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Social Security, Divorce, and the Scope of Federal Preemption

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INTRODUCTION

The time has come for Congress to recognize that there is no clear consensus among state courts with respect to the scope of the Social Security Act's federal preemption of state property distribution laws upon divorce. Specifically, state courts are clearly at a loss as to what, if anything, Congress intends state courts to do with Social Security benefits when equitably dividing property of divorcing parties. State courts have intermittently grappled with the issue, albeit unsuccessfully, since 1960, when the U.S. Supreme Court first set parameters on the nature of the property interest held in Social Security benefits vis-à-vis state property distribution laws.¹ Many commentators since then have anticipated similar resulting inequities in other federal

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1. *See* *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (ruling that Social Security beneficiaries hold a non-contractual interest in benefits, which are not considered an accrued property right).

benefit contexts affected by state property distribution laws.² Even the U.S. Supreme Court has attempted to clarify the scope of federal preemption by analogizing decisions that address the same dilemma involving other federal benefits, such as railroad retirement benefits,³ ERISA benefits,⁴ life insurance benefits,⁵ military disability benefits,⁶ and even

2. See generally John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 67 VAND. L. REV. 1665 (2014); Lawrence W. Waggoner, *The Creeping Federalization of Wealth-Transfer Law*, 67 VAND. L. REV. 1635 (2014); Leonard Bierman & John Hershberger, *Federal Preemption of State Family Property Law: The Marriage of McCarty and Ridgway*, 14 PACIFIC L.J. 27 (1982); Marilyn M. Cochran, *The Effect of Divorce on ERISA-Regulated Life Insurance Benefits*, 11 BENEFITS L.J. 55 (1998); Debra A. Davis, *The Next Generation of Preemption Cases: State Regulation of 401(K) Plans*, 26 HOFSTRA LAB. & EMP. L.J. 355 (2009); Michael T. Flannery, *Military Disability Election and the Distribution of Marital Property Upon Divorce*, 56 CATH. U. L. REV. 297 (2007); Aaron Klein, *Divorce, Death, and Posthumous QDROS: When Is It Too Late for a Divorcee to Claim Pension Benefits Under ERISA?*, 26 CARDOZO L. REV. 1651 (2005); Katherine A. McAllister, *A Distinction Without a Difference? ERISA Preemption and the Untenable Differential Treatment of Revocation-on-Divorce and Slayer Statutes*, 52 B.C. L. REV. 1481 (2011); William A. Reppy, *Community and Separate Interests In Pensions and Social Security Benefits After Marriage of Brown and ERISA*, 25 UCLA L. REV. 417 (1978); James A. Riddle, *Preemption of Reconcilable State Regulation: Federal Benefit Schemes v. State Marital Property Law*, 34 HASTINGS L.J. 685 (1983); Jon H. Trudgeon, *The Effects of Divorce Upon Qualified Retirement Benefits*, 29 LABOR L.J. 786 (1978); Stanley W. Welsh & Franki J. Hargrave, *Social Security Benefits at Divorce: Avoiding Federal Preemption to Allow Equitable Division of Property in Divorce*, 20 J. AM. ACAD. MATRIM. LAW. 285 (2007).

3. See Railroad Retirement Act of 1974, 45 U.S.C. § 231 (2012); see also *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (finding that the Social Security Act preempts application of state property law).

4. See Employee Retirement Security Act of 1974, 29 U.S.C. § 1144 (2012); see also *Kennedy v. Plan Adm'r for Dupont Savs. & Inv. Plan*, 555 U.S. 285, 285–86 (2009) (regarding federal common law waiver as ineffective for divorce decrees not qualifying as a valid QDRO); *Egelhoff v. Egelhoff ex rel Breiner*, 532 U.S. 141, 150 (2001) (holding that federal law preempts state laws regarding presumption of revocation upon divorce of non-probate assets).

5. See Federal Employees' Group Life Insurance Act ("FEGFIA") of 1954, 5 U.S.C. § 8705(a) (2012); see also *Hillman v. Maretta*, 133 S. Ct. 1943, 1949–55 (2013) (ruling that FEGFIA preempts state law provisions regarding life insurance designation).

6. See Uniformed Services Former Spouses' Protection Act ("USFSPA"), 10 U.S.C. § 1408 (2012); see also *Howell v. Howell*, 137 S. Ct. 1400 (2017); *Mansell*

the inheritance rights of posthumously-conceived children.⁷ Nevertheless, states sharply disagree over the analogousness of the specific benefits and the applicability of the Court's reasoning to the Social Security context.⁸ It is confounding, then, why Congress continues to idly observe the guessing game that persists among state appellate courts with respect to how Congress intends federal Social Security benefits to be considered in state divorce proceedings, when its idleness comes at the expense of divorcing parties and stands in stark contrast to the aims of its own federal benefit scheme.

In May 2017, the U.S. Supreme Court offered some insight into Congress's intent with respect to the scope of federal preemption—at least in the narrow context of military disability benefits—in *Howell v. Howell*.⁹ The Court's decision is instructive in its dicta, but it is by no means directive for state courts considering the classification and distribution of Social Security benefits upon divorce, in light of its limited scope and arguably distinguishable context. Therefore, until Congress expressly clarifies the scope of federal preemption under the Social Security Act, state appellate courts will continue to emulsify the Social Security Act in an effort to equitably divide marital property in accordance with their respective state property distribution laws. Although this may provide equity between divorcing spouses within an individual state, the continued accretion of the Social Security Act only exacerbates the lack of uniformity among states and the inequity between

v. Mansell, 490 U.S. 581 (1989); *McCarty v. McCarty*, 453 U.S. 210, 220–36 (1981).

7. See MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY (AM. BAR ASS'N 2008), https://www.americanbar.org/content/dam/aba/publishing/family_law_quarterly/family_flq_artmodelact.authcheckdam.pdf.

8. See, e.g., *Gray v. Gray*, 101 S.W.3d 816, 827 (Ark. 2003) (quoting *Skelton v. Skelton*, 5 S.W.3d 2, 4–5 (Ark. 1999)) (“Because the purposes of social security and the [Civil Service Retirement System] are fundamentally different, they are not interchangeable.”).

9. See discussion *infra* Section III.A.1.

divorcing spouses of different states, which seems to contradict Congress's intent for the equitable and uniform execution of the Social Security Act. Therefore, it is time for Congress to prioritize its goals by clarifying its intent regarding the scope of federal preemption of Social Security benefits.

State courts are obligated to equitably divide property upon divorce within the framework of federal preemption, as prescribed in the Social Security Act. In the effort to apply their respective state laws without violating the Supremacy Clause of the U.S. Constitution, state courts have now adopted no less than seven different interpretations of the proper scope of federal preemption.¹⁰ This lack of uniformity seemingly defies the federal Social Security scheme that Congress intended. Therefore, Congress must act now to clarify its intent with respect to how, if at all, state courts may consider federal Social Security benefits when equitably dividing marital property upon divorce.

Part I of this Article describes the competing relationship between the Social Security Act and the respective state property distribution schemes relevant to divorce. Both legal bases are applicable to the equitable division of marital property, and state courts must negotiate the intersection of these two governing bodies of law within the context of federal preemption. Part I simply sets out the parameters within which this problem arises, which forms the basis for the need for Congress to clarify its intent on this issue within the context of Social Security.

There are other federal benefit contexts within which a similar problem has arisen that are relevant to the context of Social Security.¹¹ The most relevant of other contexts are railroad retirement benefits¹² and military disability

10. See *infra* notes 127–33 and accompanying text.

11. See *supra* notes 3–7 and accompanying text.

12. *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

benefits.¹³ These contexts offer insight into Congress's probable intent with respect to the scope of federal preemption of Social Security benefits.¹⁴ However, each federal benefit context has its own statutory language and unique considerations, and even the U.S. Supreme Court's conclusions about the nature of the respective federal benefit schemes is not necessarily determinative of Social Security. The law relevant to these arguably analogous contexts and the dilemma of its applicability to Social Security also is discussed in Part I.

The variation among state courts resulting from this dilemma in the context of Social Security is fully discussed in Part II. The purpose of federal preemption of Social Security is threefold: to provide financial security to qualified beneficiaries, equity to divorcing parties, and a uniform application of relevant benefits.¹⁵ However, Part II will describe the wide variation of state court approaches to the consideration of Social Security benefits upon divorce. These range from permitting the offset of marital property to the total preemption of any consideration of benefits in equitably dividing marital property. Part II describes all seven of the various approaches, each based on the states' respective interpretations of Congress's intent regarding the scope of federal preemption within this context.¹⁶

13. *See generally* Howell v. Howell, 137 S. Ct. 1400 (2017); Mansell v. Mansell, 490 U.S. 581 (1989); McCarty v. McCarty, 453 U.S. 210 (1981).

14. *See infra* text accompanying notes 53-72, 448-90, 495-506.

15. *See* 20 C.F.R. § 416.110(d) (2017) (including "[n]ationwide uniformity of standards" as a part of the purpose of the program). *See generally* Ronen Perry, *Differential Preemption*, 72 OHIO ST. L.J. 821 (2011) (recognizing the need for uniformity in preemption of maritime law, specifically, but generally asserting that uniformity should not be an end in itself, but a means to protect federal interests, and concluding that when parties can select applicable law, uniformity becomes less important); Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1 (1995) (discussing uniformity as a goal of federal preemption that may be harmful when federal interests become frustrated by it).

16. *See infra* Part II.

The consequences of this variation are neither uniformity among state courts nor equity between or among divorcing spouses. To provide such uniformity, Congress must expressly clarify its intent for the scope of federal preemption under the Social Security Act. In Part III, I will discuss the U.S. Supreme Court's May 2017 decision in *Howell v. Howell*, in which the Court provided, in dicta, its own interpretation of Congress's intent regarding the scope of federal preemption, albeit in the arguably analogous context of military disability benefits.¹⁷ The Court in *Howell* concluded that Congress's likely intent is that federal preemption be "total" in scope. I will discuss the basis for the Court's conclusion in Part III.

I also will discuss in Part III the effect that "total preemption" will have on the states that adopt the various approaches described in Section II.B. Such restrictions may result in uniformity among states, but this will have consequences for state legislative and judicial authorities to fulfill their obligations to enact and apply statutory schemes for equitably dividing marital property—even marital property *other* than Social Security. Thus, congressional clarification may provide uniformity among states, but only at the expense of equity between divorcing spouses. I will discuss the parameters of these consequences for state legislatures and divorcing spouses in Part III.

Notwithstanding the relevance and significance of the Court's dicta in *Howell*, congressional clarification is necessary because of the arguably limited context of *Howell* and a long history of other U.S. Supreme Court decisions that have distinguished benefits in other contexts when faced with state courts attempting to equitably divide Social Security benefits in divorce. After all, it is from the decisions in other federal contexts from which the debate over the proper scope of federal preemption of Social Security benefits first began to fragment. In Part III, I will explain the specific

17. See *infra* Section III.A.

need for congressional clarification in the Social Security context.

Without congressional clarification of the intended scope of federal preemption of Social Security, state courts will continue to fragment the application of federal law by interpreting the Social Security Act in various ways that allow state courts to apply state property distribution laws to account for Social Security benefits in the equitable division of marital property. And, if the U.S. Supreme Court is correct in its dicta in *Howell*—that Congress likely intended the federal preemption of Social Security to be “total” in scope—then absent congressional clarification, the majority of states will continue to usurp congressional intent regarding the extent to which federal law should preempt conflicting state law governing the distribution of Social Security benefits upon divorce.

I. THE CONFLICT BETWEEN FEDERAL AND STATE LAW GOVERNING THE DISTRIBUTION OF SOCIAL SECURITY BENEFITS UPON DIVORCE

The critical issue addressed in this Article is not simply whether federal or state law should govern the distribution of Social Security benefits upon divorce. The Social Security Act makes clear that Congress intends federal law to govern the administration of this federal benefit scheme, and there are no state courts that suggest otherwise. Rather, the critical issue that warrants congressional clarification is the *extent* to which federal law should preempt otherwise applicable state law governing the equitable distribution of marital property. Even more specifically, as state courts continue to try to negotiate the ambiguous parameters of federal law so as to constitutionally reconcile the federal scheme with otherwise applicable state property distribution laws, the confounding issue has become whether the scope of federal law should extend so far as to preempt state law that otherwise is applicable to property *other* than Social Security insofar as the application of state law to such property may

do significant damage to the federal plan.¹⁸ To assess the factors that bear on this issue, we must first understand the dynamics and purposes of each of the competing bodies of law—the federal Social Security Act and the respective state property distribution schemes—and the nature and necessity of their coexistence.

A. *State Law*

Generally, issues of domestic relations, including divorce and commonly related claims for property distribution, support, and custody, are governed by state courts applying state law.¹⁹ Notwithstanding the basic distinctions between community property and common law jurisdictions,²⁰ with respect to the distribution of property, each state employs its own statutory distributive scheme to ensure equity between the parties. Relevant to the distribution of Social Security benefits is the issue of whether such benefits are classified as “marital” or “separate” property.

All state statutory schemes typically define any property as “marital” or “separate”—and, thereby, generally divisible

18. See, e.g., *Litz v. Litz*, 288 S.W.3d 753, 758 (Mo. Ct. App. 2009) (ruling that the trial court could consider parties’ Social Security benefits in determining equitable distribution of property, but not to the extent that it would have material impact on federal scheme). The court ultimately held that the wife’s proposed consideration of Social Security as hypothetical value that offset Civil Service Retirement System benefits would materially impact relatively equal and equitable division of property. *Id.*

19. See *In re Burrus*, 136 U.S. 586, 593–94 (1890); *In re Marriage of Crook*, 813 N.E.2d 198, 202 (Ill. 2004) (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)) (“[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States’ . . . [h]owever . . . when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has ‘positively required by direct enactment’ that state law be pre-empted.”). Before state law is preempted, it “must do ‘major damage’ to ‘clear and substantial’ federal interests.” *In re Crook*, 813 N.E.2d at 202.

20. See, e.g., *In re Marriage of Brane*, 908 P.2d 625, 628 (Kan. Ct. App. 1995) (discussing difference in applicability of *Hisquierdo* to common law and community property states).

or not divisible—and prescribe rules for the division of either form of property upon divorce. In applying these rules, most state statutory schemes prescribe statutory considerations or “factors” to be employed by the court in determining an equitable division of property.²¹ The factors most commonly relevant to a court’s consideration of Social Security benefits typically include: the value of any property interests of the parties, the current or future economic circumstances of the parties, or any other factor that the court deems necessary or appropriate to determine a fair and equitable division of property.²² Absent any federal question or constitutional requirement that mandates uniformity on a specific domestic relations issue,²³ each state has a constitutional right to define the details of its own rules relevant to marriage and divorce.²⁴ Thus, there is a presumption against federal preemption of domestic relations matters, including the distribution of marital property because historically, this matter has been relegated to the authority of state courts.²⁵

In analyzing whether there is sufficient conflict for federal preemption to apply, a court must assess whether the application of existing state law encroaches on the federal interest that Congress is seeking to protect, and not vice-versa. Congress is not limited by existing state laws; rather, existing state laws may be preempted by Congress based on the federal interests involved and the extent to which existing state law conflicts with those interests. The extent of the conflict will determine the scope of the preemption. As

21. *See, e.g.*, MD. CODE ANN., FAM. LAW § 8–205(b) (West 2017) (listing required considerations for grant of award or transfer of ownership of interest in property).

22. The final factor is commonly referred to as a “catch-all” provision. *Id.* § 8–205(b)(11).

23. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593–2608 (2015) (holding that state law prohibiting same-sex marriage violated equal protection).

24. *Umber v. Umber*, 591 P.2d 299, 301 (Okla. 1979).

25. *Barber v. Barber*, 62 U.S. 582, 584 (1858); *see also Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001).

described by the U.S. Supreme Court, “[o]n the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination [of] whether Congress has ‘positively required by direct enactment’ that state law be pre-empted.”²⁶ To provide a sufficient conflict, “[s]tate family and family-property law must do ‘major damage’ to ‘clear and substantial’ federal interests before the Supremacy Clause will demand that state law be overridden.”²⁷ As noted previously, *whether* state statutory schemes sufficiently conflict with federal law respecting Social Security is not the issue—all courts accept that they do. Rather, the issue is, *to what extent* does Congress intend that state law must be preempted so as not to violate federal law? To determine this, we must first look to the nature of the federal interests involved.

B. *Federal Law*

The relevant federal law in the discussion is the Social Security Act (“Act”), which President Franklin D. Roosevelt signed into law on August 14, 1935.²⁸ The Act created a highly regulated social insurance benefit program designed to ensure a continuing source of income to retired workers, age sixty-five or older.²⁹

Since 1977, divorced spouses are eligible to receive Social Security benefits on account of a former spouse. The current

26. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *Wetmore v. Markow*, 196 U.S. 68, 77 (1904)).

27. *Id.* (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)); *see also* *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.*, 514 U.S. 645, 655 (1995)) (“In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention ‘clear and manifest.’”).

28. Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. § 402 (2012)).

29. Social Security Act, 42 U.S.C. § 402 (2012).

provision for eligibility is summarized as follows: A divorced husband or divorced wife of an individual who is entitled to old-age or disability insurance benefits is entitled to spousal insurance benefits if he or she:

- (1) has applied for such benefits;³⁰
- (2) is at least 62 years old;³¹
- (3) is not married;³²
- (4) is not entitled to his or her own primary insurance benefit in an amount equal to or greater than one-half of the primary insurance amount that is due to the former spouse;³³ and
- (5) had been married to his or her spouse for a period of 10 years immediately before their divorce.³⁴

Within the Act, Congress reserved for itself the exclusive authority to alter, amend, or repeal any of its provisions.³⁵ Because of this exclusive authority, the U.S. Supreme Court has held that Social Security beneficiaries have a non-contractual interest in Social Security benefits and that these benefits are not to be considered as an accrued property right.³⁶ In addition, Section 407(a) of the Act prohibits the

30. *Id.* § 402(b)(1)(A), (c)(1)(A).

31. *Id.* § 402(b)(1)(B), (c)(1)(B).

32. *Id.* § 402(b)(1)(C), (c)(1)(C).

33. *Id.* § 402(b)(1)(D), (c)(1)(D).

34. *Id.* § 416(d)(1), (d)(4).

