plan and California property law ensued solely from rote application of the statute verbatim, without regard for its intended impact. Speaking for the dissent, Justice Minton attempted to distinguish between claims brought by creditors and claims based on an ownership interest in the policy.

> I think the statute presupposes that the beneficiary is the undisputed owner of the proceeds, and that a creditor has sought to reach the fund on an independent claim. Under those circumstances the remedy is denied, for the statute immunizes the fund from levy or attachment. That is not the case before us. The nature of this dispute is a claim by the wife that she is the *owner* of a half portion of these proceeds, because such proceeds are the fruits of funds originally hers.[46]

The extrapolation of 38 U.S.C. section 3101(a) to cover not only the "claims of creditors," but also the asserted interest of a defrauded owner, derogated a principle recognized in state and federal courts alike that

> [w]here funds of another have been misappropriated and used to purchase, or pay premiums on, life insurance, the courts will generally allow some form of recovery from the proceeds by the one whose funds were misused. Generally the courts will impress a trust, constructive or resulting, on the proceeds of life insurance, in favor of one whose money was wrongfully[47] used to pay the premiums thereon.[48]

If the conflict between the rights of a claiming owner and the

---

43. U.S. CONST. art. I, § 8, cl. 12.

44. U.S. CONST. art. I, § 8, cl. 13.

45. U.S. CONST. art. VI, § 2.

46. 338 U.S. at 662 (Minton, J., dissenting opinion).

47. The facts in *Wissner* as reported by the court of appeal, 89 Cal. App. 2d 759, 201 P.2d 837 (3d Dist. 1949), make the embezzlement analogy particularly applicable. The Wissners were married in 1930. Although the husband-insured found the partnership notion of community property quite agreeable during the completion of his medical education, partially at his wife's expense, in 1944 he closed the couple's joint bank accounts and placed all assets in the hands of his parents.

48. 6 G. COUCH, CYCLOPEDIA OF INSURANCE LAW 174 (2d ed. 1961); *see* Wendell P. Colton Co. v. New York & Cuba Mail S.S. Co., 27 F.2d 657, 658 (2d Cir. 1928); Vorlander v. Keyes, 1 F.2d 67 (8th Cir. 1924) (Minnesota law); Brown v. New York Life Ins. Co., 58 F. Supp. 252 (D. Ore. 1944) (Oregon law), *aff'd* 152 F.2d 246 (9th Cir. 1945); Brodie v. Barnes, 56 Cal. App. 2d 315, 132 P.2d 595 (1st Dist. 1942); Fidelity & Deposit Co. v. Stordahl, 353 Mich. 354, 356, 91 N.W.2d 533, 535 (1958); Massachusetts Bonding & Ins. Co. v. Josselyn, 224 Mich. 159, 194 N.W. 548 (1923);

prohibition of section 3101(a) is a less than distinct one,[49] the majority's position is not strengthened by reliance on 38 U.S.C. section 717(a), guaranteeing to the insured the right to select his own beneficiary. The insured in *Wissner* was allowed not only to select *his* beneficiary, but moreover to select *his wife's* beneficiary. He directed the ultimate dispensation of funds (or their proceeds) belonging to another. This result is highly incongruous with federal and state cases recognizing certain limitations upon section 717(a). In cases prior to *Wissner*, neither section 717(a) nor section 3101(a) was found to constitute a bar to claims for alimony or child support under state law. The Court of Appeals for the Districtof Columbia Circuit reasoned that the purpose of the statute was to protect the insured and his dependents from claims hostile to the duty of support.[50] *Gaskins v. Security-First National Bank of Los Angeles*[51] reached the same result on the ground that such claims do not constitute a "debt" within the meaning of the statute but rather an obligation growing out of the family relationship

---

Truelsch v. Miller, 186 Wis. 239, 202 N.W. 352 (1925); *cf.* American Casualty Co. v. M.S.L. Indus. Inc., Howard Indus. Div., 406 F.2d 1219, 1222 (7th Cir. 1969). *See also* CONTINUING EDUCATION OF THE BAR, FAMILY LAW FOR CALIFORNIA LAWYERS 470 (1956); W. VANCE, HANDBOOK TO THE LAW OF INSURANCE 618 (2d ed. 1930).