35. *Id.* §1304.

36. *Flemming v. Nestor*, 363 U.S. 603, 609–10 (1960); *In re Marriage of Kelly*, 9 P.3d 1046, 1047 (Ariz. 2000) (holding Social Security benefits may not be divided as community property); *Skelton v. Skelton*, 5 S.W.3d 2, 4 (Ark. 1999) (“Congress has excluded from its definition of marital property any benefits from social security”); *In re Marriage of Morehouse*, 121 P.3d 264, 265 (Colo. App. 2005) (“a trial court cannot distribute or divide Social Security benefits as marital property”); *Mahoney v. Mahoney*, 681 N.E.2d 852, 855–56 (Mass. 1997) (holding that Social Security benefits are not marital property in light of Congress’s expressed intent to preempt an entire area of law when providing for divorced spouses under limited circumstances); *Wolff v. Wolff*, 929 P.2d 916, 920–21 (Nev. 1996) (finding that Social Security benefits cannot be divided as community property); *Neville v. Neville*, 791 N.E.2d 434, 436 (Ohio 2003) (citing *Hisquierdo* for proposition that federal law preempts state law that authorizes equitable distribution of Social Security benefits); *In re Marriage of Swan*, 720 P.2d 747,

assignment of benefits:

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.³⁷

Thus, Congress expressly forbids the use of any legal process to dispose of a party's right to future Social Security interests.³⁸

In 1975, pursuant to Section 659 of the Act, Congress carved out a narrow exception to this prohibition—for collection of past due child support or alimony.³⁹ The current provision states:

Notwithstanding any other provision of law (including section 407) . . . , moneys (the entitlement to which is based upon remuneration for employment) due . . . to any individual . . . shall be subject . . . to withholding . . . to enforce the legal obligation of the individual to provide child support or alimony.⁴⁰

In 1977, Congress narrowly defined the type of “alimony”

750 (Or. 1986) (“[i]ncluding the value of . . . social security benefits . . . in a division of marital property . . . is contrary to the Social Security Act”); *In re Marriage of Zahm*, 978 P.2d 498, 502 (Wash. 1999) (“federal statutes secure social security benefits as the separate indivisible property of the spouse who earned them”).

37. 42 U.S.C. § 407(a).

38. Courts differ as to whether a divorce proceeding qualifies as a legal process to dispose of a party's right to future Social Security interests. *Gross v. Gross*, 8 S.W.3d 56, 57–58 (Ky. Ct. App. 1999) (“mere consideration of a [non-prospective Social Security] benefit did not constitute a transfer, assignment, or ‘other legal process’ as prohibited by the anti-alienation provisions of the Act”); *Depot v. Depot*, 2006 ME 25, 893 A.2d 995, 1001 (holding that Social Security Act does not include divorce as qualified legal process); *Jackson v. Sollie*, 141 A.3d 1122, 1136 (Md. 2016) (holding that consideration of Social Security as equitable factor in distribution of property is not a qualified legal process that transfers property).

39. 42 U.S.C. § 659(a).

40. *Id.*

that may be assigned under Section 659.⁴¹ The current provision defines “alimony” as excluding “any payment or transfer of property or its value by an individual to the spouse or a former spouse of the individual in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.”⁴² The U.S. Supreme Court has broadly construed this prohibition.⁴³ Thus, there exists an inherent conflict between the federal law expressly limiting a state court’s authority to assign Social Security benefits in a dissolution proceeding and a state court’s obligation to equitably divide marital property upon divorce.

Despite this conflict, as will be discussed fully in Section III.A, there is at least one degree of uniformity among states insofar as the scope of federal preemption of Social Security benefits is concerned: all states agree that federal law preempts state courts from directly dividing Social Security benefits when equitably dividing property upon divorce.⁴⁴ Notwithstanding this clear prohibition, however, neither Congress nor the U.S. Supreme Court has clearly concluded that federal law preempts a state court from either: (1) offsetting marital property *other* than Social Security benefits to compensate for the inequitable receipt of Social Security benefits resulting from federal preemption; or (2) considering each parties’ receipt of Social Security benefits as an equitable factor within the state property distribution scheme when determining an equitable division of property upon divorce.

Consequently, state courts have adopted these approaches—and variations thereof—in an effort to compensate divorcing parties who suffer the inequity arguably resulting from the prohibition on dividing Social

41. *Id.* § 662(c) (repealed 1996).

42. *Id.* § 659(i)(3)(B)(ii).

43. *See* *Philpott v. Essex Cty. Welfare Bd.*, 409 U.S. 413, 417 (1973).

44. *See infra* Section III.A.

Security benefits upon divorce.⁴⁵ And, until Congress clarifies its intent with respect to the scope of federal preemption in this area, the disparity among states, and the resulting inequity for divorcing parties, will only continue.

State appellate courts are not without precedent in determining which of the state approaches Congress likely intended. The U.S. Supreme Court has addressed the scope of federal preemption in the context of other federal benefit plans⁴⁶ and has analogized those contexts to the Social Security context.⁴⁷ Thus, there is some basis by which to narrow (or broaden) the scope of federal preemption in the context of Social Security. However, many state courts find a relevant distinction between the Social Security context and the contexts of other federal benefits—either within the express language of the federal acts governing the respective benefits,⁴⁸ or by the very nature of the federal benefits, themselves⁴⁹—such that there is reason to hold that other federal benefit plans are not sufficiently analogous to the federal Social Security plan to be determinative.

The primary and original authority on the issue of the

45. See *infra* Section II.B.

46. See *supra* notes 3–7 and accompanying text.

47. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581–90 (addressing scope of federal preemption in Railroad Retirement context).

48. *In re Marriage of Kelly*, 9 P.3d 1046, 1049 n.3 (Ariz. 2000) (noting that anti-attachment language in Social Security Act is similar, but not identical, to that of the Railroad Retirement Act); *Depot v. Depot*, 2006 ME 25, 893 A.2d 995, 999 (distinguishing that 45 U.S.C. § 231(m)(b)(2)—railroad retirement—and 10 U.S.C. § 1408(c)(1)—military disability—countermanded *Hisquierdo* and *McCarty* by making benefits subject to community property law, but that Congress did not do same for Social Security); *In re Marriage of Swan*, 720 P.2d 747, 751 (Or. 1986) (“Because the antiassignment provisions of 45 USC § 231m are legally indistinguishable from the antiassignment provisions of 42 USC § 407(a), we have no hesitancy in concluding that the *Hisquierdo* rule applies here.”).

49. See, e.g., *Gray v. Gray*, 101 S.W.3d 816, 827 (Ark. 2003) (quoting *Skelton v. Skelton*, 5 S.W.3d 2, 4–5 (Ark. 1999)) (“Because the purposes of social security and the [Civil Service Retirement System] are fundamentally different, they are not interchangeable.”).

scope of federal preemption of federal benefits is *Hisquierdo v. Hisquierdo*.⁵⁰ In *Hisquierdo*, the U.S. Supreme Court considered whether retirement benefits received under the federal Railroad Retirement Act of 1974 could be either attached or offset with other property during state divorce proceedings.⁵¹ The Court held that either attachment of benefits or an offsetting award in a state divorce action would impermissibly conflict with the Railroad Retirement Act and, therefore, prohibited a state court from either attaching or offsetting Railroad Retirement benefits upon divorce.⁵² The Court reached its decision by analogizing Railroad Retirement benefits with Social Security benefits as non-contractual benefits in which the parties hold no property interest.⁵³ Therefore, since *Hisquierdo*, many courts have held that the Court's reasoning with respect to Railroad Retirement benefits equally applies to Social Security benefits.⁵⁴

50. *Hisquierdo*, 439 U.S. at 572.

51. *Id.*

52. *Id.* at 574–77.

It is for Congress to decide how these finite funds are to be allocated. The statutory balance is delicate. Congress has fixed an amount thought appropriate to support an employee's old age and to encourage the employee to retire. Any automatic diminution of that amount frustrates the congressional objective. By reducing benefits received, it discourages the divorced employee from retiring. And it provides the employee with an incentive to keep working, because the former spouse has no community property claim to salary earned after the marital community is dissolved. Section 231m shields the distribution of benefits from state decisions that would actually reverse the flow of incentives Congress originally intended.

Id. at 585.

53. *Id.* at 575 (“Like Social Security, and unlike most private pension plans, railroad retirement benefits are not contractual.”).

54. *In re Marriage of Crook*, 813 N.E.2d 198, 202 (Ill. 2004); *In re Marriage of Boyer*, 538 N.W.2d 293, 294–95 (Iowa 1995); *In re Marriage of Brane*, 908 P.2d 625, 628 (Kan. Ct. App. 1995); *Pongonis v. Pongonis*, 606 A.2d 1055, 1058 (Me. 1992); *Rudden v. Rudden*, 765 S.W.2d 719, 720 (Mo. Ct. App. 1989); *Wolff v. Wolff*, 929 P.2d 916 (Nev. 1996); *Olson v. Olson*, 445 N.W.2d 1, 6–7 (N.D. 1989); *In re Marriage of Zahm*, 978 P.2d 498, 501 (Wash. 1999). *But see Hisquierdo*, 439 U.S.

In response to the questions posed in *Hisquierdo*, Congress clarified its intent regarding the scope of the preemption of Railroad Retirement benefits when it amended the Railroad Retirement Act to allow distribution of certain retirement benefits in state divorce proceedings.⁵⁵ At the same time, Congress amended the Social Security Act to include Section 407(b), which functions similarly by providing exceptions to the anti-assignment clause of the Social Security Act for purposes of child support and alimony.⁵⁶ Thus, many courts hold, just as Congress intended for Railroad Retirement benefits, that the exceptions for child support and alimony in Section 407 represent the entirety of a state court's authority to consider Social Security assets.⁵⁷

Subsequent to *Hisquierdo*, the federal benefit context that offers the most insight into what Congress likely intended with respect to Social Security benefits is military disability election under the Uniform Services Former Spouses Protection Act (USFSPA).⁵⁸ Until 1981, state courts distributed federal military retirement monies according to their respective state distribution schemes. In 1981, the U.S. Supreme Court held, in *McCarty v. McCarty*, that federal law preempted state law with respect to the distribution of federal military retirement benefits upon divorce.⁵⁹ The *McCarty* Court based its decision on the Court's reasoning in

at 602 (Stewart, J., dissenting) ("Unlike the Social Security Act, . . . the Railroad Retirement Act contains no express provision permitting Congress to terminate it.") (internal citation omitted).

55. 45 U.S.C. § 231m(b)(2) (2012) (subjecting railroad retirement benefits to community property laws).

56. See 42 U.S.C. § 407(b) (2012).

57. Gray v. Gray, 101 S.W.3d 816, 827 (Ark. 2003); Gentry v. Gentry, 938 S.W.2d 231, 232–33 (Ark. 1997); Johnson v. Johnson, 726 So. 2d 393, 394–95 (Fla. Dist. Ct. App. 1999).

58. See Uniformed Services Former Spouses' Protection Act ("USFSPA"), 10 U.S.C. § 1408 (2012).

59. *McCarty v. McCarty*, 453 U.S. 210 (1981).

Hisquierdo.⁶⁰

In direct response to the *McCarty* decision, in 1982, Congress enacted the USFSPA, which expressly authorized state courts to distribute disposable retired pay in divorce.⁶¹ In doing so, however, state courts varied in their interpretation of the scope of their authority under the USFSPA.⁶² In 1989, in *Mansell v. Mansell*, the U.S. Supreme Court attempted to clarify the scope of state court authority under the USFSPA by holding that state court authority was limited to disposable marital property, which did not include the portion of retired pay that was waived in the election for disability pay, which the Court held was the separate property of the disabled military retiree.⁶³ As a result of this limitation, some state courts began to offset the portion of military retirement pay that was waived to receive disability pay with other disposable marital property.⁶⁴ Yet others held that the Supremacy Clause of the U.S. Constitution and the anti-assignment clause within the USFSPA preempted state courts from offsetting in this manner.⁶⁵

Since *Mansell*, state courts have varied in their interpretation and application of the scope of federal preemption in the context of military disability benefits in precisely the same way that states are now doing in the

60. *Id.* at 220–21.

61. 10 U.S.C. § 1408(a)(2)(C), (a)(4), (c)(1).

62. Flannery, *supra* note 2, at 297, 325–27 (describing pre-*Mansell* state court treatment of disability pay under the USFSPA).

63. *Mansell v. Mansell*, 490 U.S. 581, 581–82 (1989).

64. Flannery, *supra* note 2, at 329–59 (describing state court responses to *Mansell*).

65. *See id.* at 320–25. The Arizona Supreme Court in *Howell* recognized the majority view that most states allow a judge to use equitable remedies to prevent unilateral reduction of military retirement pay granted to a spouse in a divorce decree. *See In re Marriage of Howell*, 361 P.3d 936, 938–39 (Ariz. 2015). *But see* *Mallard v. Burkart*, 10–CA–02069–SCT, 95 So. 3d 1264, 1271 (Miss. 2012) (disagreeing that there is a clear majority view on this point).

context of Social Security benefits.⁶⁶ It was not until December 2016, when the U.S. Supreme Court granted certiorari in the case of *Howell v. Howell*, that the Court seemed postured to resolve, once and for all, the issue of the scope of federal preemption of military disability benefits and, by arguable analogy, Social Security benefits in divorce cases.⁶⁷ However, in its May 2017 decision, the U.S. Supreme Court addressed a much narrower issue and simply concluded that, insofar as military disability benefits are concerned, the outcome is governed by the Court's decision in *Mansell*, which limited a state court's authority to dispose of military disability pay, which it defined as separate property.⁶⁸ In light of the state court variation of the interpretation and application of *Mansell* that already existed before the *Howell* decision, it would seem that the Court brought no greater clarity to the resolution of the issue in 2017 than it did in 1989.

In fact, the Court expressly provided that it did not decide these broader matters in its opinion in *Howell*. Instead, the Court noted the narrow scope of the issue that it addressed and the limitation of its holding and, in dicta, expressly recognized the issue that remains—and the issue that is addressed in this article—which is: to what extent may state courts consider the effect of the scope of federal preemption of federal benefits, as prescribed in *Mansell*, when equitably dividing marital property upon divorce?⁶⁹ Before endeavoring to understand the effect of the Court's decision in *Howell* on the distribution of property in the

66. See Flannery, *supra* note 2, at 329–59 (describing state variation in military disability election context on issue of offsetting).

67. *Howell v. Howell*, 361 P.3d 936 (Ariz. 2015), *cert. granted*, 137 S. Ct. 546 (U.S. Dec. 2, 2016) (No. 15 – 1031).

68. *Howell v. Howell*, 137 S. Ct. 1400 (2017).

69. Because the Court's decision in *Howell* is clearly relevant and insightful in its dicta as to Congress's likely intent on the broader issues addressed in this Article, a full discussion of the facts and specific holding in *Howell*, and the effect of the Court's decision on the scope of federal preemption of Social Security benefits, is fully discussed in Part III.

Social Security context, however, we must first fully understand the variation among state courts that exists in that context and the reasoning that supports each of the various approaches that state courts adopt.

II. RECONCILING THE SCOPE OF FEDERAL PREEMPTION OF SOCIAL SECURITY

One of the primary purposes of the federal preemption of Social Security is the uniform distribution of benefits.⁷⁰ Although the Social Security Act applies in a variety of different contexts, dividing Social Security benefits upon divorce is clearly an area that presents a significant opportunity for application disparity, given that each state adopts its own definitions and criteria by which it classifies and distributes marital property.⁷¹ Thus, the issue is whether the uniformity that Congress intends is for all states to similarly *distribute* Social Security benefits under a broad scope of federal preemption or to similarly *classify* Social Security benefits as non-divisible separate property, but to provide equity through the application of state property distribution laws under a narrow scope of federal preemption. In negotiating this dilemma, state courts have adopted no less than seven different approaches to the treatment of Social Security benefits in divorce, each representing a different interpretation and application of federal preemption in light of the holding in *Mansell*.⁷² Notwithstanding this wide disparity among the states, however, all states uniformly agree that federal law prohibits state courts from the direct distribution of Social Security benefits.

70. See *supra* note 15 and accompanying text.

71. See *supra* text accompanying notes 19–25.

72. See *infra* Part II.

A. *State Uniformity on Prohibiting the Direct Distribution of Social Security Benefits*

Notwithstanding the diversity of state court approaches on the issue of the scope of federal preemption, there is a uniform starting point at which all courts agree: federal law preempts state courts from treating Social Security benefits as marital property that is directly divisible upon divorce.⁷³ The basis of this uniformity is the plain language of the anti-assignment provision within Section 407 of the Social Security Act.⁷⁴ The issue, however, is whether the scope of Section 407 is limited to a state court's *classification* of Social Security benefits as divisible marital property or whether it extends to a court's consideration of Social Security benefits within the broader equitable factors included within the applicable state property distribution provisions. The following section discusses the uniformity of state courts'

73. *Luna v. Luna*, 608 P.2d 57, 60 (Ariz. Ct. App. 1979) (finding that Social Security disability benefits are the separate property of the receiving spouse); *Gentry v. Gentry*, 938 S.W.2d 231, 233 (Ark. 1997) (deeming unenforceable provision in property settlement agreement providing that wife receive one-half of future Social Security benefits paid to husband); *In re Marriage of Hillerman*, 167 Cal. Rptr. 240, 243–44 (Ct. App. 1980) (recognizing implicit congressional intent that Social Security benefits are immune from division by state courts in marital dissolution proceedings); *Johnson v. Johnson*, 726 So. 2d 393, 394–95 (Fla. Dist. Ct. App. 1999); *Sherry v. Sherry*, 701 P.2d 265, 270 (Idaho Ct. App. 1985); *In re Marriage of Boyer*, 538 N.W.2d 293, 295 (Iowa 1995); *Cruise v. Cruise*, 374 S.E.2d 882, 884 (N.C. Ct. App. 1989) (holding that Social Security benefits may not be disbursed in an equitable distribution award); *Kluck v. Kluck*, 1997 ND 41, 561 N.W.2d 263, 270 (N.D. 1997); *Umber v. Umber*, 591 P.2d 299, 301–02 (Okla. 1979) (qualifying husband's Social Security benefits as separate property and not subject to division as property settlement in a divorce proceeding); *Kirk v. Kirk*, 577 A.2d 976, 980 (R.I. 1990) (holding that "Social Security benefits are not to be treated by State courts as property"); *Simmons v. Simmons*, 634 S.E.2d 1, 3–4 (S.C. Ct. App. 2006); *In re Marriage of Zahm*, 978 P.2d 498, 502 (Wash. 1999) (holding that trial court erred in characterizing Social Security benefits as community property but that the error was nevertheless harmless because court merely considered wife's hypothetical benefits, in lieu of Social Security, when determining parties' relative economic circumstances at dissolution, and did not directly apportion or indirectly offset Social Security benefits).

74. 42 U.S.C. § 407 (2012).

views on the plain language of the anti-assignment provision of Section 407 of the Social Security Act and the arguable limits of that provision and, thereby, the limits of state uniformity.

1. The Plain Language of the Social Security Act

The basis of the sole point of uniformity among states on the issue of the direct distribution of Social Security benefits is the plain language of Section 407 of the Social Security Act, which many states interpret from *Hisquierdo* as sufficient to denote the minimal parameter of federal preemption.⁷⁵ All courts strictly adhere to this minimal parameter. For example, in *Kirk v. Kirk*, relying on the limitations prescribed by *Hisquierdo*, the Supreme Court of Rhode Island held that “Social Security benefits may be reached by a former spouse for alimony or child support but not for property division.”⁷⁶ The court simply held that “[u]nder the supremacy clause of the U.S. Constitution, Article VI, [state] law must defer to the Social Security Act’s statutory scheme for allocating benefits.”⁷⁷

The *Kirk* court explained that Congress: restricted allocation of benefits to the recipient spouse under Section 407 of the Act; carved out specific exceptions for child support and alimony in Section 659(a); limited the kind of alimony that is reachable by a non-participant spouse within the language of Section 662(c);⁷⁸ and, held that “[i]n this way Federal law has carefully limited a divorced spouse’s ability to reach both past and future Social Security benefits.”⁷⁹ Relying on Congress’s express language, the court reasoned that “Social Security benefits are not to be treated by State

75. See, e.g., *Kirk*, 577 A.2d at 979–80 (prohibiting direct distribution).

76. *Id.* at 980.

77. *Id.* at 979 (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979)).

78. See 42 U.S.C. § 662(c) (repealed 1996).

79. *Kirk*, 577 A.2d at 980.

courts as property.”⁸⁰ Rather,

Social Security benefits are intended to protect the Social Security beneficiary and those dependent upon him or her from the claims of creditors. . . . When a former spouse attempts to attach these benefits, then the former spouse becomes more like a creditor than a dependent. Therefore, these Social Security benefits may be reached by a former spouse for alimony or child support but not for property division.⁸¹

Thus, for the court in *Kirk*, this comprised the entirety of the analysis; there was no basis by which the court would consider the broader issues of whether to offset other property or consider Social Security benefits as an equitable factor as a means of providing equity to the parties within the application of state property distribution laws.

Likewise, in *Cruise v. Cruise*, the North Carolina Court of Appeals provided that “[t]he federal statutory scheme is complete. It provides certain benefits for divorced spouses which are not dependent on the idiosyncrasies of each state’s system of marital property law.”⁸² The court reasoned that if state courts were to divide Social Security benefits based upon state marital property law, it could distribute Social

80. *Id.*

81. *Compare id.* (internal citation omitted), *with* *Evans v. Evans*, 434 S.E.2d 856, 860 (N.C. Ct. App. 1993) (“[W]here a wife seeks her husband’s Social Security benefits in the form of alimony, she is not a creditor as such; and the statute should not apply, therefore, to defeat her claim for alimony.”).

82. *Cruise v. Cruise*, 374 S.E.2d 882, 884 (N.C. Ct. App. 1989) (citing *Richard v. Richard*, 659 S.W.2d 746, 749 (Tex. App. 1983)); *see also* *Sherry v. Sherry*, 701 P.2d 265, 270 (Idaho Ct. App. 1985) (holding that “the federal law embodied in the Social Security Act and the state community property laws are in actual conflict and . . . federal law preempts the application of the state laws.”); *Loudermilk v. Loudermilk*, 397 S.E.2d 905, 909–10 (W. Va. 1990) (recognizing that inequitable result of federal law “at first blush . . . appear[s] to defy logic,” but nevertheless holding that “specific provisions of federal law” provide “very strong, very clear, and very unambiguous language” that excludes Social Security from pool of marital property to be equitably divided). *But see* *Phipps v. Phipps*, 864 P.2d 613 (Idaho 1993) (addressing the “consideration” question and subsequently allowing consideration of Social Security if it is not determined by an “actual” amount and offset with other property).

Security benefits to a spouse that neither applied nor qualified for such benefits, thereby doing major damage to the federal benefit scheme.⁸³ Thus, some state courts, like those in *Kirk* and *Cruise*, resolve the issue of direct distribution on the basis of the plain language of Section 407 of the Social Security Act and the unambiguous supremacy of federal law, which excludes Social Security benefits as divisible property under state law.⁸⁴

2. The Limitations of the Plain Language of the Social Security Act

Beyond the narrowest scope of federal preemption, which is limited to the plain language of Section 407 and the direct division of Social Security benefits, ambiguity presents itself. Many state courts that adhere to the express prohibition on direct distribution of Social Security benefits nevertheless have recognized the limitations of the plain language of the Act and the natural progression of issues that result from those limitations. For example, when the issue of the division of Social Security benefits upon divorce first came before the Supreme Court of Oklahoma in 1979, in the case of *Umber v. Umber*, the principal question for the court was “whether . . . federal social security benefits received by the [husband] were his separate property and not *subject to division* as property settlement in a divorce proceeding.”⁸⁵ In conformity

83. *Cruise*, 374 S.E.2d at 884.

84. *Olson v. Olson*, 445 N.W.2d 1, 11 (N.D. 1989); *In re Marriage of Swan*, 720 P.2d 747, 751–52 (Or. 1986).

Although an employee’s social security account increases in relative value over his working life, social security is not a property like a pension. It is a system of social insurance. To engraft upon the social security system a concept of accrued property rights would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands.

Johnson v. Johnson, 726 So. 2d 393, 395 (Fla. Dist. Ct. App. 1999) (quoting *Mack v. Mack*, 323 N.W.2d 153, 156 n.1 (Wis. Ct. App. 1982)) (internal quotations omitted).

85. *Umber v. Umber*, 591 P.2d 299, 300 (Okla. 1979) (emphasis added).

with the consensus that the court may not directly divide Social Security benefits as property settlement, the court reasoned that “Congress intended to specify the *distribution* of benefits between spouses at the time of divorce, thus placing such questions beyond state control.”⁸⁶ But in so reasoning, the court held that “Social Security benefits are not an item to be *considered* in determination of property settlement”⁸⁷ The court did not say that Social Security benefits may not be “*divided*,” or “*distributed*” or “*allocated*;” rather, it said that Social Security may not be “*considered*.”⁸⁸ Thus, the court’s language leaves open the question of the scope of the court’s *consideration* of Social Security benefits in dividing property.

These broader questions that extend from such seemingly plain language under the Act arise from a combination of the factual distinctions that present themselves to the courts on an ad hoc basis, and the distinctions between the respective state property distribution schemes. For example, in *Pleasant v. Pleasant*, the Court of Special Appeals of Maryland held that “the Supremacy Clause of the U.S. Constitution precludes states from intervening in the allocation of social security benefits. Consequently, social security benefits may not be considered marital property or be subject to distribution *in any manner* in a divorce proceeding.”⁸⁹

Based on the court’s reasoning (the supremacy of federal law) and the totality of its language (“*in any manner*”), its view of the scope of federal preemption as to the division of Social Security seems clear—it is totally excluded from property distribution. Nevertheless, the court added that,

86. *Id.* at 301 (emphasis added).

87. *Id.* at 302 (emphasis added).

88. *Id.*

89. *Pleasant v. Pleasant*, 632 A.2d 202, 206 (Md. Ct. Spec. App. 1993) (emphasis added); *see also* *Huntley v. Huntley*, 145 A.3d 607, 613–14 (Md. Ct. Spec. App. 2016) (“[T]he court did not have the power to divide [Social Security] benefits.”).

“[i]n an appropriate case, of course, it may be that a court could consider the fact that a party is receiving, or will receive, social security benefits, as ‘any other factor’ in determining whether to make a monetary award.”⁹⁰ Thus, the court simply begs the question of the extent to which federal law preempts the “manner” in which a state court may consider Social Security benefits and compensate the spouse for any equitable imbalance without subjecting the actual benefits to distribution.

The broadest application of federal preemption suggests that the only manner in which a court may consider Social Security is as an equitable factor in the determination of alimony, pursuant to Section 659, which typically comes in the form of a monetary award.⁹¹ In *Pleasant*, however, the court implied that it may consider Social Security benefits as an equitable factor in the division of other marital property, which also may come in the very same form of a monetary award. This implication raises numerous questions.

For example, if the court’s determinations of property division and alimony are both based on the same equitable consideration—the receipt of Social Security—and if the monetary award that compensates for the resulting inequity may come from the same property source—such as a bank account awarded in the division of assets upon divorce—then what damage is caused to the federal scheme if federal law allows the court to classify the compensating award as “alimony,” but state law allows the court to classify it as “property”? Could Social Security benefits not qualify as both? Indeed, is a legitimate award of alimony that is based on the disparate future incomes of the parties (perhaps caused solely by one party’s receipt of Social Security benefits) and paid every month from the payor spouse’s income, which subsequently is deposited into a bank account

90. *Pleasant*, 632 A.2d at 207 n.3.

91. See *infra* notes 376–78; see also discussion *infra* text accompanying notes 472–76.

and used to pay alimony or other financial obligations, now prohibited under federal law simply because the source of the monetary award is the payor spouse's income derived from the receipt of Social Security benefits?⁹² Does federal law preempt a state court from considering Social Security benefits in its determination of alimony if Social Security benefits are the *sole* source of income for the payor spouse?⁹³ Must the court distinguish the nature of the equitable interests under such a circumstance?⁹⁴ Is this even possible?⁹⁵

Note that all of these questions evolve from the narrowest application of the scope of federal preemption, which provides, simply, that state courts may not directly divide Social Security benefits—the only scope of federal preemption upon which all courts agree. Yet, the narrowest and most uniform of applications has led to wide disparity among states on how to provide equity to spouses beyond this narrow framework of federal preemption.

No jurisdiction more clearly represents the natural expansion of the issues that are raised when a state court simply resolves the narrow issue of the direct division of Social Security benefits than Indiana, specifically in the case of *Luttrell v. Luttrell*.⁹⁶ In *Luttrell*, the wife received \$915 per

92. See, e.g., *Depot v. Depot*, 2006 ME 25, 893 A.2d 995, 1002–03 n.6 (Dana, J., dissenting) (providing that if court just continued husband's alimony after retirement, it could avoid the issue altogether).

93. See *Mays v. Braden*, No. 10-350-GFVT, 2011 WL 4478958, at *3 (E.D. Ky. Sept. 26, 2011); *Russo v. Russo*, 474 A.2d 473, 476 (Conn. App. Ct. 1984); see also *infra* note 284 and accompanying text.

94. See, e.g., *Vitko v. Vitko*, 524 N.W.2d 102, 104 (N.D. 1994) (obscuring whether the court distinguished military disability income from Social Security income with respect to its ability to consider Social Security as a financial factor outside of property distribution).

95. *In re Marriage of Mueller*, 2015 IL 117876, 34 N.E.3d 538; *Lorenzen v. Lorenzen*, 883 N.W.2d 292, 298 (Neb. 2016); *Panetta v. Panetta*, 851 A.2d 720, 727–29 (N.J. Super. Ct. App. Div. 2004) (questioning court's ability to consider effect of disparity in receipt of benefits without calculating value of benefits).

96. See *Luttrell v. Luttrell*, 994 N.E.2d 298 (Ind. Ct. App. 2013).

month in Social Security disability benefits and had received a lump sum payment of \$14,430.75 in Social Security disability (SSDI) benefits in 2010.⁹⁷ The parties divorced in 2012, and the trial court concluded that the wife's lump sum SSDI award was not a marital asset subject to division. The court awarded the wife sixty percent of the marital estate, as well as \$15,000 in attorney's fees, due to the parties' disparity in income.⁹⁸ The husband appealed, claiming that the wife's lump sum SSDI award should be treated as marital property because the payment was analogous to a worker's compensation benefit intended to replace lost earnings during the marriage.⁹⁹

The Court of Appeals was inclined to agree, based on state property distribution law, but held that the trial court properly excluded the wife's lump sum award from the divisible property based on the plain language of federal law, specifically Sections 407 and 659 of the Social Security Act.¹⁰⁰

This is so even though the payment was retroactive, even though a large portion of it covered a period of time during the marriage, and even though the money would have been available for both [the husband and wife]'s use had it been received as payments . . . when her disability began and when they were living as a married couple . . . rather than as a lump sum payment following their separation.¹⁰¹

Thus, the court relied upon a broad application of the plain language of the anti-assignment and alimony exception provisions of the Social Security Act and held that federal law preempts the direct division of Social Security benefits under state law.¹⁰² However, in a footnote, the court

97. *Id.* at 300.

98. *Id.* at 301.

99. *Id.* at 302.

100. *Id.*

101. *Id.* at 303.

102. *Id.*

acknowledged the narrow scope of the issue for which it relied upon this broad application of federal law by recognizing:

Some courts have held that, while SSDI payments may not be divided in divorce proceedings, they may be considered as part of the total picture as a court decides how to equitably divide up those items that are divisible. . . . We do not reach that question here.¹⁰³

Subsequently, the husband filed a petition to transfer jurisdiction to the Supreme Court of Indiana, which denied the husband's petition.¹⁰⁴ In his dissent from the denial of the transfer, Justice David, joined by Justice Rush, held that the court should formally address the issue presented on transfer, which was the issue raised, but not addressed, by the Court of Appeals as to "whether trial courts can *consider* [Social Security] as part of the total picture when determining how to equitably divide property upon divorce."¹⁰⁵ The dissent held that "the [Social Security Act] does not control [this issue]."¹⁰⁶

Supporting this position, the dissent observed that the wife's lump sum Social Security award stood as a "potential windfall" for the wife, "particularly where, under most circumstances, the lump sum represents lost income that was compensated for by a combination of the other spouse stepping up and both parties doing without during the period which gave rise to the SSDI qualification."¹⁰⁷ The court recognized that this windfall could be substantially greater in any given case.¹⁰⁸ The court ultimately held that, at a minimum, receipt of lump sum Social Security should be a

103. *Id.* at 303 n.4 (internal citation omitted). *Cf.* *Howell v. Howell*, 137 S. Ct. 1400, 1406 (2017) (recognizing but declining to address same question).

104. *Luttrell v. Luttrell*, 10 N.E.3d 1002, 1002 (Ind. 2014).

105. *Id.* at 1003 (David, J., dissenting) (emphasis in original).

106. *Id.*

107. *Id.*

108. *Id.*

factor for the court to consider when awarding attorney fees, particularly when the attorney fees that were awarded were based on the trial court's consideration of the parties' disparity of future income,¹⁰⁹ which is permitted in the court's determination of alimony.¹¹⁰

The *Luttrell* case precisely represents the distinction between the narrow and broad applications of the scope of federal preemption of Social Security benefits and the arguable inequities that result when the state court is preempted from considering the equitable factors that it would otherwise consider when dividing the parties' property. As demonstrated in *Luttrell*, this is particularly so when the court's final division of property is closely connected to its final determination of alimony, attorney's fees, and the distribution of other separate property, in balancing the overall equities of the parties.

Likewise, in *Simmons v. Simmons*, when the parties divorced in 1990, the Family Court in South Carolina approved the parties' agreement that, as part of the equitable division of property, the wife would receive a portion of each monthly Social Security check that the husband was entitled to receive upon retirement.¹¹¹ The agreement provided that "*any payments to Wife under the terms of this provision regarding division of Social Security benefits shall be construed only as a property settlement, and shall not in any way be considered or construed as alimony.*"¹¹² When the husband reached retirement age and failed to pay the wife any portion of his Social Security benefits, she petitioned the court, in 2003, to compel the husband's compliance with the agreement.¹¹³ After a trial and upon appeal, the Court of Appeals held that because the

109. *Luttrell v. Luttrell*, 994 N.E.2d 298, 301 (Ind. Ct. App. 2013).

110. *Luttrell*, 10 N.E.3d at 1003 (David, J, dissenting).

111. *Simmons v. Simmons*, 634 S.E.2d 1, 2 (S.C. Ct. App. 2006).

112. *Id.* (emphasis in original).

113. *Id.*

Social Security Act's anti-assignment clause defines Social Security benefits as non-marital or separate property with respect to the division of property upon divorce, the family court necessarily lacked subject matter jurisdiction to divide a spouse's Social Security benefits in a property distribution.¹¹⁴ Consequently, the court voided that part of the agreement that resulted from the parties' (and the trial court's) mutual mistake regarding the ability to equitably apportion Social Security benefits as property.¹¹⁵

Subsequently, in 2008, the wife moved the court to reopen the entire judgment in the case to reconsider the now partially void settlement agreement and the effect of the court's preemption enforcement by holding that Social Security benefits were not divisible.¹¹⁶ The Family Court

114. *Id.* at 2–3. *But see* Biondo v. Biondo, 809 N.W.2d 397, 401 (Mich. Ct. App. 2011) (holding “[t]he Social Security Act simply does not divest state courts of subject-matter jurisdiction in divorce cases. Rather, the Supremacy Clause preempts state laws regarding the division of marital property only to the extent they are inconsistent with 42 U.S.C. § 407(a).”).