49. If the position advanced in the text is accepted, and application of state community property law found not to contravene 38 U.S.C. section 3101(a), there remains a choice of law question. Since 38 U.S.C. section 3101(a) attempts to broadly govern the susceptibility of insurance proceeds to judicial process, the court must determine whether to apply nonconflicting state law or judicially fashion new federal law to accommodate circumstances unforeseen by the legislature. The opinion of the court in Roecker v. United States, 379 F.2d 400 (5th Cir. 1967) (holding that state law determines whether or not a guardian may alter the beneficiary designation of an incompetent), artfully summarizes the standard to be applied in such a circumstance:

> Many considerations bear on the decision whether to apply state law or to fashion federal law. For example, where the particular question under the federal act depends on a status traditionally governed by state law, the federal court may infer that Congress, legislating against this background of state law, intended that law to govern. See De Sylva v. Ballantine, 1956, 351 U.S. 570, 76 S. Ct. 974, 100 L.Ed. 1415. Similarly, where application of state law would not interfere with the federal program, but application of federal law would disrupt state agencies, state law should be applied, RFC v. Beaver County, 1946, 328 U.S. 204, 66 S. Ct. 992, 90 L.Ed. 1172. . . . And, of course, the court will fashion federal law where nationwide uniformity is necessary to protect a federal program. Textile Workers Union of America v. Lincoln Mills, 1957, 353 U.S. 448, 77 S. Ct. 912, 1 L.Ed. 2d 972.

379 F.2d at 405. *See also*, Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 802-14 (1957). Nationwide uniformity in the definition of property rights is not necessary to assure that military insurance proceeds will be protected from the claims of creditors. Moreover, the disruption of rights conferred by state policy resultant from application of contrary federal law militates against that alternative. It must therefore be coucluded that Congress intended 38 U.S.C. section 3101(a) to apply against the backdrop of existing state property law.

50. Schlaefer v. Schlaefer, 112 F.2d 177 (D.C. Cir. 1940).

51. 30 Cal. App. 2d 409, 86 P.2d 681 (2d Dist. 1939).

and public policy. These cases were given tacit approval by the *Wissner* majority.[52]

Subsequent to *Wissner* other exceptions to the rule of section 717(a) have been recognized where an overriding policy is found to require a disposition contrary to that requested by the beneficiary. In *Shoemaker v. Shoemaker*[53] the court found the public policy against felonious heirship sufficient to preclude receipt of proceeds by a named beneficiary who was responsible for the insured's death. Likewise, if an attempt to make payments as directed by the insured will result in escheat of the proceeds, it has been held that the government should make no payments on the policy.[54]

These cases establish that section 717(a) cannot be read as an absolute dictate. They hold that in enacting this provision Congress did not intend to ensure the right of the serviceman to select his beneficiary in all instances. If the legislative intent behind section 717(a) is insufficient to require recognition of the serviceman's absolute right to select his own beneficiary, how can it be found so pervasive as to require that the insured be permitted to designate a beneficiary for the funds of another? The *Wissner* majority does not answer this question. Surely if Congress did not mean to preclude application of sound policies against the desertion of dependents and felonious heirship, it did not intend to preclude remedies against embezzlement. As stated so aptly for the dissent by Justice Minton:

> I cannot believe that Congress intended to say to a serviceman, "You may take your wife's property and purchase a policy of insurance payable to your mother, and we will see that your defrauded wife gets none of the money."[55]

Despite this inconsistency and a vigorous dissent, *Wissner* remains sound authority. It has been applied frequently by lower courts both to frustrate claims by plaintiffs such as Mrs. Wissner[56] and to enforce payment to former wives claiming as named beneficiaries despite the terms of a divorce settlement relinquishing any right to such benefits.[57] *Wissner* has been applied to preclude a divorce decree ordering the

52. 338 U.S. at 659.

53. 263 F.2d 931 (6th Cir. 1959).

54. Burke v. United States, 459 F.2d 1017 (8th Cir. 1972).

55. 338 U.S. at 663-64.

56. Fitzstephens v. United States, 189 F. Supp. 919, 921 (D. Wyo. 1960); Eldin v. United States, 157 F. Supp. 34, 37 (S.D. Ill. 1957); Heifner v. Soderstrom, 134 F. Supp. 174, 178 (N.D. Iowa 1955); *cf.* Suydam v. United States, 404 F.2d 331 (D.C. Cir. 1968) (husband's agreement to provide for children upon death gave them no claim to insurance proceeds).

57. United States v. Donall, 466 F.2d 1246 (6th Cir. 1972); Taylor v. United States, 459 F.2d 1007 (9th Cir. 1972); *cf.* McCollum v. Sieben, 211 F.2d 708 (8th Cir. 1954).

husband to make no change in the designated beneficiary of his military insurance policy.[58] Since *Wissner* was based on a conflict between state policy and specific federal statutes rather than any overriding federal policy against application of community property laws in this context, California courts have steadfastly refused to extend *Wissner* to cases not involving an attempt to compel designation of a specific beneficiary or an action against a named beneficiary.[59] Since the wife in *Milhan* sought reimbursement out of *other* community assets, the specific statutory conflict found problematic in *Wissner* was not present.

Only one state supreme court in a community property jurisdiction other than California has determined whether the insured under a National Service Life Insurance policy may be required upon dissolution to reimburse his/her spouse for one-half the present value of the policy attributable to community funds. In *Ramsey v. Ramsey*[60] the Supreme Court of Idaho held that such policies may not be considered community property because the creation of "vested rights" in NSLI policies for anyone other than the insured is contrary to federal statute and case law.[61] Although the wife in *Ramsey* apparently did not present a well-formed request for the remedy afforded in *Milhan*, the position taken by the Idaho Supreme Court would seem to preclude any award or allocation premised on the community property status of the policy.

Two opinions in *Ramsey*, agreeing with the majority's dispensation of the NSLI policy, but dissenting from the court's inclusion of military retirement pay in the assets of the community, expand upon the position

---

58. Hoffman v. United States, 391 F.2d 195 (9th Cir. 1968).

59. In Estate of Allie, 50 Cal. 2d 794, 329 P.2d 903 (1958), the supreme court held that proceeds payable to the serviceman's estate may be treated as community property because the insured has effectively waived any right to designate a named beneficiary.

60. 535 P.2d 53 (Idaho 1975).

61. *Id.* at 56. Ironically the Idaho Supreme Court cites *Fithian* and *Milhan* as authority for the basis of its holding. This is perplexing in light of the fact that *Milhan* reaches an opposite result.

> *Wissner* does not require community property states to classify the proceeds of National Service Life Insurance policies as separate property, but only to refrain from administering those incidents of community property law which would frustrate the congressional plan.

13 Cal. 3d at 132, 528 P.2d at 1146, 117 Cal. Rptr. at 810.

The federal statute which the Idaho Supreme Court finds contrary to allocation of community property in a manner designed to compensate each partner for funds appropriated by the other spouse to his/her separate benefit is not specified. If the court relies upon 38 U.S.C. § 717(a) (1970), guaranteeing to the NSLI insured the absolute right to select a beneficiary and alter that designation, the reading is somewhat attenuated. While that section implies that no beneficiary acquires vested rights in the policy since the designation is subject to change, it has no bearing on the rights of one who claims not as a beneficiary, but rather as an owner of funds used to pay premiums on the policy. The section is particularly inapplicable where the claimant does not seek recourse to the policy, but rather to other funds.

adopted by Judge B. Abbott Goldberg in a recent article taking issue with the trend towards inclusion of military retirement benefits in community property.[62] The two dissenting justices and Judge Goldberg contend that Congress intended all incidents of retirement pay, disability pay, and military life insurance to be governed by federal law, including their status as separate or community property. It thus becomes clear that any obstacle to treatment of military retirement benefits in the same manner as considerations conferred by private employers ensues not from the laws of Fuero, but rather from the laws of the United States.