115. *See Simmons*, 634 S.E.2d at 5. Many other courts have held similarly in declining to enforce settlement agreements in which the parties agreed to divide Social Security benefits as part of the equitable division of property. *Gentry v. Gentry*, 938 S.W.2d 231, 233 (Ark. 1997) (invalidating agreement to divide Social Security benefits as “a transfer or assignment of future benefits prohibited by § 407”); *In re Marriage of Anderson*, 252 P.3d 490 (Colo. App. 2010) (finding husband's agreement to pay former wife part of future Social Security benefits was void under Supremacy Clause); *In re Marriage of Hulstrom*, 794 N.E.2d 980, 982 (Ill. App. Ct. 2003) (invalidating agreement where the parties combined their social security benefits and then sought to equitably divide them); *Biondo*, 809 N.W.2d at 401–02 (holding that federal law preempted enforcement of divorce agreement provision obligating parties to equalize Social Security benefits); *Boulter v. Boulter*, 930 P.2d 112 (Nev. 1997) (holding that neither the Nevada Supreme Court nor the trial court could enforce agreement requiring husband to pay his wife one-half of Social Security benefits); *Olson v. Olson*, 445 N.W.2d 1, 2 (N.D. 1989) (finding “that [S]ocial [S]ecurity should not be considered in dividing marital property”); *In re Marriage of Swan*, 720 P.2d 747, 747 (Or. 1986) (holding that “the value of social security benefits of either spouse may not be considered in the division of property”); *Kirk v. Kirk*, 577 A.2d 976, 980 (R.I. 1990) (finding that social security benefits could not be reached by a former spouse for property division). *But see* Reffalt v. Reffalt, 10–CA–01013–COA, 94 So. 3d 1222, 1226 (Miss. Ct. App. 2011) (finding the parties may agree on division of Social Security as equitable factor relevant to alimony instead of property distribution).

116. *Simmons v. Simmons*, 709 S.E.2d 666, 666–67 (S.C. 2011).

held in accordance with the 2006 decision by the Court of Appeals and dismissed the wife's motion for lack of subject matter jurisdiction.¹¹⁷ However, on appeal, the South Carolina Supreme Court held that the Family Court had jurisdiction to revisit the entire divorce judgment, noting that the parties' original agreement in 1990, albeit mistaken and unenforceable, represented what the parties determined to be a "fair and reasonable" compromise under all the circumstances and "an equitable resolution to all of the issues" before the court.¹¹⁸ The court held that "[b]ecause . . . the parties' desire to equitably divide [the husband]'s Social Security benefits was a significant feature of the over-all agreement, we expand the scope of the remand to include [the wife]'s alimony claim."¹¹⁹

Thus, the scope of the court's review upon remand would fall within the Social Security Act's "alimony" exception to the preemption of state courts directly dividing Social Security benefits.¹²⁰ But the *Simmons* court added that, "in divorce settlements, it would be difficult to fairly view the various aspects of this agreement in isolation. . . . [T]he parties' intended agreement concerning alimony is inextricably connected to the agreed upon division of marital property, and vice versa."¹²¹ Thus, the *Simmons* court highlighted the dilemma that continues to confound state courts burdened with the task of equitably dividing marital property, which is whether, and to what extent, the court may consider the effect of the federal preemption of Social Security benefits, *beyond the consideration of alimony or child support*, when providing equity to the parties in the context of the distribution of marital property. As recognized by the court in *Simmons*, the court's determination of

117. *Id.* at 667.

118. *Id.* at 666 n.1.

119. *Id.* at 667.

120. *See* 42 U.S.C. § 659 (2012).

121. *Simmons*, 709 S.E.2d at 668.

alimony bears directly on the court's equitable division of property, and vice-versa, and both categories may be directly affected by the court's consideration of Social Security benefits. Yet, federal law has expressly permitted the court to consider Social Security with respect to one right—alimony—but has left unanswered the extent to which it may consider Social Security with respect to property distribution. It is no wonder, then, that state courts are at a loss as to how to ensure equity for the parties under state law without violating federal law.

B. *State Variations on the Scope of Federal Preemption of Social Security Benefits*

As previously described, all courts agree that federal law preempts state courts from directly distributing Social Security benefits when dividing marital property upon divorce.¹²² However, beyond this, there is very little consensus among the states. In 1960, the U.S. Supreme Court decided, in *Flemming v. Nestor*, that Social Security beneficiaries have a “non-contractual interest” in Social Security benefits and that, therefore, these benefits are not to be considered as an accrued property right that is subject to state law regarding the distribution of marital property upon divorce.¹²³ Since then, state courts have widely varied in defining the scope of federal preemption in this context. Indeed, efforts by state courts to define the scope of federal preemption *beyond a prohibition of direct distribution* so as to constitutionally divide marital property under their respective state property distribution schemes have led to the development of six additional interpretations and applications of the scope of federal preemption.¹²⁴ These include: (1) offsetting any marital property other than Social Security benefits with the value of actual Social Security

122. *See supra* Section II.A.

123. *Flemming v. Nestor*, 363 U.S. at 603, 610–11 (1960).

124. *See infra* Section II.B.

benefits;¹²⁵ (2) offsetting retirement benefits received in lieu of Social Security with a hypothetical Social Security value;¹²⁶ (3) offsetting retirement benefits received in lieu of Social Security with actual Social Security value;¹²⁷ (4) prohibiting offsetting;¹²⁸ (5) considering Social Security benefits as one of many factors relevant to the equitable division of marital property;¹²⁹ and, (6) totally preempting the court from considering Social Security benefits in any way in determining an equitable division of marital property.¹³⁰

1. Offsetting Permitted

In *Hisquierdo v. Hisquierdo*, the U.S. Supreme Court defined the parameters of the anti-assignment clause by holding that it prohibits state courts from directly assigning or offsetting Social Security benefits.¹³¹ Because one of the purposes of federal preemption is to protect the participating spouse by assuring that he or she receives the benefits that Congress has solely reserved for the participant employee, several state courts have held that *Hisquierdo* prohibits only the offsetting of *actual* Social Security benefits.¹³² Those state courts further hold that in dividing property upon divorce, a court is only preempted from offsetting if the division of property alters the actual receipt of benefits by the participating spouse.¹³³ Thus, some state courts have implemented offsetting methods that arguably have no effect on the actual receipt of Social Security benefits reserved for

125. See *infra* Section II.B.1.a.

126. See *infra* Section II.B.1.b.i.

127. See *infra* Section II.B.1.b.ii.

128. See *infra* Section II.B.2.

129. See *infra* Section II.B.3.

130. See *infra* Section II.B.4.

131. 439 U.S. 572, 586, 590 (1979).

132. See *infra* text accompanying notes 197–200.

133. See *infra* text accompanying notes 135–41.

the participating spouse.¹³⁴

These alternative offsetting methods come in two primary forms: (1) offsetting divisible marital property *other than Social Security benefits* with the actual value of Social Security benefits; and, (2) offsetting retirement benefits received in lieu of Social Security with either the hypothetical or actual value of Social Security benefits. Arguably, neither of these methods directly alters the receipt of Social Security benefits by the participant spouse, yet compensates the non-participant spouse for the inequitable distribution of retirement benefits in which the non-participant spouse claims he or she otherwise would have a marital interest. The question, of course, is whether either of these methods is constitutional in light of Congress's intended scope of federal preemption.

134. See *infra* Section II.B.1.

a) *Offsetting any other Marital Property with Actual Social Security Value*

Almost every state interprets the holding in *Hisquierdo* as prohibiting the offset of Social Security benefits with other marital property.¹³⁵ The exceptions are Louisiana,¹³⁶ Pennsylvania,¹³⁷ New Jersey,¹³⁸ Arizona,¹³⁹ and Ohio.¹⁴⁰ Georgia and Rhode Island also are postured to permit offsetting, but they present limited case law with unique circumstances in addressing this question.¹⁴¹ However, even within this small minority of states, Louisiana stands alone in its statutory prescription for such an approach.

Louisiana Revised Statute Section 9:2801.1 provides:

When federal law or the provisions of a statutory pension or retirement plan, state or federal, preempt or preclude community classification of property that would have been classified as community property under the principles of the Civil Code, the spouse of the person entitled to such property shall be allocated or assigned the ownership of community property equal in value to such property prior to the division of the rest of the community property. Nevertheless, if such property consists of a spouse's right to receive social security benefits or the benefits themselves, then the court in its discretion may allocate or assign other community

135. See *infra* Section II.B.2.

136. See *infra* text accompanying notes 142–59.

137. See *infra* text accompanying notes 166–87.

138. See *infra* text accompanying notes 202–22.

139. See *infra* text accompanying notes 190–200.

140. See *infra* text accompanying notes 223–57. Also, some states, like Washington, Iowa, and Kentucky, may employ an offset of Social Security benefits in dividing marital property, but do so merely as an equitable consideration of the parties' financial circumstances, rather than as a prescribed policy for offsetting Social Security benefits. See *infra* text accompanying notes 285–314.

141. See *Rabek v. Kellum*, 620 S.E.2d 387, 388 (Ga. 2005) (viewing offset as viable option, but husband failed to present sufficient evidence to support claim); *Schaffner v. Schaffner*, 713 A.2d 1245, 1249 (R.I. 1998) (finding that offsetting may be appropriate under certain circumstances but does not clarify what offset method of valuation to use).

property equal in value to the other spouse.¹⁴²

Thus, the statute allows the court, at its discretion, to directly offset the marital value of a recipient's Social Security benefits with other marital property of the same value.¹⁴³

For example, in *Carmichael v. Brooks*, the court valued the husband's Social Security benefits at \$44,000 and awarded the wife one-half of that value, totaling \$22,000.¹⁴⁴ Upon the husband's appeal, the court held that the scope of federal preemption of Social Security benefits is limited to the state's ability to classify Social Security benefits as community property.¹⁴⁵ The court determined that, were it not for federal law preempting state courts from classifying Social Security benefits as property of the marital community, the husband's Social Security benefits would be classified as property of the marital community in which the wife held an interest.¹⁴⁶ The court held that, pursuant to Section 9:2801.1, "a trial court is granted discretion to choose whether to award a spouse additional community assets as compensation for the right to receive social security benefits, or the benefits themselves, of the other spouse when those benefits would otherwise be classified as community property but for federal preemption."¹⁴⁷ In so holding, it is relevant to note that the court specifically referred to this compensation as an "offset" of Social Security benefits.¹⁴⁸

142. LA. STAT. ANN. § 9:2801.1 (2016).

143. Section 9:2801.1 is equally applicable to the division of military disability benefits. See *Ast v. Ast*, 2014-1282 p. 5-6 (La. App. 3 Cir. 4/1/15); 162 So. 3d 720, 724-25, *writ denied*, 2015-0864, p. 1 (La. 6/5/15), 171 So. 3d 952.

144. *Carmichael v. Brooks*, 2016-93, p. 1, 3 (La. App. 3 Cir. 6/22/16); 194 So. 3d 832, 836.

145. *Id.* at p. 4, 194 So. 3d at 837.

146. *Id.* at p. 4, 194 So. 3d at 837.

147. *Id.* at p. 4, 194 So. 3d at 837 (quoting *Bhati v. Bhati*, 09-1030, p. 6 (La. App. 3 Cir. 3/10/10); 32 So. 3d 1107, 1111).

148. *Id.* at p.4, 194 So. 3d at 837-39, 844.

However, the court specifically stated that “the state statute, La.R.S. 9:2801.1, allowing for an offset equal in value, is in fact enacted for the purpose of achieving an equitable result.”¹⁴⁹ In exercising its discretion, the court considered the offset of exactly one-half of the husband’s Social Security benefits as equitable and, therefore, the court affirmed the trial court’s award.¹⁵⁰ Thus, the court in *Carmichael* manifested numerous levels of analysis that confound the issues and warrant congressional clarification. Specifically, is the scope of federal preemption limited to the classification, direct distribution, offset, or consideration of Social Security benefits? Or, does Congress intend its preemption of state law to be “total” in scope, thereby prohibiting state courts from considering the receipt of Social Security benefits as in any way bearing on the equitable division of the parties’ property?”

Louisiana’s answer to these questions is the narrowest of all the states’ interpretations of the scope of federal law in that, as long as the state respects federal law and does not categorize Social Security benefits as community property and, therefore, as directly divisible upon divorce, the state court has statutory authority to exercise its discretion as to how to compensate for the inequity resulting from the limitations prescribed by federal law. In exercising its discretion, sometimes the court finds an offsetting award to be equitable,¹⁵¹ and sometimes it does not.¹⁵² In *Carmichael*,

149. *Id.* at p.4, 194 So. 3d 837.

150. *Id.* at p.4, 194 So. 3d 839.

151. *Id.* at p.4, 194 So. 3d 839; *Comeaux v. Comeaux*, 08-1330, p. 6 (La. App. 3 Cir. 4/1/09), 7 So. 3d 110, 115–16 (“equalizing payment [of one-half of husband’s Social Security interest] necessary to balance the community of acquets and gains and to reimburse [wife] for payments she made for the community.”).

152. *Williams v. Williams*, 2012-732, p. 3 (La. App. 3 Cir. 12/5/12), 104 So. 3d 760, 763 (affirming trial court’s refusal to allocate marital property to wife to offset husband’s Social Security benefits); *Tucker v. Tucker*, 47,373, p. 6 (La. App. 2 Cir. 8/1/12), 103 So. 3d 493, 497 (denying offset of husband’s Social Security because husband was still fifteen years from eligibility, and wife had retained employment and had begun accumulating pension benefits); *Trahan v. Trahan*,

the amount of offset that the court deemed equitable happened to be exactly one-half of the husband's Social Security benefits.¹⁵³ The husband objected to this award on the basis that it contravened federal law by treating his Social Security benefits as community property.¹⁵⁴

Nevertheless, the court held that the statute "does not classify social security benefits as community property . . . To the contrary, it merely provides for a discretionary equitable offset."¹⁵⁵ Therefore, as long as the court does not directly distribute or assign to one party actual Social Security benefits that, under federal law, are reserved for the participating spouse, the Louisiana statute allows the court the discretion to offset the benefit amount with other marital property that otherwise falls within the court's authority to divide under the state property distribution scheme. In this way, the statute arguably respects the preemption mandated by federal law as well as the state court's obligation to provide equity to the parties within the state's statutory distribution scheme.

Of course, this begs the question of the proper scope of

2010-0109, p. 19 (La. App. 1 Cir. 6/11/10), 43 So. 3d 218, 234 (finding that it was not equitable to offset husband's Social Security because wife received significant assets through the marriage contract); *Bhati*, 09-1030 at p. 6, 32 So. 3d at 1111 (denying offset to wife because wife received periodic support of \$1,000.00 per month, the couple's three children were no longer minors, the wife was employable, and the wife received a substantial monetary award via disbursements of husband's other retirement accounts not including his social security benefits).

153. The court held that "[t]he trial court did not err in adjudicating [the wife's] entitlement to the offset and reaching a decision on the valuation and amount thereof. The amount of the offset to which [the wife] is entitled, being established at \$22,000.00, is to be accounted for when the division of the remaining items is accomplished." *Carmichael*, 2016-93 at p. 3, 194 So. 3d at 836. As to the method for valuation, to which the husband objected as "vague and unreliable" and "utter guesswork," the court heard expert testimony on the value of the Social Security benefits and held that "[t]he trial court . . . considered the present value of the benefits and granted [the wife] an offset of one-half of that amount toward the community property partition." *Id.* at p.6, 194 So. 3d at 838.

154. *Id.* at p.6, 194 So. 3d at 838.

155. *Id.* at p.6, 194 So. 3d at 838.

federal preemption by assuming that federal preemption is limited to mere classification and, thereby, to direct distribution. In *Tucker v. Tucker*,¹⁵⁶ the court held that, because of other factual considerations in the case, the trial court did not abuse its discretion by *not* awarding other marital property to the wife to offset the husband's Social Security benefits. The court noted the following with respect to Louisiana's approach to offsetting Social Security benefits:

[T]he result . . . places Louisiana law in a "minority of one" on the issue of whether a court can award an "equal value" offset award for noncommunity property social security benefits. A review of the case law of other states calls into serious doubt whether R.S. 9:2801.1 is constitutional under federal preemption. . . . [E]xcept for Louisiana and the states which absolutely forbid an award of any type of offset for the value of a spouse's social security benefits, there is a uniform and consistent statutory or jurisprudential rule that a spouse's social security benefits may be a factor to be considered in marital property division, but an award equal to the estimated value of those benefits is a violation of federal law. R.S. 9:2801.1 appears to run afoul of this line of out-of-state cases because it purports to give a trial court the discretion to "allocate or assign other community property equal in value."

If the majority national position is correct . . . the discretion granted in R.S. 9:2801.1 to give an amount "equal to" is unconstitutional, violative of the Supremacy Clause.¹⁵⁷

However, the court in *Carmichael* held contrarily:

Federal law preempts the classification of social security benefits as community property, but it does not prohibit an assignment of property equal in value to the amount of social security benefits. . . . Louisiana Revised Statutes 9:2801.1 is not in contravention of federal law. Rather, its enactment simply allows a trial court, depending upon the facts and circumstances of the community property regime, to provide a spouse an offset in an amount equal to that of the social security benefits, when doing so would be equitable and in furtherance of Louisiana's community property laws. . . . [T]here is an inequity of [one spouse] receiving much more than one-half of the social security benefits available to the parties

156. *Tucker*, 47,373 at p. 1, 103 So. 3d at 493 n.1 (internal citation omitted).

157. *Id.* at p.1, 103 So. 3d at 493 n.1 (internal citation omitted).

and . . . the state statute, La.R.S. 9:2801.1, allowing for an offset equal in value, is in fact enacted for the purpose of achieving an equitable result.¹⁵⁸

Thus, even within the State of Louisiana—the only state that statutorily provides for the direct offset of Social Security benefits with other distributable property equal in value to Social Security benefits—there is confusion over the proper scope of federal preemption and the court’s ability to reconcile ambiguous congressional intent with the application of the state’s own property distribution scheme. And, as evidenced by the court’s express reasoning in *Carmichael*, a state court’s ability to compensate for the inequity of federal preemption of Social Security may rest entirely on the semantic distinction between calling the division an “offset of equal value” or an “equitable consideration,” which simply may happen to be equal.¹⁵⁹ Unless or until Congress clarifies its intent, Louisiana will continue to statutorily authorize state courts to offset the value of actual Social Security benefits from the value of other marital property that the court is otherwise permitted to divide so long as Social Security benefits are classified as separate property pursuant to federal law.

b) Offsetting Retirement Benefits “in lieu of” Social Security with Hypothetical or Actual Social Security Value

Although Louisiana is the only state to statutorily provide for directly offsetting Social Security benefits with other marital property of equal value, there are other states that allow an offset of Social Security benefits when one party receives Social Security benefits but the other party does not because he or she has contributed to a retirement plan “in

158. *Carmichael*, 2016-93 at p. 4, 194 So. 3d at 837.