II. The Suggested Supremacy of Indifference

> Federal law is generally interstitial in its nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. This was plainly true in the beginning when the federal legislative product (including the Constitution) was extremely small. It is significantly true today, despite the volume of Congressional enactments, and even within areas where Congress has been very active. Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.[63]

Judge Goldberg and the *Ramsey* dissenters contend that in enacting legislation to provide retirement benefits for United States servicemen, Congress superseded state community property laws by determining that federal law should govern property rights in such benefits. Judge Goldberg's position differs in one important regard from that of Chief Justice McQuade and Justice Bakes of the Idaho Supreme Court. While Judge Goldberg contends that determination of the nature and incidents of military retirement benefits is an area in which the federal government has "exclusive legislative jurisdiction",[64] an area in which state law may operate only if expressly permitted to do so by federal statute, the *Ramsey* dissenters recognize that "[A]s a general rule, state law will be applied unless it would defeat or conflict with the federal legislative purpose [citations omitted]."[65] Judge Goldberg's initial position is difficult to reconcile with the tenth amendment, which assures the

62. Goldberg, *Is Armed Services Retired Pay Really Community Property?*, 48 CAL. ST. B.J. 13 (1973) [hereinafter cited as Goldberg].

63. P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 470-71 (2d ed. 1973).

64. Goldberg, *supra* note 62, at 14.

65. 535 P.2d at 61.

viability of state legislation unless superseded by an act of Congress pursuant to its articulated powers. The evidence proffered by Judge Goldberg to establish supersedure of state property laws by the federal statutes defining the conditions and mode of a serviceman's retirement and the means of calculating benefits is not convincing.

Judge Goldberg and others who argue that the supremacy clause precludes application of state community property laws to military retirement benefits rely heavily on Senate Report Number 1480,[66] prepared to explain certain amendments to the Retired Serviceman's Family Protection Plan (RSFPP). The report states, "Historically, military retired pay has been a personal entitlement payable to the member himself as long as he lives."[67] It has been argued that the words "personal entitlement" mean "separate property."[68] The interpretation seems reasonable when considered in a vacuum, but an examination of the context in which these words were written shatters any synonymity. Congress was concerned with the low level of participation in the RSFPP, particularly in light of the fact that retirement pay guaranteed by statute ceases upon the death of the veteran and hence affords no protection to his surviving dependents. The Senate report was written to emphasize the need to enhance use of the plan by liberalizing the conditions of participation. In order to explain the desirability of the proposed amendments, it was necessary to clarify that other benefits available to the veteran are measured by his life and are not a suitable substitute for participation in RSFPP. The report did not purport to make any comment on property interests in retirement pay received during the veteran's lifetime.

The same Senate report includes a letter from the Department of Defense explaining recommended amendments to the RSFPP.[69] Certain elements of the plan had discouraged participation. Three years before retirement the serviceman was required to elect a reduced amount of retirement pay in order to provide the annuity for survivors. The plan also contained constraints upon modification of this decision. In order to meliorate the finality of the election, the department recommended that withdrawal provisions be liberalized and that full retired pay be restored automatically when an eligible beneficiary no longer exists. This could occur if the participant's spouse predeceases him, a divorce occurs, or his children become ineligible by virtue of age. The letter states that in such event automatic restoration of full retired pay

66. S. REP. No. 1480, 90th Cong., 2d Sess. (1968), 1968 U.S. CODE CONG. AND ADM. NEWS 3294. Page references hereinafter are to the later source.

67. *Id.* at 3300.

68. Ramsey v. Ramsey, 535 P.2d 53, 62 (1975) (McQuade, C.J., dissenting); Goldberg, *supra* note 62, at 16.

69. S. REP. No. 1480, *supra* note 66, at 3306.

would "safeguard the participants' future retired pay."[70] It has been asserted that this statement establishes Congress' intent to preclude application of state property laws giving a former wife an interest in retired pay not yet received.[71] It is clear from reading the statement in context, however, that the Department of Defense was solely concerned with making the RSFPP comport with the needs and expectations of the veterans for whom it was originally established. It is to be expected that veterans will not wish to defer receipt of retired pay to which they are presently entitled so that an estranged wife may enjoy the benefits after the serviceman's death. The veteran electing to participate in the plan would not expect his contributions (in the form of diminished retired pay) to be irrevocably assigned to an individual who might cease to be the object of his bounty. The amendments supported by the Department of Defense merely sought to avoid this unexpected result. The assurance that funds will not be set aside for the future benefit of a former wife, however, says nothing about the former wife's rights in amounts *received* by the serviceman during his lifetime.

Judge Goldberg places great reliance on several instances in which Congress has enacted legislation designed to afford benefits to widows or surviving dependents of servicemen but has indicated a complete disinterest in providing similar benefits for former wives. An example is the Armed Forces Survivor Benefit Plan[72] (replacing the Retired Serviceman's Family Protection Plan) under which a serviceman's widow, but not his former wife, may receive an annuity. Judge Goldberg's article suggests that Congressional scorn for the welfare of former wives supersedes state laws giving them property interests in other entitlements of the retired serviceman.[73] The fact that Congress has seen fit to provide special benefits for veteran's widows, however, says absolutely nothing about Congressional attitude toward former wives. Congressional disinterest in enacting benefit programs for former wives of servicemen may indicate complete satisfaction with the rights and entitlements afforded such persons under state property laws. Since Congressional inactivity in the field is equally compatible with the scorn attached to it by Judge Goldberg and the satisfaction attributed to it by this Note, it is ultimately conclusive of nothing.

It has been suggested that the scheme of military retirement benefits is incompatible with community property law because a disabled serviceman may elect to waive his right to retired pay in favor of a

70. *Id.* at 3307.

71. Ramsey v. Ramsey, 535 P.2d 53, 63 (1975) (McQuade, C.J., dissenting); Goldberg, *supra* note 62, at 88.

72. 10 U.S.C. §§ 1447-55 (Supp. 1975).

73. Goldberg, *supra* note 62, at 17.

Veteran's Administration pension. If the serviceman is allowed to "convert at least part of his pay to a 'gratuity,' and, hence, into his separate property"[74] he has been allowed to subvert community property law. This argument, however, is self-serving, for it assumes the very conflict it seeks to establish by characterizing the Veteran's Administration pension as a gratuity beyond the reach of community property laws. *Fithian* reached precisely the opposite conclusion:

> While it would indeed be inconsistent with community property law to allow the husband to transmute community property into his own separate property, pensions are not considered gratuities under California law and are classed as community property for precisely the same reasons that retirement benefits are community property.[75]

The serviceman's option to elect a pension after he has acquired a right to retired pay is not necessarily incongruous with community property law. If the pension is recognized as a substitute for retirement pay and treated likewise by the courts, it cannot be utilized as a subterfuge of the spouse's vested interest.

Congressional commentary on the compatibility of state community property laws and federal provisions establishing military retirement benefits is sparse indeed. So vacuous is the legislative history on the topic that commentators have been driven to attach meaning to Congressional inactivity. The fact that Congress has provided benefits for the widows of servicemen while taking no interest in the welfare of their former wives, however, cannot be taken as evidence that all state laws determining the rights and entitlements of the latter class in military retirement benefits have been implicitly superseded. Phrases and sentences written with regard to the needs of specific benefit programs should not be twisted to create a conflict between state and federal law, and the supremacy clause should not be made a means to governance by the indifferent.

Apart from his contention that federal law precludes application of state community property principles to military retirement benefits, Judge Goldberg suggests that two dire consequences must ensue from such application. The first is

> . . . that a serviceman who was never domiciled in California until the day before he was eligible to retire may, should his wife obtain a dissolution here, will [sic] be faced with a judgment granting her one-half or more of his retired pay.[76]

At least one jurisdiction has declined to apply its community property

74. *Id.*
75. 10 Cal. 3d at 602, 517 P.2d at 455, 111 Cal. Rptr. at 375.
76. Goldberg, *supra* note 62, at 13 [footnote omitted].

laws with such indiscriminate vigor. In *Roebuck v. Roebuck*[77] the Supreme Court of New Mexico found that while the husband's presence in the state on a military tour of duty for one year made it possible to sue for divorce in New Mexico, it did not cause his military retirement pay to become community property.