159. See *Howell v. Howell*, 137 S. Ct. 1400, 1401–02 (2017) (noting “semantic” distinctions of state court reasoning).

lieu of” Social Security.¹⁶⁰ These states include Pennsylvania,¹⁶¹ New Jersey,¹⁶² Arizona,¹⁶³ and Ohio.¹⁶⁴

Depending on the circumstances of the case, the offset can consist of deducting from the marital portion of the non-participating spouse’s pension received in lieu of Social Security either: (1) the hypothetical value of Social Security benefits that the non-participating spouse would have received were it not for his or her receipt of pension benefits in lieu of Social Security; or, (2) the actual value of Social Security benefits received by the participating spouse. Under the first option of offsetting with the *hypothetical* value of Social Security benefits, the hypothetical value that the non-participant spouse may have earned, had he or she participated in Social Security, may be quite different (greater or less) than the value of the participant spouse’s actual benefits. This offset is not necessarily “equated” but, rather, is “maximized,” to allow each party to separate their respective interests in Social Security benefits—one being actual and the other being hypothetical. However, under the second option of offsetting the *actual* value of Social Security benefits, the court takes the value of the participating spouse’s actual Social Security benefits and offsets an equalizing amount for the non-participating spouse from the marital portion of the non-participating spouse’s retirement benefits received in lieu of Social Security; thus, the offsetting amount is “equated.” Of course, this begs the question of whether equating the benefits by

160. This also could apply when both parties receive varying Social Security benefits but one party also contributes to a private retirement plan in lieu of Social Security.

161. Cornbleth v. Cornbleth, 580 A.2d 369, 373–74 (Pa. Super. Ct. 1990).

162. Panetta v. Panetta, 851 A.2d 720, 727–28 (N.J. Super. Ct. App. Div. 2004).

163. Kelly v. Kelly, 9 P.3d 1046, 1048 (Ariz. 2000).

164. Neville v. Neville, 99 Ohio St. 3d 275, 2003-Ohio-3624, 791 N.E.2d 434, at ¶ 12; Hochstetler v. Hochstetler, 2012-Ohio-2669, at ¶¶ 28–29; Colley v. Colley, 2009-Ohio-6776, at ¶41; Parsons v. Parsons, 2008-Ohio-1904, at ¶¶ 15, 19; Harshbarger v. Harshbarger, 158 Ohio App. 3d 121, 2004-Ohio-3919, 814 N.E.2d 105, at ¶ 15; Eickelberger v. Eickelberger, 638 N.E.2d 130, 134 (Ohio Ct. App. 1994).

offsetting with an equalizing value is “equitable,” particularly if the parties would not have earned the same amount of Social Security had they both contributed to it.

For example, consider the circumstances wherein a husband is employed and contributes during the marriage to Social Security, and, thereby, receives or anticipates receiving Social Security benefits upon retirement. Consider also that his wife, who also is employed during the marriage, opts to participate in a private pension plan, whereby she is prohibited from participating in Social Security and, thereby, receives or anticipates receiving no Social Security benefits but, instead, receives greater benefits through her private pension plan, which both spouses are able to enjoy during the marriage. Consider, finally, that the parties then divorce. In determining an equitable distribution of the parties’ property, the court must confront the fact that federal law requires that the husband’s Social Security benefits are classified as the separate property of the husband and are not subject to division. However, under most state property distribution schemes, the wife’s retirement benefits are classified as marital property and, thereby, are divisible upon divorce.¹⁶⁵

Thus, assuming an equal division of marital property, the court must award the husband one hundred percent of his Social Security benefits, but the court will divide the wife’s retirement benefits acquired in lieu of Social Security by awarding fifty percent to the wife and fifty percent to the husband. Accordingly, if the only marital property to be divided were the parties’ retirement interests, the husband would receive one hundred fifty percent of the parties’ total property, while the wife would receive only fifty percent of the total property. Arguably—at least for the wife—this is

165. Although most states classify retirement benefits as marital property, some states may statutorily define retirement benefits in lieu of Social Security benefits as separate property. *See, e.g.*, MO. REV. STAT. § 169.572 (1991) (providing that teacher retirement benefits be treated in same manner as Social Security benefits and therefore are not divisible).

not an equitable division of property. Accordingly, the wife contends that if the husband solely is to enjoy his Social Security benefits, she solely should be able to enjoy the amount of her retirement plan that equals either: (1) the hypothetical value of Social Security benefits that she solely would have enjoyed as her separate property if she had participated in the Social Security program instead of the private plan in which she participated; or, (2) one-half of the actual amount of Social Security benefit attributable to the marriage that her husband now solely enjoys, so as to equate the parties' marital interests in their total retirement property. The following subsections address each of these two options, which various courts have considered and adopted as methods for compensating the non-participating spouse for the arguable inequity resulting from the federal preemption of Social Security.

i. Offsetting Using the Hypothetical Value of Social Security

The leading decision in which a court placed a present-day hypothetical value on the Social Security benefit that a non-participating spouse would have earned had he or she contributed to Social Security instead of contributing to a private retirement plan in lieu of Social Security is the Pennsylvania case of *Cornbleth v. Cornbleth*.¹⁶⁶ In *Cornbleth*, the husband participated in the Civil Service Retirement System (CSRS) and, therefore, did not participate in Social Security.¹⁶⁷ His participation in Social Security would have resulted in a commensurate decrease in his pension annuity under CSRS.¹⁶⁸ Any compensation the husband received through his CSRS pension during the marriage was considered marital property and, therefore, was divisible.¹⁶⁹

166. *Cornbleth*, 580 A.2d at 369.

167. *Id.* at 371.

168. *Id.*

169. *Id.* at 371 n. 1 (referencing 5 U.S.C. § 8345(j)(1) (2012) of the Civil Service

However, the wife contributed to Social Security through her retirement plan, the income from which, therefore, was exempt from distribution.¹⁷⁰ The husband argued that because the wife's Social Security benefits could not be considered marital property under federal law, his CSRS benefits should be similarly treated.¹⁷¹ The court agreed and excluded a portion of the husband's CSRS benefits from the marital estate.¹⁷²

In support of its holding, the court first observed that "[a]lthough the benefit of the [husband's] pension may be delayed until some future time, its value to the owner is undeniable . . . [and] a present value can be ascribed to it . . . thus providing a means for dividing its value."¹⁷³ Additionally, the court observed that "income earned during the marriage, which would otherwise become disposable to the couple, is most often utilized to fund the pension."¹⁷⁴ Likewise, "any employer contributions to the pension can easily be viewed as a form of delayed compensation" and any compensation earned during the marriage constitutes marital property.¹⁷⁵ Therefore, the husband's CSRS pension may be included as divisible marital property.¹⁷⁶

As such, upon the equitable distribution of marital property, the pension recipient will suffer a "diminution of expected retirement income."¹⁷⁷ Yet, despite a tremendous degree of similarity between the nature of Social Security

Retirement Act ("CSRA"), which allowed for the equitable division of CSRS benefits as marital property).

170. *Id.* at 372.

171. *Id.* at 371.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

benefits and conventional retirement benefits,¹⁷⁸ Social Security benefits are excluded as marital property, and the wife reaps the benefits of this exemption upon retirement.¹⁷⁹ Had Social Security benefits not been so excluded,

the parties, as a married couple, would have benefitted either by having an increased disposable income or by saving the additional funds. Had the funds been saved or used to purchase an asset that retained value, then that value would have been subject to equitable distribution. Conversely, had the funds been simply expended by the couple during their marriage there may not have been an asset to equitably divide. However, there would have been a present enjoyment of that stream of income by *both* parties during the course of the marriage.¹⁸⁰

Thus, there is no division of Social Security benefits upon divorce to offset the division of the non-participating spouse's pension benefits.¹⁸¹ The court observed that this inequity is exacerbated:

in that the money that would, in a conventional setting, be routed into Social Security, and thus into an exempt status, would either have been consumed by the couple, thus providing previous benefits enjoyed by both, or, perhaps, routed into the CSRS or another retirement type vehicle, which, of course, would then be included in the marital estate.¹⁸²

Therefore, the court determined that income that is otherwise marital is used to finance a future Social Security

178. *Id.*; see also *Kelly v. Kelly*, 9 P.3d 1046, 1047 (Ariz. 2000) (“Social Security bears many characteristics of a pension and would ordinarily be considered community property under state law principles.”). *But see* cases cited *supra* note 8.

179. *Cornbleth*, 580 A.2d at 371.

180. *Id.* at 372 (internal citation omitted) (emphasis added); see also *Kelly*, 9 P.3d at 1048 (“[I]n the absence of social security contributions, the community could have spent, saved, or invested those funds as it saw fit. . . . But . . . community funds have been diverted to the separate benefit of one spouse. . . . [T]his situation compels an equitable response.”).

181. *Cornbleth*, 580 A.2d at 371.

182. *Id.* at 372.

benefit that is excluded from the equitable division of property and shielded for the benefit of the Social Security participant, but similar CSRS benefits are not so protected.¹⁸³ The court concluded that this leaves CSRS beneficiaries at a significant disadvantage upon divorce when compared to the majority of the work force who contribute to Social Security.¹⁸⁴ The exemption, therefore, creates a bias that must be eliminated by equitably distributing property in a way that equates the parties' differing financial circumstances.

To equate the benefits to the parties, the court held that it is:

necessary to compute the present value of a Social Security benefit had the CSRS participant been participating in the Social Security system. This present value should then be deducted from the present value of the CSRS pension at which time a figure for the marital portion of the pension could be derived and included in the marital estate for distribution purposes.¹⁸⁵

Accordingly, the court held that "to the extent part of [a] pension might figuratively be considered 'in lieu of' a Social Security benefit . . . that portion should be exempted from the marital estate."¹⁸⁶

In describing the need for a state court to provide an equitable remedy to the inequity resulting from the federal preemption scheme, the court noted:

Inherent to our disposition here is the realization that Social

183. There are other courts that prohibit such offsetting because they view pension plans and Social Security plans as materially different. *See* cases cited *supra* note 8.

184. *Cornbleth*, 580 A.2d at 372.

185. *Id.*

186. *Id.* at 371. *But see* Rabek v. Kellum, 620 S.E.2d 387, 388 (Ga. 2005) (holding as a matter of first impression that it was not improper for the trial court to deny husband offset of his CSRS pension benefits by hypothetical amount of Social Security benefits that he otherwise would have received, but husband failed to present sufficient evidence of what that value would be).

Security is, in essence, a forced savings plan. Essentially the federal government mandates that a portion of a worker's income, which as previously observed would otherwise be marital property, be saved away until the worker becomes eligible to collect it. By exempting Social Security from equitable distribution, the federal government has created not only a means where a married individual can shield marital property from division, but, essentially, has mandated such an action. Our decision here simply recognizes this fact and attempts to equate those workers in the CSRS with the rest of the work force.¹⁸⁷

Of course, this begs the question of whether Congress intends for employees who contribute to Social Security and employees who participate in private pension retirement funds in lieu of Social Security to be *equated* in terms of the benefits to which they are entitled upon divorce. Until Congress clarifies this question, for courts adopting this view, when parties participate in retirement plans in lieu of Social Security,¹⁸⁸ the court may attribute to the non-participating spouse a hypothetical Social Security value that is deducted from the marital estate, thereby reducing the Social Security participant's share of the non-participant's retirement benefits and equating each party's interest in the marital estate.¹⁸⁹

187. *Cornbleth*, 580 A.2d at 372 n.3; *see also* *Kelly v. Kelly*, 9 P.3d 1046, 1048 (Ariz. 2000) (having adopted the resolution set forth in *Cornbleth*, the court held that its "resolution merely attempts to place the parties in the position they would have been [in] had both participated in social security.").

188. *Kelly*, 9 P.3d at 1048–49 n.2 (citing *Elhadj v. Elhadj*, 605 A.2d 1268, 1271 (Pa. Super. Ct. 1992) (noting that the court's adoption of the *Cornbleth* remedy of offsetting as separate property pension benefits earned "in lieu of" Social Security benefits is improper where both husband and wife participated in CSRS and neither was entitled to Social Security benefits).

189. *See, e.g., Holland v. Holland*, 588 A.2d 58, 60 (Pa. Super. Ct. 1991) (providing that where husband's estimated pension benefit was \$4233.00 and wife's estimated Social Security benefit was \$858.00, court awarded wife only forty percent of husband's retirement benefit, or \$1693.00, thereby leaving husband \$2540.00 of retirement interest and affording wife a combined interest in husband's retirement and her Social Security of \$2551.00); *see also Kelly*, 9 P.3d at 1048 (holding that "a present value . . . should be placed on the social security benefits [the husband] would have received had he participated in that system during the marriage. . . . The social security calculation then can be

Likewise, in Arizona, in *Kelly v. Kelly*, in which the wife participated in Social Security but the husband, instead, participated in the CSRS, which did not include Social Security, the court held that although federal law prohibits it from dividing Social Security benefits because Social Security must be characterized as the separate property of the entitled spouse, it is not so constrained with respect to CSRS pension benefits that are subject to no such restriction and are characterized as marital property under state law.¹⁹⁰ Thus, the court held that “to the extent individuals with Social Security benefits enjoy an exemption of that ‘asset’ from equitable distribution . . . those individuals participating in the CSRS must, likewise, be so positioned.”¹⁹¹ The court specifically noted that in making an equitable response by offsetting, the court does not attempt to value the participating spouse’s expected Social Security benefits.¹⁹² Rather,

a present value, measured as of the date of dissolution, should be placed on the social security benefits *[the husband] would have received had he participated in that system during the marriage. . . .* The social security calculation can then be deducted from the present value of [the husband’s] CSRS pension on the date of dissolution. The remainder, if any, is what may be divided as community property.”¹⁹³

The court reasoned that, “pension benefits that are ‘in lieu of’ social security can be set aside as . . . separate property, just as the value of . . . social security benefits are . . . separate property.”¹⁹⁴ However, the court noted that one problem in this approach is that,

deducted from the present value of [the husband’s] CSRS pension on the date of dissolution. The remainder, if any, is what may be divided as community property.”).

190. *Kelly*, 9 P.3d at 1047.

191. *Id.* at 1048 (quoting *Cornbleth*, 580 A.2d at 371).

192. *Id.*

193. *Id.* (citing *Cornbleth*, 580 A.2d at 372) (emphasis in original).

194. *Id.*

this method will create an imbalance whenever there is a disparity between the salaries of each spouse. But such an inequity is not of our making, nor can it be worse than the situation that presently exists under the law. If both [the husband] and [wife] had participated in social security, they would be in the same financial position as that created by our holding today. The social security portion of each retirement plan would be set aside as the respective spouse's separate property, whether equal or not, while the remaining benefits earned during marriage would be divided as community property by the trial court. Thus, our resolution merely attempts to place the parties in the position they would have been [in] had both participated in social security.¹⁹⁵

In adopting the approach that the court may offset the hypothetical value of Social Security with other marital property that the court is otherwise authorized to divide under state law, the court in *Kelly* made two important determinations that distinguish the reasoning of *Hisquierdo* and the states that rely on it to apply a broad scope of preemption:¹⁹⁶ (1) it determined that Social Security benefits are not sufficiently analogous to Railroad Retirement benefits for the restrictions of *Hisquierdo* to apply;¹⁹⁷ and, (2) it determined that reclassifying other marital property as separate property is different than reclassifying Social Security as divisible marital property, which is what federal law prohibits.¹⁹⁸ Thus, the court's holding in *Kelly* provided not an offset of Social Security but, rather, a means to consider the resulting inequity as an equitable factor.¹⁹⁹ The

195. *Id.*; see also *Kohler v. Kohler*, 118 P.3d 621, 625 (Ariz. Ct. App. 2005) (applying *Kelly* exemption where only one party participated in retirement plan).

196. *Wolff v. Wolff*, 929 P.2d 916, 921 (Nev. 1996); *Olson v. Olson*, 445 N.W.2d 1, 11 (N.D. 1989); *Swan v. Swan*, 720 P.2d 747, 752 (Or. 1986); see also *Cox v. Cox*, 882 P.2d 909 (Alaska 1994); *Peterson v. Peterson*, 197 Cal. Rptr. 3d 588 (Cal. Ct. App. 2016); *In re Marriage of Crook*, 813 N.E.2d 198 (Ill. 2004); *Manning v. Manning*, 93 A.3d 566 (Vt. 2014).

197. See *Kelly*, 9 P.3d at 1049 n.3 (distinguishing relevant anti-assignment provisions of Railroad Retirement Act and Social Security Act).

198. *Id.* at 1048.

199. See *In re Marriage of Zahm*, 978 P.2d 498 (Wash. 1999) (distinguishing *Hisquierdo* because there was no offset or definitive Social Security value that

court held that “we are today neither dividing social security benefits nor providing an offset. Therefore, *Hisquierdo* is not violated by our holding.”²⁰⁰

Of course, again, this begs the question of whether Congress intended to make such a distinction when it drafted Section 407, and whether the Court in *Hisquierdo* intended the prohibition of offsetting to include the offsetting of Social Security, itself, but not the offsetting of other property based on Social Security. Some courts do not draw this distinction but, instead, hold that reclassifying other marital property as separate property of the non-participating spouse to compensate for the participating spouse’s Social Security is the same as depriving the participating spouse of his or her Social Security.²⁰¹

ii. Offsetting Using the Actual Value of Social Security

The approach adopted by the court in *Cornbleth*, and later in *Kelly*, was flatly rejected by the Superior Court of New Jersey in *Hayden v. Hayden*.²⁰² In *Hayden*, the husband was forty-three years old and received a pension from his employment with the New Jersey State Police and, consequently, did not contribute to Social Security.²⁰³ The husband relied on *Cornbleth* to argue that the court should offset from the marital share of his pension the amount of hypothetical Social Security benefits he would have received had he not participated in the state police pension.²⁰⁴

was determined such that, essentially, the court looked upon Social Security as a “consideration” that occurred after property distribution).

200. *Kelly*, 9 P.3d at 1049.

201. See *Hisquierdo v. Hisquierdo*, 539 U.S. 572, 583 (1979); see also *Johnson v. Johnson*, 726 So. 2d 393, 394–95 (Fla. Dist. Ct. App. 1999); *In re Marriage of Crook*, 813 N.E.2d at 202; *Depot v. Depot*, 2006 ME 25, ¶ 11, 893 A.2d 995, 999–1000.