Judge Goldberg also expresses concern that should a state court require payment to the former wife of her community interest out of the monthly checks received (rather than awarding a lump sum equivalent to the present value of her interest out of other assets), such right to payments may constitute an inheritable property interest which will pass to her successors.[78] Thus, someone unrelated to the serviceman may receive benefits conferred by the federal government for his support and maintenance.

Such a result, however, is not required under California community property law. In *Waite v. Waite*[79] the California Supreme Court held that the terms and objectives of the state employees' pension plan there under consideration[80] required that the benefits to be paid each spouse terminate at death. In so holding, the court stated:

> 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.[81]

Such a finding would be equally appropriate in the context of military retirement benefits. Justice Bakes states in *Ramsey* that this result "mongrelizes recognized property law concepts,"[82] but if the finding is based on the terms and objectives of the particular plan involved, it consists of nothing more than the precise definition of each partner's contract rights. If the rights of the retired employee are an entitlement to be enjoyed only during the recipient's lifetime and not subject to testamentary disposition, it hardly mongrelizes the right conferred to impose this same condition on others acceding to benefits under the plan.[83]

---

77. 87 N.M. 96, 529 P.2d 762 (1974).
78. Goldberg, *supra* note 62, at 15.
79. 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972).
80. CAL. GOV'T CODE §§ 75070, 75071 (West 1964).
81. 6 Cal. 3d at 473, 492 P.2d at 21, 99 Cal. Rptr. at 333.
82. 535 P.2d at 65.
83. While making each recipient's life the measuring life for that individual's rights in the plan prevents the serviceman's spouse from receiving an inheritable property

III. Necessity, Propriety, and the Federalist Systems

The California Supreme Court appears willing to concede that Congress "may determine the community or separate character of a federally created benefit, and such determination binds the states."[84] Hence, if Congress were to explicitly state the scorn for application of state community property law to military benefits which Judge Goldberg finds implicitly evident, such result would be accepted by the court as binding. There seems no escape from this concession under present law. *Free v. Bland*[85] makes clear that where a state statute and a federal law are in clear conflict, the supremacy clause does not permit weighing the interests at stake for each sovereign. Chief Justice Warren, on behalf of the Court, wrote:

> The relative importance to the state of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article VI, Clause 2. This principle was made clear by Chief Justice Marshall when he stated for the court that any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield.[86]

Thus, submission to the federal will may only be avoided if the preempting legislation be found constitutionally infirm. Congress is limited to those powers delegated to it in the Constitution and those necessary and proper for carrying into execution the delegated powers. While the literal meaning of the words "necessary and proper" connotes a limitation upon the scope of the enumerated powers, the statement of Alexander Hamilton in Federalist Paper No. 33[87] that the constitutional operation of the intended government would be precisely the same if the clause were obliterated completely, or if it were placed at the end of every article rings true today. Since *McCulloch v. Maryland*,[88] means adapted to accomplishment of a permissible end have ultimately survived challenge under the necessary and proper clause.

Given this standard of review, the words used by the Supreme Court to establish the constitutionality of 38 U.S.C. section 717(a) in

---

interest, it also suggests that she/he should continue to receive benefits after the veteran's death. Although the *Waite* court did not specifically deal with such a situation, its rationale requires this result.

84. *In re* Marriage of Jones, 13 Cal. 3d 457, 461, 531 P.2d 420, 423, 119 Cal. Rptr. 108, 111 (1975).

85. 369 U.S. 663 (1962) (Treasury regulation guaranteeing right of survivorship to co-owners of United States Savings Bonds held to preempt Texas community property law).

86. *Id.* at 666.

87. E.H. SCOTT, THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 172 (1902).

88. 17 U.S. (4 Wheat.) 316 (1819).

Wissner could be spoken with equal authority in establishing the constitutionality of a federal statute expressly precluding any application of state community property laws to military benefits.

> The constitutionality of the congressional mandate above expounded 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 [38 U.S.C. section 3101(a)] 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.[89]

No doubt, the assurance that pay and benefits received would be the separate property of the serviceman could also be found to enhance his morale. This being established, it is a means well adapted to the same legitimate end relied upon in *Wissner*.

There is some authority for the position, however, that where an act of Congress assumes power over matters historically governed by state legislatures possessed of expertise in such areas and a more keen awareness of local policy interests, a higher standard of review should prevail. In essence this position is based on the assertion that where important interests protected by state law are at stake, the people deserve more from the judiciary than a cursory search for some attenuated relationship between the enactment and legitimate federal goals. Justice Douglas, speaking for the dissent in *United States v. Oregon*,[90] suggested the application of such a rule. The case involved the conflict between 38 U.S.C. section 5220(a), providing that property of an inmate in a Veterans' Administration Hospital who dies without legal heirs shall vest in the United States, and provisions of state law requiring escheat to the state.

> [W]hen the Federal Government enters a field as historically local as the administration of decedents' estates, some clear relation of the asserted power to one of the delegated powers should be shown. At times the exercise of a delegated power reaches deep into local problems. Wickard v. Filburn, 317 U.S. 111, allowed the commerce power to extend to home-grown and home-used wheat, because total control was essential for effective control of the interstate wheat market. But there is no semblance of likeness here. The need of the Government to enter upon the administration of veterans' estates—made up of funds not owing from the United States—is no crucial

89. 338 U.S. at 660.
90. 366 U.S. 643 (1961).

> phase of the ability of the United States to care for ex-service men and women or to manage federal fiscal affairs.[91]

If such a "clear relation" test is advisable when the only detrimental effect of the federal act is a slight reduction in state treasuries, it would seem much more advisable where the property rights of the citizens of the several states are at stake.

This viewpoint, however, remains a minority position. For the moment there is little doubt that a federal enactment exempting all military benefits from community property laws in express terms would be upheld and would prevail over state interests asserted. Fortunately, the crisis will likely not arise. As with most other systems of governance, the only sure means of preserving the concomitance of competing powers is through the discreet exercise thereof by persons in control. Congress has shown no inclination to challenge this rule by displacing the judgment of its state counterparts as to all incidents of ownership in military benefits.

IV. The Frontiers of Inclusion

The logic of *Fithian, Milhan, Jones,* and *Loehr* suggests that four fact situations not yet presented to the court require inclusion of a benefit conferred through service in the armed forces within the property of the community.

a. Expectancy in Retirement Pay

There has been little question to date in California that a right to receive retirement benefits which has not yet accrued at the time of dissolution is not a community asset.[92] This prevents an award on the

---

91. *Id.* at 649. Subsequent majority opinions of the Supreme Court have on occasion exhibited the same deference for state law in cases of equivocation. In Labine v. Vincent, 401 U.S. 532 (1970) (validating a Louisiana statute which precludes an acknowledged but illegitimate child from taking by way of intestacy, challenged as a violation of equal protection and due process), Justice Black stated on behalf of the court:

> . . . [T]he power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State.

401 U.S. at 538.

92. Phillipson v. Bd. of Administration, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970); French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941); Williamson v. Williamson, 203 Cal. App. 2d 8, 21 Cal. Rptr. 164 (2d Dist. 1962). A requirement that the right to receipt of the benefits accrue during the course of the marriage is generally applied in other jurisdictions as well. *See* Davis v. Davis, 495 S.W.2d 607 (Tex. Civ. App. 1973). In Miser v. Miser, 475 S.W.2d 597 (Tex. Civ. App. 1971), however, the Texas Court of Civil Appeals found that the reason for the rule was satisfied where an enlisted man had completed 18½ of the 20 years of service required to qualify for retirement pay and at the time of the dissolution proceedings had enlisted for a term sufficient to guarantee his eligibility.