202. *Hayden v. Hayden*, 665 A.2d 772 (N.J. Super. Ct. App. Div. 1995).

203. *Id.* at 773.

204. *Id.* The wife’s expert valued the husband’s pension at \$188,290, which did not account for the husband’s lack of Social Security benefits. *Id.* The husband’s expert valued the husband’s pension at \$132,323.18, but based on the holding in

However, the court rejected the authority of *Cornbleth* and denied the husband's claim on the basis that he could still accrue Social Security benefits based on other employment during his state police career or employment following his retirement.²⁰⁵ Thus, *Hayden* arguably rejected the offset approach for retirement benefits in lieu of Social Security in New Jersey.

However, in 2004, the same court that decided *Hayden* decided *Panetta v. Panetta*.²⁰⁶ In *Panetta*, during the marriage, the husband was initially employed in the private sector, but subsequently, from 1977 to 2000, he was employed by the federal government.²⁰⁷ As a federal employee, he participated in the federal Civil Service Employees' pension system. Therefore, he neither contributed to nor received Social Security benefits.²⁰⁸ The wife was employed by AT&T and contributed to Social Security through her employment.²⁰⁹ The parties divorced in 1994, at which time the parties agreed, and the court subsequently ordered, that when the husband elected to retire and to begin receiving Social Security benefits, the husband would be entitled to adjust the wife's portion of his pension by decreasing the wife's portion by the value of the husband's imputed Social Security benefits.²¹⁰ The husband

Cornbleth, reduced the value of the husband's pension by \$26,160.38, which represented the hypothetical value of Social Security the husband would have received had he been enrolled in Social Security. *Id.* at 773–74.

205. *Id.* at 775. The husband also was employed during the marriage as an adjunct professor at Seton Hall University. *Id.* at 773.

206. *Panetta v. Panetta*, 851 A.2d 720 (N.J. Super. Ct. App. Div. 2004).

207. *Id.* at 722.

208. *Id.* at n.1. In fact, the husband received Social Security benefits from his employment prior to his civil service employment through which he derived the subject pension, and, thus, the court ultimately held that his Social Security benefit should be offset by his wife's Social Security benefit, and then the wife's marital portion of the husband's pension should be offset against any remaining Social Security benefit that the wife received. *Id.* at 728–29.

209. *Id.* at 722.

210. *Id.* at 722–23. The court held that “it is impossible to calculate that portion

retired in May 2000, at which time both parties raised issues about the valuation of the husband's pension and the Social Security offset.²¹¹

In September 2002, the trial judge ruled that the court's holding in *Hayden*, which was decided in 1995—after the agreement in *Panetta* was signed but before the husband retired—changed the law with respect to the offsetting of Social Security benefits.²¹² As a result, the court held that “under New Jersey law it was correct for a judge to refuse to reduce the valuation of a pension by the amount of the social security benefit that [one party] would have received if he [or she] had been in equivalent private employment.”²¹³

The husband appealed, arguing that the trial court erred in “finding that *Hayden* changed the law on the social security offset prior to [his] retirement [and in] disallowing the social security offset”²¹⁴ On appeal, the Superior Court of New Jersey held that, in fact, *Hayden* did *not* change the law of pension offsets by denying the husband's claim to offset.²¹⁵ Rather, the *Hayden* court simply rejected the claim for an offset based on imputed or hypothetical Social Security benefits, and the court in *Panetta* simply confirmed the *Hayden* court's rejection of that approach.²¹⁶ Thus, the *Panetta* court rejected the trial court's inappropriate reliance on *Hayden* to deny an offset based on actual Social Security

of [the husband's] pension attributed to . . . social security benefits . . . until [the husband's] true and exact retirement date, pension benefits and social security benefits become known” *Id.* at 723 (referencing the amended judgment filed on March 21, 2000).

211. *Id.* at 723–24.

212. *Id.* at 725.

213. *Id.* at 724 (quoting trial court's letter opinion referencing *Hayden* court's rejection of *Cornbleth* holding). The court also determined that the husband was entitled to Social Security benefits related to his employment in the private sector prior to his employment with the federal government, which additionally affected the court's valuation of the parties' pension interests. *Id.*

214. *Id.* at 725.

215. *Id.* at 728–29.

216. *Id.* at 729.

benefits.²¹⁷ Instead, the *Panetta* court held that “the purpose of the offset is to balance the retirement benefits accrued by each of the parties during the marriage”²¹⁸ and that the best way to achieve this balance is to offset the participating spouse’s actual social security benefit against his or her share of the non-participating spouse’s pension.”²¹⁹ Thus, the court recognized the possibility of offsetting to balance the retirement benefits accrued by each of the parties during the marriage, but the court treated the Social Security benefits like any other deferred distribution and held that the offset could not be calculated until the beneficiary spouse collected the Social Security benefits.²²⁰ The court held that,

[t]he fairest and most equitable means is to deduct [the husband’s] actual social security benefit . . . from [the wife’s] actual social security benefit when she begins to collect it, and then offset the remainder . . . against [the wife’s] share of [the husband’s] pension. In other words, the partial participant’s actual social security benefit is deducted from the full participant’s benefit and the remainder . . . is offset against the full participant’s share of the partial participant’s pension.²²¹

Notwithstanding the court’s reasoning for its specific

217. Although the court in *Panetta* held that an offset of retirement benefits, in lieu of Social Security benefits, against actual Social Security benefits is appropriate, the court denied the husband’s claim for an offset based on the “hypothetical” aspect of his claim as well as for equitable reasons based on the husband’s failure to comply with the parties’ existing agreement. *Id.* at 724–25, 729.

218. *Id.* at 728.

219. *Id.* at 729; *see also* *Hochstetler v. Hochstetler*, 2012-Ohio-2669; *Eickelberger v. Eickelberger*, 638 N.E.2d 130, 135 (Ohio Ct. App. 1994).

220. *Panetta*, 851 A.2d at 728–29; *see also* *Schaffner v. Schaffner*, 713 A.2d 1245, 1249–50 (R.I. 1998) (holding that offsetting husband’s pension by hypothetical value of relinquished Social Security benefit would be inequitable, but that court should “take into account [wife’s] Social Security benefits when they commence.”). The *Schaffner* court noted that “[i]n return for that relinquishment [the husband] received decreased deductions from his paychecks while he continued to work and increased pension benefits upon retirement.” *Id.* at 1247.

221. *Panetta*, 851 A.2d at 729.

holding, it is clear that New Jersey, like Pennsylvania and Louisiana, embraces an interpretation of the scope of federal preemption that authorizes the court to equitably divide the parties' marital property by offsetting a calculated marital value of Social Security benefits against community property that is otherwise divisible by the court under the applicable state property distribution scheme. In this way, arguably, the court does no damage to the federal law requiring that Social Security benefits be classified as "non-community" and, thereby, non-divisible property, by allowing the court to reclassify, under state law, marital property *other* than Social Security,²²² so as to cure the inequity between the parties that otherwise results from the application of federal law.

Support for New Jersey's approach of offsetting a spouse's private retirement benefits received in lieu of Social Security against the actual value of a participant spouse's Social Security benefits is found in a long history of cases decided in Ohio.²²³ For example, in *Eickelberger v. Eickelberger*,²²⁴ in which the wife was to receive Social Security benefits upon retirement, but the husband, instead, participated in two pension plans, both of which were subject to equitable division as marital property, the court held that even though the court has no authority to divide interests in Social Security benefits, the trial court erred by not evaluating and considering the wife's Social Security benefits when allocating marital retirement benefits in equitably dividing property.²²⁵ The court remanded the case "for

222. In the case of Louisiana, this would include *any* other marital property, *see supra* text accompanying notes 142–59, and in the case of Pennsylvania and New Jersey, this would include retirement benefits "in lieu of" Social Security benefits, *see supra* text accompanying notes 166–87, 202–22.

223. *Neville v. Neville*, 99 Ohio St. 3d 275, 2003-Ohio-3624, 791 N.E.2d 434; *Hochstetler*, 2012-Ohio-2669; *Colley v. Colley*, 2009-Ohio-6776; *Parsons v. Parsons*, 2008-Ohio-1904; *Harshbarger v. Harshbarger*, 2004-Ohio-3919, 814 N.E.2d 105; *Eickelberger*, 638 N.E.2d at 130.

224. 638 N.E.2d at 130.

225. *Id.* at 134 (citing *Smith v. Smith*, 632 N.E.2d 555 (Ohio Ct. App. 1993)),

further consideration concerning the impact of [the wife's] potential Social Security benefits on the division of the parties' pension and retirement benefits."²²⁶ The court stated that, in making its consideration, the court

should begin an analysis by calculating [the wife's] potential future monthly Social Security benefits and [the husband's] potential future PERS monthly benefits. The court may then offset [the wife's] potential monthly Social Security benefits against [the husband's] potential PERS monthly benefits. . . . The trial court can then equitably apportion the balance of the parties' marital assets.²²⁷

This is the same formula applied by the Superior Court of New Jersey in *Panetta*.

Likewise, in *Neville v. Neville*,²²⁸ the court recognized a disparity of approximately \$44,000 in the spouses' expected Social Security benefits.²²⁹ To compensate for the disparity, the trial court awarded the wife equity in the parties' marital home, which was valued at approximately \$43,000.²³⁰ However, the appellate court reversed, holding that Social Security benefits can only be offset against other deferred benefit retirement plans.²³¹

On appeal, the Ohio Supreme Court reversed, holding that, based on the catch-all²³² provision of the state's

rev'd, 791 N.E.2d 434 (Ohio 2003); *Cornbleth v. Cornbleth*, 580 A.2d 369 (Pa. Super Ct. 1990) (noting that non-participants in Social Security are penalized because their pensions are deemed marital while private employees' Social Security contributions are not).

226. *Id.* at 135.

227. *Id.* (internal citations omitted).

228. *Neville*, 99 Ohio St. 3d 275, 2003-Ohio-3624, 791 N.E.2d 434, at ¶ 12.

229. *Id.* at 275, 2003-Ohio-3624, 791 N.E.2d 434, at ¶ 2.

230. *Id.* at 275, 2003-Ohio-3624, 791 N.E.2d 434, at ¶ 2.

231. *Id.* at 275, 2003-Ohio-3624, 791 N.E.2d 434, at ¶ 4.

232. Under Ohio's statutory scheme, the court is directed to consider all factors relevant to the equitable division of property. OHIO REV. CODE ANN. § 3105.171(C)(1) (2015). This analysis includes considering "the duration of the marriage" and "the assets and liabilities of the [parties]." *Id.* § 3105.171(F)(1) –

distribution scheme, Social Security could be considered in relation to any or all assets in the division of marital property.²³³ As to the argument that this violates *Hisquierdo* by essentially dividing Social Security assets as marital property, the court held that it did not divide Social Security assets but, rather, considered its value in dividing other marital property, which was “precisely what the statute dictate[d].”²³⁴ Thus, although the issue on appeal addressed the narrower issue of whether offsetting the value of Social Security benefits must be applied only against similar deferred payment plans or whether offsetting may apply against other marital property, the court, nevertheless, offset other property using the actual value method, at least as closely as it could, given the property that it used as compensation.

However, in *Harshbarger v. Harshbarger*,²³⁵ the trial court deviated from the “actual value” approach and applied the hypothetical offset method in determining retirement benefits.²³⁶ On appeal, the court addressed the specific question of the appropriate valuation method for offsetting Social Security benefits.²³⁷ The court recognized Pennsylvania’s *Cornbleth* decision as the leading decision supporting the hypothetical offset method.²³⁸ The court stated that

[t]he *Cornbleth* method seems to be both the most thorough and the most equitable under the circumstances presented Specifically, this method appears to give both parties comparable credit in terms of the years of participation in their respective programs, whereas,

(F)(2). In *Neville*, the “catch-all” provision directed the court to consider “[a]ny other factor that the court expressly finds . . . relevant and equitable.” *Id.* § 3105.171(F)(10).

233. *Neville*, 99 Ohio St. 3d 275, 2003-Ohio-3624, 791 N.E.2d 434, at ¶ 11.

234. *Neville*, 99 Ohio St. 3d 275, 2003-Ohio-3624, 791 N.E.2d 434, at ¶ 12.

235. 2004-Ohio-3919, 814 N.E.2d 105.

236. *Id.* at 2004-Ohio-3919, 814 N.E.2d 105, at ¶¶ 8–9.

237. *Id.* at 2004-Ohio-3919, 814 N.E.2d 105, at ¶¶ 10–13.

238. *Id.* at 2004-Ohio-3919, 814 N.E.2d 105, at ¶¶ 19, 22.

in practice, the other methods may well penalize the PERS participant by subjecting a larger proportionate share of that spouse's retirement to division as a marital asset.²³⁹

However, the court further considered that the hypothetical offset approach becomes increasingly inequitable when one of the parties receives pension benefits and as the other party's Social Security benefit approaches zero:

Where the non-Social Security spouse's retirement benefits accrued during the marriage exceed the Social Security spouse's Social Security benefits accrued during the marriage, using the Social Security spouse's actual social security benefits as an offset will always result in the equivalent of an equal division of the retirement benefits accrued during the marriage and is therefore the more equitable method of division, barring unusual circumstances justifying an unequal division.²⁴⁰

The court opted for the "actual value" method as the most equitable for offsetting other property against Social Security benefits, but noted that an unequal division of assets may be appropriate when special circumstances justify such an award.²⁴¹

The court in *Parsons v. Parsons* considered such special circumstances.²⁴² In *Parsons*, in evaluating its ability to determine the actual benefits that the parties anticipated, the court considered: the length of the marriage, the parties' ages, their retirement status, their prospects for employment, their respective health status, their ongoing contributions to Social Security, and the indefinite nature of the spousal support award, and ultimately determined that the trial court did not abuse its discretion in denying an

239. *Id.* at 2004-Ohio-3919, 814 N.E.2d 105, at ¶ 22.

240. *Id.* at 2004-Ohio-3919, 814 N.E.2d 105, at ¶ 27.

241. *Id.* at 2004-Ohio-3919, 814 N.E.2d 105, at ¶ 27.

242. 2008-Ohio-1904.

offset award.²⁴³ The court held that it “would be speculative and would unnecessarily assign a single simplistic value to a complex benefit that, depending on future events, will ultimately work an inequity on the parties.”²⁴⁴ Thus, the court was reluctant to apply an offset method for which it was not able to apply an “actual” value to the parties’ Social Security benefits.

Conversely, in *Colley v. Colley*,²⁴⁵ the court distinguished *Parsons*, finding that the circumstances of the case *did* warrant the trial court’s consideration of Social Security benefits in the division of property. In fact, the trial court specifically stated that it *did* consider the husband’s Social Security “as a matter of equity in arriving at the final property distribution.”²⁴⁶ However, the trial court included the total value of the wife’s pension account on the balance sheet, but did not include the value of the husband’s Social Security benefits.²⁴⁷ The court held that although the court *did* consider the husband’s Social Security benefits, it “offer[ed] no explanation of how the court took those benefits into account in its division and distribution of property and contain[ed] no specific findings regarding setoff of the parties’ retirement benefits.”²⁴⁸ Accordingly, it held that the trial court’s “failure to make specific findings regarding the manner in which it calculates a setoff of retirement benefits, including Social Security benefits, constitutes an abuse of discretion.”²⁴⁹

Finally, in *Hochstetler v. Hochstetler*,²⁵⁰ the court employed the same “dual-offset” of Social Security benefits

243. *Id.* at ¶¶ 16, 18, 19.

244. *Id.* at ¶ 16.

245. 2009-Ohio-6776.

246. *Id.* at ¶ 42.

247. *Id.* at ¶ 41.

248. *Id.* at ¶ 44.

249. *Id.*

250. 2012-Ohio-2669.

that the New Jersey court in *Panetta* applied.²⁵¹ First, the court offset the parties' respective Social Security benefits by reducing the value of the husband's benefits (\$247,054.61) by the value of the wife's benefits (\$37,453.91), thereby deriving a remaining Social Security value for husband of \$209,600.70.²⁵² The court then offset that amount by the value of the wife's SERS retirement account (\$237,732.31), thereby leaving a SERS balance of \$28,131.61 as the marital portion of the parties' retirement benefits that was subject to division.²⁵³

The husband appealed, claiming that Section 407 prohibited the court from treating Social Security benefits as divisible.²⁵⁴ However, the court held that, with respect to the first offset of the parties' respective Social Security benefits, the "federal statute does not forbid the court from considering or figuratively 'offsetting' the valuation of each spouse's social security benefits in order to formulate an equitable property division. [Thus, n]o improper 'division' of social security benefits resulted from the court's decision in this regard."²⁵⁵ With respect to the offset of the remaining Social Security value with the wife's SERS retirement, the court held that this offsetting was also valid²⁵⁶ and comported with Ohio's provision for the equitable division of property, which provided:

In making a division of marital property and in determining whether to make and the amount of any distributive award under this section, the court shall consider all of the following factors: . . . Any retirement benefits of the spouses, excluding the social security benefits of a spouse except as may be relevant for purposes of

251. See *Panetta v. Panetta*, 851 A.2d 720, 729 (N.J. Super. Ct. App. Div. 2004).

252. *Hochstetler*, 2012-Ohio-2669, at ¶ 27.

253. *Id.*

254. *Id.* at ¶¶ 23–28.

255. *Id.* at ¶ 28.

256. *Id.*

dividing a public pension[.]²⁵⁷

Accordingly, the court in *Hochstetler* held consistently with the long-standing precedent in Ohio that adopts the “actual value” of Social Security method when offsetting public pension benefits in divorce. Although Ohio embraces the same view that other jurisdictions like Pennsylvania, Arizona, and New Jersey adopt—that state courts may offset retirement benefits received in lieu of Social Security by a calculable value of Social Security—these states vary quite significantly on the nature of the Social Security that is calculated, insofar as whether it is an actual value derived from the benefits of the participating spouse or a hypothetical value derived from the foregone benefits of the non-participating spouse.

Notwithstanding this distinction between the states, these jurisdictions adopt the policy that offsetting retirement benefits received in lieu of Social Security does not violate federal law. However, the following section addresses the jurisdictions that hold that federal law prohibits any form of offsetting in which the value of Social Security is calculated to affect the distribution of marital property.