basis of funds which the employed spouse may never in fact receive. The result is not, however, logically consistent with the principle that amounts earned during marriage are community property. The employee performs no particular act on the day when his years of service satisfy the minimum requirement for receipt of retirement pay. Although his right to the benefits accrues on that day, they are properly earnings attributable to his entire period of service. At the point when the serviceman's expectancy becomes a vested right to receive retirement pay, he receives "earnings" partially attributable to his employment during marriage and partially attributable to his continued employment after dissolution. It therefore seems that the court should either order division of any benefits in which the parties have an expectancy, to take effect when and if such expectancy is realized, or subject the parties to its continuing jurisdiction in order to ensure the same result.[92a]

b. Interests Measured by the Life of Each Recipient

The California Supreme Court has avoided conferring an inheritable right upon the serviceman's spouse by limiting her right to receive benefits to her own lifetime.[93] While making each recipient's life the measuring life for that individual's interest in any retirement benefits comports with the objectives of most retirement plans,[94] it also suggests that the wife should continue to receive benefits *after the veteran's death.* As yet the court has not expressly so held, but the rationale applied in both *Waite* and *Fithian* suggests that the community asset established by an accrued right to retirement benefits should not terminate upon the death of the retired individual.[95]

c. Disability Benefits

The court in *Jones* and *Loehr* expressly reserved until some future time the question of the community property status of disability benefits received at the serviceman's option as an alternative to retirement pay.[96] The servicemen in *Jones* and *Loehr* had not qualified for receipt of retirement pay at the time of their disability. There is every reason to

92a. The result argued for has since been adopted by the supreme court. *In re* Marriage of Brown, 126 Cal. Rptr. 633 (1976) (contingent interest in private pension plan held community property).

93. *In re* Marriage of Fithian, 10 Cal. 3d 592, 601, 517 P.2d 449, 454, 111 Cal. Rptr. 369, 374 (1974); See text accompanying notes 79-83 *supra.*

94. Waite v. Waite, 6 Cal. 3d 461, 473, 492 P.2d 13, 21, 99 Cal. Rptr. 325, 333 (1972).

95. See note 83 *supra.* This extension of *White* and *Fithian* necessitates modification of the rule announced in Benson v. City of Los Angeles, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963). See text accompanying notes 27-30 *supra.* Since the court approved *Benson* in *Fithian* (10 Cal. 3d at 601, 517 P.2d at 454, 111 Cal. Rptr. at 374), it is unlikely that the result argued for in the text will be adopted in the near future.

96. 13 Cal. 3d at 461, 531 P.2d at 423, 119 Cal. Rptr. at 111.

believe that at least to the extent of retired pay which would have been received by the veteran barring his disability, such benefits will constitute community property. Only to the degree that the benefits received exceed the serviceman's prior entitlement to retired pay may they be considered compensation for personal injuries and hence the separate property of the recipient. The Supreme Court of Texas has already reached this result.[97]

d. Subsidized Insurance and Annuity Plans

As noted by Judge Goldberg, certain insurance and annuity plans made availabe to servicemen are not actuarially sound;[98] that is, the premium required of the serviceman for participation covers only a fraction of the cost of the plan. The remainder of the cost is borne by the government. This suggests that even if the serviceman pays for the policy with separate funds, he receives an additional benefit equal to the difference between the value or cost of the policy if acquired on the open market and the premiums which he has paid. This benefit is in the nature of compensation for services rendered and, therefore, is community property if attributable to employment during marriage. This suggests that upon dissolution, the difference between the value of the policy and premiums paid should be credited as community property allocated to the serviceman, and his spouse should receive an equivalent portion of other community assets.

Conclusion

Quite properly, the California Supreme Court has limited decisions upholding the preemption of state community property laws to facts where the conflict with federal statutes is clear and distinct. It has facilitated the concomitant viability of federal and state law governing the property incidents of military benefits. In so doing, the court has displayed its willingness to actively and aggressively apply the law of community property in all cases where economic gain is realized during the course of the marriage partnership. In order to adequately serve his client during dissolution proceedings, the California attorney must follow the court's lead and carefully assess the status of the varied benefits to which the parties may be entitled.[99]

Kathleen M. Kelly

97. Busby v. Busby, 457 S.W.2d 551 (Tex. 1970).

98. Goldberg, *supra* note 62, at 17.

99. *See* Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (malpractice verdict upheld against attorney who failed to pursue the community property status of military retirement benefits upon dissolution).