2. Offsetting Prohibited

Notwithstanding the several states that provide for various methods of offsetting divisible marital property with a calculable value of Social Security to compensate for the arguable inequity of federal preemption, there are a number of states that embrace the underlying conclusion that the scope of federal preemption prohibits a state court from offsetting the value of Social Security benefits against other property in divorce.²⁵⁸

Arkansas is an example of a state in which a court held that the scope of federal preemption of Social Security

257. *Id.* at ¶ 24.

258. *See infra* text accompanying notes 259–84.

benefits extends not only to prohibit the direct distribution of benefits,²⁵⁹ but also to prohibit state courts from offsetting retirement benefits in lieu of Social Security.²⁶⁰ Specifically, in *Gentry v. Gentry*, upon divorce, the parties entered a property settlement agreement, which the court incorporated into the parties' divorce decree, wherein the parties agreed for the wife to acquire one-half of whatever benefit the husband might receive from Social Security.²⁶¹ When the husband began receiving benefits, he refused to pay the wife her half interest, and the wife filed a petition for contempt.²⁶² The trial court held for the wife, finding that the property settlement agreement was enforceable and that the wife was entitled to a one-half share of the husband's Social Security benefits.²⁶³ As a matter of first impression in Arkansas, the widely-respected Justice Ray Thornton relied on *Hisquierdo's* broad application of the anti-assignment clause of Section 407 and held that the assignment of future Social Security benefits in the parties' agreement was unenforceable under the Supremacy Clause of the U.S. Constitution.²⁶⁴

259. *Gentry v. Gentry*, 938 S.W.2d 231 (Ark. 1997).

260. *Gray v. Gray*, 101 S.W.3d 816 (Ark. 2003).

261. *Gentry*, 938 S.W.2d at 231–32.

262. *Id.* at 232.

263. *Id.*

264. *See id.* at 232–33; *see also* Kelley v. Kelley, 2012 Ark. App. 653, at 7, 2012 WL 5834633, at *4 (relying on holding in *Gentry* to find that trial court could not enforce agreement to divide Tier I Railroad Retirement benefits, which court held were railroad equivalent of Social Security). Note, however, that the court in *Gentry* expressly limited its holding to the assignment of “future” receipt of benefits and concluded that “[o]nce Social Security benefits are received, they become the recipient’s personal property and he can do whatever he wishes with them, even use them to pay preexisting obligations.” *Gentry*, 938 S.W.2d at 232 (citing *United States v. Eggen*, 984 F.2d 848, 850 (7th Cir. 1993)). *But see* Dinges v. Dinges, 743 N.W.2d 662, 666, 670–71 (Neb. Ct. App. 2008) (finding that where wife used \$27,000 of Social Security back pay as down payment on \$54,000 modular home that she purchased for herself, payment was not traceable as divisible marital property upon divorce and once received, lump-sum Social Security payment remained protected by anti-assignment clause of § 407); *Boulter v. Boulter*, 930 P.2d 112, 115 (Nev. 1997) (quoting *Hatfield v. Christopher*,

Subsequently, in *Gray v. Gray*, the husband wanted his “in lieu of” portion of his CSRS pension plan to be exempted from distribution as an offset against the wife’s Social Security.²⁶⁵ Again relying on *Hisquierdo*, the court clearly distinguished the husband’s private retirement benefits from actual Social Security benefits and held that the husband’s retirement plan benefits earned in lieu of Social Security were not exempted from the equitable division of marital property.²⁶⁶ In making this distinction, the court relied on the view of the Court of Appeals of Florida, in *Johnson v. Johnson*, which held that

[a]n offsetting award . . . would upset the statutory balance and impair [the participant’s] economic security just as surely as would a regular deduction from his [or her] benefit check. The harm might well be greater. . . . [T]he offsetting award . . . would improperly anticipate payment by allowing [the non-participant spouse] to receive [his or] her interest before the date Congress has set for any interest to accrue. Any such anticipation threatens harm to the employee, and corresponding frustration to federal policy, over and above the mere loss of wealth caused by the offset.²⁶⁷

841 S.W.2d 761, 767 (Mont. App. Ct. 1992)) (“It is clear from the U.S. Supreme Court’s opinion in *Philpott v. Essex County Welfare Board*, . . . that if a bank account contains social security funds, the funds are exempt from legal process.”); *Kluck v. Kluck*, 1997 ND 41, ¶ 31, 561 N.W.2d 263, 271 (“[I]dentifiable social security moneys in the hands of a divorcing spouse cannot be counted as marital assets to calculate divisions). This limited holding presents yet another level of disagreement among states with respect to whether Social Security payments already received may be directly assignable in divorce. For cases dealing with the enforceability of agreements, see *supra* note 116.

265. *Gray*, 101 S.W.3d 816 at 817.

266. *Id.* at 827–28.

267. *Johnson v. Johnson*, 726 So. 2d 393, 396 n.4 (Fla. Dist. Ct. App. 1999). See *In re Marriage of Berthiaume*, No. C5-90-2392, 1991 WL 90839, at *2 (Minn. Ct. App. June 4, 1991) (finding that the approach taken by court in *Cornbleth* was wrong by not fully appreciating the supremacy of federal law); *Olson v. Olson*, 445 N.W.2d 1 (N.D. 1989); *Loudermilk v. Loudermilk*, 397 S.E.2d 905 (W.Va. 1990); *Mack v. Mack*, 323 N.W.2d 153 (Wis. Ct. App. 1982); see also *Schaffner v. Schaffner*, 713 A.2d 1245, 1248 (R.I. 1998) (distinguishing *Cornbleth* and disallowing offset by subtracting hypothetical value of Social Security benefits of retirement “in lieu of” Social Security, where other party had received no Social Security benefits). Cf. *Johnson v. Johnson*, 2007 S.D. 56, 734 N.W.2d 801 (holding

Therefore, the *Gray* court held that pension benefits received in lieu of Social Security were not sufficiently analogous to Social Security so as to be exempted from marital property, whereas the pension benefits were contractual in nature, but the parties held no property interest in Social Security benefits.²⁶⁸ The court also held that it was the husband's choice to opt for the pension plan instead of Social Security benefits and that he acquired more present benefits from this choice.²⁶⁹

Thus, Arkansas stands as a state that interprets the scope of federal preemption to not only prohibit the distribution of Social Security benefits, but also to prohibit the court from offsetting a hypothetical portion of retirement benefits that are acquired in lieu of Social Security. However, Arkansas has yet to determine if, or how, the court may consider the effect of this preemption on its determination of the equitable division of marital property.

As in Arkansas, courts in Nebraska have held that offsetting to compensate for the disparity in Social Security benefits between parties is prohibited by the Supremacy Clause and the Court's holding in *Hisquierdo*.²⁷⁰ Specifically,

that consideration was not equivalent with direct distribution in terms of effect on recipient's benefits).

268. *Gray*, 101 S.W.3d at 827.

269. *Id.* at 827–28; see also *In re Marriage of Boyer*, 538 N.W.2d 293, 296 (Iowa 1995) (noting wife's willingness to leave her position of employment from which she might have derived Social Security); *Schaffner*, 713 A.2d at 1247 (finding that because husband voluntarily opted out of Social Security system by participating in private retirement fund, he was not entitled to claim its exemption from equitable distribution upon divorce). The dissent in *Gray* urges the court to adopt the view of Pennsylvania and Ohio, which allows for offsetting. *Gray*, 101 S.W.3d at 828 (Corbin, J., dissenting). The dissent held that even though it was the husband's choice, his choice benefitted both parties and, thus, it would be a windfall for the wife not to offset against her Social Security. *Id.*

270. See *Lorenzen v. Lorenzen*, 883 N.W.2d 292, 298–99 (Neb. 2016) (ruling that there was to be no offsetting hypothetical value because this effectively assigns Social Security, which is prohibited); *Webster v. Webster*, 716 N.W.2d 47, 56 (Neb. 2006) (ruling that there was to be no offsetting of actual social security value).

Some courts prohibit offsetting in theory, but then compensate for any inequity

in *Webster v. Webster*, as a matter of first impression in 2006, the Supreme Court of Nebraska held that a state court is prohibited from offsetting the wife's marital share of the husband's pension by an amount reflecting the actual value of the difference between his marital share of his wife's Social Security benefits and his wife's share of her Social Security benefits.²⁷¹ The court specifically noted that it was not impermissible, however, for the court to make a more generalized consideration of Social Security benefits as a factor "within the more elastic parameters of the court's power to formulate a just and equitable division of the parties' marital property."²⁷² The court held that such an approach is particularly proper when one spouse has worked to contribute to the increase of Social Security benefits.²⁷³ However, like the Arkansas courts, the *Webster* court never reached this specific issue.

In 2008, the Court of Appeals of Nebraska *did* reach this issue in *Dinges v. Dinges*, in which the court confirmed the

by offsetting other property that is otherwise divisible, reasoning that any offsetting of Social Security in such a division of property is merely as an equitable factor authorized under the state property distribution law and not violative of federal law under § 407. For example, courts in Iowa and Washington adopt this approach. See *In re Boyer*, 538 N.W.2d at 296; *In re Marriage of Zahm*, 978 P.2d 498, 503 (Wash. 1999); *In re Marriage of Rockwell*, 170 P.3d 572, 577 (Wash. Ct. App. 2007); see also *Shown v. Shown*, 479 S.W.3d 611, 614 (Ky. Ct. App. 2015) (ruling that where wife was entitled to Social Security, court required consideration of husband's non-eligibility for Social Security and then employed offset of husband's teacher's retirement account with hypothetical value of husband's interest "in lieu of" Social Security as method of valuation without expressly prohibiting offsetting). However, because these courts express the basis of support for this approach as one of equitable consideration and specifically not one of offsetting calculable Social Security value, the discussion of these jurisdictions is reserved for the following section, which discusses the jurisdictions that permit the consideration of Social Security benefits as only one of many possible equitable factors bearing on the division of marital property.

271. *Webster*, 716 N.W.2d at 54.

272. *Id.* at 55 (quoting *In re Zahm*, 978 P.2d at 502) (finding *Hisquierdo* inapplicable where trial court does not compute a formal calculation of Social Security benefits nor offset a formal numerical value as a basis for the division of property).

273. *Id.* at 56.

prohibition against offsetting, but then determined the issue raised, but not addressed, in *Webster*, by holding that although the court is prohibited from offsetting Social Security benefits, it may properly consider such an award in equitably dividing the marital property.²⁷⁴ However, the court offered no insight into how it might consider and structure such an award.²⁷⁵

In 2016, in *Lorenzen v. Lorenzen*, the Supreme Court of Nebraska confirmed the holdings in *Webster* and *Dinges*, but went no further in advancing the issue of how Social Security benefits may be considered in the distribution of property because neither party contended that this is how the benefits should be viewed.²⁷⁶ Rather, the parties and the court limited the issue to the classification of benefits as marital or separate property.²⁷⁷ However, the court based its decision on a case in Illinois—*In re Marriage of Mueller*²⁷⁸—that the Illinois Supreme Court had decided subsequent to the divorce decree issued in *Lorenzen*.²⁷⁹

In *Mueller*, the court answered the issue that now presented itself to the court in *Lorenzen*, which was whether and how to offset from marital property benefits received in lieu of Social Security.²⁸⁰ The *Mueller* court held that

274. *Dinges v. Dinges*, 743 N.W.2d 662, 671 (Neb. Ct. App. 2008).

275. *See id.*

276. 883 N.W.2d 292, 296 (Neb. 2016).

277. *Id.*

278. 2015 IL 117876.

279. *Lorenzen*, 883 N.W.2d at 297–98. For a more in-depth discussion of *In re Mueller*, see *infra* notes 398–410 and accompanying text.

280. There is an important distinction between the two cases, however. In *In re Mueller*, the husband was seeking offset of the value of his wife's *actual* Social Security benefits that were to be received in the future, but were excluded. *See In re Mueller*, 2015 IL 117876, ¶¶ 1–2. In *Lorenzen*, the husband was seeking the *hypothetical* value of his *own* benefits that he gave up. *Lorenzen*, 883 N.W.2d at 294–95. The court in *Lorenzen* later held that although these are different, and Lorenzen's request for hypothetical value may be less subject to speculation than those in *In re Mueller*, they still effectively offset benefits that are separate under state law, as well as federal law, and effectively serve as a direct offset from the

although reducing the husband's pension benefits by an amount of hypothetical Social Security benefits that the husband might have received if he had been eligible was "not strictly speaking an offset," it still created "parallel benefits for the husband that would affect the division of marital property" and, therefore, such a division was equally improper under Section 407.²⁸¹ Consistent with the line of reasoning in *Mueller* with respect to the issue of how the court might "consider" the effect of such a holding in distributing marital property, the *Lorenzen* court held that:

'as a matter of policy, any rule permitting trial courts to consider the mere existence of Social Security benefits without considering their value, and thereby violating federal law, is nearly impossible to apply' . . . because of 'the uncertainties inherent in Social Security benefits' and the speculation involved in estimating such benefits.²⁸²

The court agreed that it would be "both illogical and inequitable" to adjust the marital estate for 'hypothetical Social Security benefits that, even if the husband had participated in that program, he may not ever receive.'²⁸³ Thus, although the court in *Lorenzen* recognized the holdings in *Webster* and *Dinges* as authorizing the court to consider the effect of this view of the scope of federal preemption—extending the scope of preemption to include the offset of property received in lieu of Social Security by either actual or hypothetical values—in dividing marital property, the court determined, in accordance with the reasoning of the court in *Mueller*, that such consideration would be nearly impossible to apply.²⁸⁴

marital estate. *Id.* at 298–99.

281. *Id.* at 297 (quoting *In re Mueller*, 2015 IL 117876, ¶ 5).

282. *Id.* at 298 (quoting *In re Mueller*, 2015 IL 117876, ¶ 26).

283. *Id.* (quoting *In re Mueller*, 2015 IL 117876, ¶ 26).

284. *See id.* at 298–99. Subsequent to the July 2016 *Lorenzen* decision, in November 2016, the Court of Appeals of Nebraska decided *Smith v. Smith*, No. A-15-1234, 2016 WL 6956771 (Neb. Ct. App. Nov. 29, 2016) in which the husband had \$137,000 retirement that was marital and was distributed. *Id.* at *3–5. The

Thus, Arkansas and Nebraska represent the posture of those states that have not yet addressed or officially embraced the position that a court may consider Social Security as an equitable factor in dividing marital property. Some states, like Arkansas, interpret the reasoning of *Hisquierdo* to resolve the issue. Other states, like Nebraska, are inclined to limit the scope of federal preemption to allow courts discretion under state property distribution laws to consider Social Security as a factor in determining the equitable division of property. In either posture, however, offsetting by calculating a hypothetical or actual Social Security value with which to offset other marital property, including retirement benefits in lieu of Social Security, is prohibited.

3. “Considering” Social Security Benefits as an Equitable Factor in Dividing Property

Even though many courts hold that offsetting is prohibited by the preemptive reach of *Hisquierdo*, and even though many of those courts, such as those in Nebraska, which nevertheless consider the offsetting issue but still prohibit offsetting—even for retirement benefits in lieu of Social Security—many state courts interpret the Social Security Act to allow a court to consider the effect of this broader application of federal preemption on the equitable division of marital property. The manner in which these states assume this posture and manifest this consideration often varies,²⁸⁵ but the objective is the same—to limit the

wife’s Social Security was not distributed. *See id.* The trial court equalization judgment was for the husband to pay \$50,902.40 and the only source available for payment was his retirement. The court said that the classifications of property were correct under *Lorenzen*, but that a QDRO must be used in consideration of the husband’s limited resources to make payment. *Id.* at 4–5. For cases discussing issue of Social Security as the sole source of income, see cases cited *supra* note 93.

285. For example, courts in Iowa, Kentucky, and Washington have offset Social Security value, but framed it as an equitable consideration of future economic circumstances. *In re Marriage of Boyer*, 538 N.W.2d 293, 296 (Iowa 1995); *Shown v. Shown*, 479 S.W.3d 611, 614 (Ky. Ct. App. 2015) (finding that where wife was

scope of federal preemption of Social Security and, thereby, compensate spouses through the application of the equitable provisions of state property distribution laws.

For example, there are several jurisdictions that effectively offset Social Security, without violating the broader application of *Hisquierdo*, by manifesting the offset as an equitable consideration affecting the future financial circumstances of the parties rather than as a calculated influence on the court's division of marital property. The most demonstrative example of this is Washington, in the cases of *In re Marriage of Zahm*²⁸⁶ and *In re Marriage of Rockwell*.²⁸⁷

In *In re Zahm*, in dividing property upon divorce, the trial court characterized the husband's Social Security benefits as marital property, although it "neither assigned

entitled to Social Security, court required consideration of husband's non-eligibility for Social Security and then employed offset of husband's teacher's retirement account with hypothetical value of husband's interest "in lieu of" Social Security as method of valuation without expressly prohibit offsetting); *In re Marriage of Zahm*, 978 P.2d 498, 503 (Wash. 1999); *In re Marriage of Rockwell*, 170 P.3d 572, 577–78 (Wash. Ct. App. 2007). Courts in North Dakota and Oregon, however, have, at one time, expressly prohibited offsetting based on the supremacy of federal law and the broad application of the reasoning in *Hisquierdo*. See *Olson v. Olson*, 445 N.W.2d 1, 11 (N.D. 1989) ("social security cannot be distributed or used as an offset in division of marital property."); *In re Marriage of Swan*, 720 P.2d 747, 750–51 (Or. 1986) (holding that federal law preempted any inclusion of Social Security benefits in the court's determination of property division, including offsetting). Subsequent to these respective decisions, these states have endorsed equitable considerations by the court. See *Kluck v. Kluck*, 1997 ND 41, ¶¶ 30–31, 561 N.W.2d 263, 270–71 (recognizing trial court's authority to consider effect of property distribution—including exclusion of Social Security benefits as divisible part thereof—on parties' future financial circumstances); *Vitko v. Vitko*, 524 N.W.2d 102, 104 (N.D. 1994) (ruling Social Security benefits excluded from court's equitable division of marital property, but court may consider disability income "so as to determine the financial circumstances of each party to the divorce."); *In re Marriage of Herald*, 322 P.3d 546, 549 (Or. 2014) (finding court's holding in *Swan* to be too sweeping and restrictive and, instead, holding that, within appropriate limits, it is proper for the court to consider anticipated Social Security benefits in effecting an equitable division of marital property).

286. 978 P.2d at 498.

287. 170 P.3d at 572.

nor calculated in a future value of these monies as part of the court's property characterization and distribution."²⁸⁸ The Court of Appeals of Washington held that this was an improper characterization of Social Security benefits, but held that the error was harmless since the court "did not order an actual distribution of those benefits."²⁸⁹ Instead, "the trial court merely noted . . . that '61% of [the husband's] social security was earned during marriage."²⁹⁰ The husband asserted that notwithstanding whether the benefits were ultimately apportioned or not, such consideration was factored into the distribution of the parties' assets and, therefore, was improper.²⁹¹ However, the court held that "mere consideration by a trial court of a party's social security benefits in a marital dissolution proceeding is [not] reversible error."²⁹² Rather, "a trial court may still properly consider a spouse's social security income within the more elastic parameters of the court's power to formulate a just and equitable division of the parties' marital property."²⁹³

Arguably, the court did precisely that in *In re Rockwell* when it compensated the wife with the present value of the Social Security that she would have received but was not entitled to draw due to the structure of her federal pension.²⁹⁴ Thus, the Washington Court of Appeals viewed "hypothetical offsetting" as a method for "consideration" of the parties' financial circumstances in dividing the parties' property. Ultimately, this is nothing more than an offset with other marital property, but because there is no actual calculation of the participant spouse's Social Security—an approach that the *Lorenzen* court rejected as "illogical and

288. *In re Zahm*, 978 P.2d at 500.

289. *Id.* at 501.

290. *Id.* at 502.

291. *Id.*

292. *Id.*

293. *Id.*

294. *In re Marriage of Rockwell*, 170 P.3d 572, 577–78 (Wash. Ct. App. 2007).

inequitable” and “nearly impossible to apply”—the court viewed it as “a fair and proper means of considering social security or achieving overall fairness” without violating federal preemption.²⁹⁵

Similarly, in *Shown v. Shown*, the Court of Appeals of Kentucky held that where the wife was entitled to Social Security but the husband was not, to divide the husband’s retirement account without considering its nature as a substitute for Social Security “effectively divides his ‘social security’ benefits anyway, leaving [his wife]’s Social Security benefits untouched, and unconsidered.”²⁹⁶ The court directed that to properly consider the husband’s ineligibility for Social Security on remand, the court must:

compute the present value of a Social Security benefit that [the husband] would have received had he contributed to Social Security. That value should be deducted from the present value of [the husband]’s teachers’ retirement pension, prior to division of the parties’ pension plans. . . . Otherwise, for the courts to divide teacher retirement accounts in this manner puts every teacher spouse at grave risk as compared to those persons working in the private sector with federally protected Social Security accounts.²⁹⁷

The court added that such complex financial calculations are necessary to determine the equities and should require expert testimony.²⁹⁸ Thus, like the Washington courts in *Zahm* and *Rockwell*, the Kentucky court in *Shown* effectively employed an indirect offset of the wife’s Social Security under the guise of mere consideration of the husband’s Social Security ineligibility.²⁹⁹

295. *Id.* at 578.

296. *Shown v. Shown*, 479 S.W.3d 611, 613 (Ky. Ct. App. 2015); *see also* *Gross v. Gross*, 8 S.W.3d 56, 57–58 (Ky. Ct. App. 1999) (“court’s consideration of [wife’s] non-prospective Social Security benefits in formulating [equitable] division of marital property is not preempted by [the Social Security Act]”).

297. *Shown*, 479 S.W.3d at 614.

298. *Id.*

299. *See id.*

In *In re Marriage of Boyer*, the Supreme Court of Iowa adopted essentially the same approach.³⁰⁰ As part of the equitable division of property, the trial court ordered the wife to pay the husband a cash settlement of \$20,000 “to equalize the property distribution, and also recognizing and taking into consideration the greater benefit [the husband] will be getting from social security.”³⁰¹ On appeal, the majority of the Iowa Court of Appeals, relying on the reasoning of *Hisquierdo*, concluded that the court may not “consider” Social Security benefits in property distributions.³⁰² Consequently, the Iowa Court of Appeals increased the cash settlement the wife was to pay the husband by \$5,000, presumably to compensate for the trial court’s improper consideration of the husband’s Social Security benefits.³⁰³

On appeal, relying on prior case law,³⁰⁴ the Iowa Supreme Court recognized distinctions between the Railroad Retirement Act applicable in *Hisquierdo* and the Social Security Act applicable in the case before it, but nevertheless agreed with the court below that *Hisquierdo* prohibits state courts from “directly or (by way of setoff) indirectly divid[ing] social security benefits in their formulation of economic terms and dissolution decrees.”³⁰⁵ However, the Supreme Court of Iowa disagreed with the lower court that the trial court’s “consideration” of the anticipated Social Security benefits of the parties amounted to an indirect offset.³⁰⁶ Rather, the court held:

We see a crucial distinction between: (1) adjusting property division

300. 538 N.W.2d 293, 293–94 (Iowa 1995).

301. *Id.* at 294.

302. *Id.*

303. *Id.*

304. *In re Marriage of Schissel*, 292 N.W.2d 421, 424–27 (Iowa 1980) (holding that court may consider military pension benefits in formulating economic terms of dissolution decree).

305. *In re Boyer*, 538 N.W.2d at 295.

306. *Id.* at 296.

so as to indirectly allow invasion of benefits; and (2) making a general adjustment in dividing marital property on the basis that one party, far more than the other, can reasonably expect to enjoy a secure retirement. [The court] should not invalidate a property division if a disproportionate expectation regarding social security benefits is acknowledged in the court's assessment of the equities.³⁰⁷

Like the court in *Rockwell*, the *Boyer* court held that while “a court cannot ‘divide’ the anticipated benefits or establish any exact setoffs on such a basis,” a court can weigh as a factor in fixing the economic terms of a dissolution decree “the fact that one party expects benefits that will not be enjoyed by the other.”³⁰⁸

By doing this, the trial court did not value [the husband's] social security and offset it against other property, nor did it divide his social security benefit. . . . Rather, the trial court focused solely on [the wife's] foregone, indivisible social security benefits and valued them for purposes of comparing her economic future against [her husband's]. . . . [T]his was appropriate—the trial court's adjustment method simply removed both parties' social security benefits from the equation in order to put them on comparable footing prior to dividing the remaining assets.³⁰⁹

Thus, the court effectuated as an appropriate consideration what many courts otherwise prohibit as an indirect offset.³¹⁰ The court noted that the adjustment that the trial court made was not proportional to the

307. *Id.*; see also *Biondo v. Biondo*, 809 N.W.2d 397, 402–03 (Mich. Ct. App. 2011); *Johnson v. Johnson*, 2007 SD 56, ¶¶ 26–27, 734 N.W.2d 801, 808–09 (finding as a matter of first impression that Social Security benefits may be considered as a factor, among others, when dividing marital property in a divorce action).

308. *In re Boyer*, 538 N.W.2d at 293–94.

309. *In re Marriage of Rockwell*, 170 P.3d 572, 577 (Wash. Ct. App. 2007).

310. See, e.g., *Smith v. Smith*, 2015 MT 256, ¶¶ 16–17, 381 Mont. 1, 358 P.3d 171 (allowing consideration of Social Security benefits in division of property, but only as an equitable factor in considering economic circumstances of parties while cautioning against “achiev[ing] indirectly what [it] may not do directly” by succumbing to the temptation to simply shift property of equivalent value, thereby treating Social Security as marital property, which is an unacceptable practice).

disproportion of the parties' Social Security interests, but further noted that the trial court's adjustment was based not only on the disproportion in Social Security benefits but, rather, it was also based on the court's "desire 'to equalize the property distribution.'"³¹¹ Additionally, the court noted that "[t]he disproportion was in part a result of [the wife's] willingness to leave her position [and forego Social Security benefits]." ³¹²

The court's interpretation of the holding in *Hisquierdo* as prohibiting "consideration" of Social Security benefits by way of indirect offset suggests that if the trial court's adjustment were proportional to the disproportion of Social Security benefits, then the trial court's "adjustment" would be unconstitutional as falling within the scope of federal preemption. However, the *Boyer* court held that "the adjustment here was not proportional because no attempt was made to shape the extent of the adjustment by computing the disproportion . . . [and, therefore,] the challenged consideration did not poison the trial court's property division."³¹³ Thus, the court held:

[A] state court is not required to pretend to be oblivious of the fact that one party expects benefits that will not be enjoyed by the other. This contrasting economic security can be weighed as a factor in fixing the economic terms of a dissolution decree. . . . [Therefore,] [w]e do not think the federal preemption legislation requires state courts under these circumstances to purge so obvious an economic reality in its assessment.³¹⁴

Accordingly, even though most courts hold that offsetting is prohibited by the preemptive reach of

311. *In re Boyer*, 538 N.W.2d at 296.

312. *Id.*; see also *Gray v. Gray*, 101 S.W.3d 816, 827 (Ark. 2003).

313. *In re Boyer*, 538 N.W.2d at 296; see also *Litz v. Litz*, 288 S.W.3d 753, 758 (Mo. Ct. App. 2009) (holding that court may not offset but may consider Social Security in a way that "would not have a material impact on its division of marital property.").

314. *In re Boyer*, 538 N.W.2d at 293–94, 296.

Hisquierdo, many of these same courts nevertheless allow a state court to consider the effect of this broad application of federal preemption on the overall division of marital property by viewing Social Security as one of many equitable factors bearing on the parties' future financial circumstances.³¹⁵ However, even at this level of the analysis, courts disagree about what this reconciliation means and how a court may implement it within a divorce proceeding.

One of the states that most comprehensively addressed each level of the analysis of the court's consideration of Social Security benefits is Maryland, where its courts have held that Social Security may not be directly distributed³¹⁶ or offset,³¹⁷ but that it may be considered as an equitable consideration in the division of property.³¹⁸ Specifically, recall that in *Pleasant v. Pleasant*, the Court of Special Appeals of Maryland held that Social Security may not be directly distributed because

the Supremacy Clause of the United States Constitution precludes states from intervening in the allocation of social security benefits. Consequently, social security benefits may not be considered

315. *Lorenzen v. Lorenzen*, 883 N.W.2d 292, 298–99 (Neb. 2016) (prohibiting offset of retirement benefits in lieu of Social Security, but recognizing holdings in *Webster* and *Dinges*, which authorized court to consider prohibition when making determination of property division); *Simmons v. Simmons*, 709 S.E.2d 666, 668 (S.C. 2011) (ruling that parties' agreement to apportion Social Security was unenforceable, but court considered the effect of preemption on equitable resolution of entire divorce judgment, including alimony, which court held to be "inextricably connected" to division of marital property).

316. *Huntley v. Huntley*, 145 A.3d 607, 613–14 (Md. Ct. Spec. App. 2016); *Pleasant v. Pleasant*, 632 A.2d 202, 206 (Md. Ct. Spec. App. 1993).

317. *See Dapp v. Dapp*, 65 A.3d 214, 220–21 (Md. Ct. Spec. App. 2013) (holding that Supremacy Clause of United States Constitution precluded enforcement of marital separation and property settlement agreement entitling ex-wife to one-half of ex-husband's "Tier I" retirement benefits, the component of ex-husband's retirement benefits that served as substitute for Social Security benefits under Railroad Retirement Act of 1974, since assignment of Tier I benefits is prohibited by the Railroad Retirement Act).

318. *See Brewer v. Brewer*, 846 A.2d 1, 21 (Md. Ct. Spec. App. 2004) (ruling that courts, when seeking to compensate inequity, may generally consider non-marital property to understand parties' incomes and posture).

marital property or be subject to distribution *in any manner* in a divorce proceeding. . . . [However] a court could consider the fact that a party is receiving, or will receive, social security benefits, as “any other factor” in determining whether to make a monetary award.³¹⁹

Thus, the court attempted to reconcile both sides of the conflict—the broad federal law preempting the distribution of Social Security benefits *in any manner* and the state law permitting state courts to consider factors that are relevant to the equitable distribution of property.

In 2016, the court in *Jackson v. Sollie* confronted the same balance.³²⁰ In *Jackson*, the husband and wife were married for thirty-five years.³²¹ The sixty-one-year-old husband participated in the federal government’s CSRS program since 1977.³²² Under the CSRS program, Social Security taxes are not withheld from the employee’s salary; thus, the employee is not entitled to Social Security benefits.³²³ However, for twelve years prior to his employment with the federal government, the husband worked in the private sector and contributed to Social Security during that time.³²⁴ Thus, upon retirement, the husband was entitled to limited Social Security benefits.³²⁵ However, the fifty-eight-year-old wife participated in the Maryland State Retirement Service (MSRS) plan and was entitled to her state pension as well as full Social Security

319. *Pleasant*, 632 A.2d at 206, 207 n.3 (emphasis added).

320. 141 A.3d 1122, 1125 (Md. 2016) (finding that anticipated income may be considered as a factor).

321. *Id.*

322. *Id.* at 1124 n.2, 1125.

323. *Id.* at 1124 n.1. The CSRS program was replaced by the Federal Employees Retirement System (“FERS”). Unlike participants in the CSRS program, FERS participants contribute to Social Security; the husband opted not to participate in the FERS program. *Id.* at 1124 n.4, 1125 n.5.

324. *Id.* at 1125.

325. *Id.*

benefits upon retirement.³²⁶ The husband argued that, in dividing the parties' property, the court should reduce his CSRS pension benefits by the embedded portion that was in lieu of Social Security.³²⁷ However, the trial court awarded each party fifty percent of the marital share of the other party's divisible retirement benefits, which included only the wife's state pension and the entirety of the husband's federal CSRS pension, from which the husband appealed.³²⁸

On appeal, the court addressed the jurisdictional split on the interpretation and application of the holding in *Hisquierdo*, which "preempted state courts from directly or indirectly interfering with [in this case, Social Security] benefits."³²⁹ The Maryland court defined the issue as being whether "indirect" interference in *Hisquierdo* included both offsetting of other property—namely, retirement benefits in lieu of Social Security—as well as a more general consideration of Social Security in the overall property distribution scheme.³³⁰ With respect to offsetting, the court held that because of the difference in property interests between pension annuities and Social Security benefits, federal law preempts state courts from "offset[ting] the alleged embedded Social Security value in the CSRS pension" based on the Court's finding in *Hisquierdo* that "[a]n offsetting award . . . would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his [or her] benefit check."³³¹

The court also held that "any valuation of hypothetical Social Security benefits allegedly located within the CSRS

326. *See id.* at 1124 n.2, 1125.

327. *Id.* at 1125.

328. *See id.*

329. *See id.* at 1128, 1131–34 (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588 (1979)).

330. *See id.* at 1131–34.

331. *Id.* at 1134–35 (quoting *Hisquierdo*, 439 U.S. at 588).

pension would be speculative.”³³² However, with respect to a more generalized consideration of Social Security, the court held that “federal law does not prevent courts from generally considering a party’s participation in the Social Security program . . . because it does not involve the direct division of Social Security benefits or the indirect division of those benefits by way of an offset.”³³³ Rather, it may be considered as a statutory factor in “the determination of the parties’ relative economic circumstances at the time of the divorce proceeding.”³³⁴ In reaching this conclusion, the court drew a critical clarification regarding the relevant limitations of Section 407(a)’s prohibition against subjecting Social Security to “other legal process[es]” whereas the U.S. Supreme Court has limited the phrase “other legal process” to some judicial mechanism by which control over property passes from one person to another, which the *Jackson* court found does not include a divorce court’s consideration of “anticipated or actual Social Security benefit payments as a factor relevant to the equitable distribution of property.”³³⁵ The court reasoned that for a court to fail to make such considerations is to “ignore reality” and results in “a distorted picture of [each] spouse’s financial needs, and, in turn, an inequitable division of the marital property.”³³⁶

Accordingly, the *Jackson* court held that “a trial court is *required* to consider the parties’ actual or anticipated Social Security benefits as a relevant factor” under the applicable state property distribution provisions.³³⁷ Provided the trial court neither directly distributes nor indirectly offsets a

332. *Id.* at 1135.

333. *Id.*

334. *Id.* at 1136 (citing *In re Marriage of Zahm*, 978 P.2d 498, 503 (Wash. 1999) (en banc)).

335. *Id.* (quoting *Washington State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003)).

336. *Id.* at 1136–37 (quoting *Depot v. Depot*, 2006 ME 25, ¶ 17, 893 A.2d 995, 1101–02).

337. *Id.* at 1138 (emphasis added).

formally calculated lump sum value equated with Social Security in equitably dividing property, Social Security must be considered with all of the other past, present, and future financial circumstances of the parties.³³⁸ Thus, the court concluded that under Maryland's statutory property distribution scheme, a monetary award is a valid means of compensating for the inequity of the preempted distribution of marital property.³³⁹

Specifically, the court noted that under Maryland's statutory scheme, there are eleven factors that the court must consider, several of which would include the parties' actual or anticipated Social Security benefits.³⁴⁰ In terms of

338. *See id.* (first quoting *Depot*, 2006 ME 25 at ¶ 10, 893 A.2d at 999; and then quoting *In re Zahm*, 978 P.2d at 501).

339. *See id.* at 1139.

340. *See id.* at 1139–40. Section 8–205(b) of the Maryland Code of Family Law lists the considerations that a court must take into account in determining a monetary award:

- (1) the contributions, monetary and nonmonetary, of each party to the well-being of the family;
- (2) the value of all property interests of each party;
- (3) the economic circumstances of each party at the time the award is to be made;
- (4) the circumstances that contributed to the estrangement of the parties;
- (5) the duration of the marriage;
- (6) the age of each party;
- (7) the physical and mental condition of each party;
- (8) how and when specific marital property or interest in property described in subsection (a)(2) of this section, was acquired, including the effort expended by each party in accumulating the marital property or the interest in property described in subsection (a)(2) of this section, or both;
- (9) the contribution by either party of property described in § 8–201(e)(3) of this subtitle to the acquisition of real property held by the parties as tenants by the entirety;
- (10) any award of alimony and any award or other provision that the court has made with respect to family use personal property or the family home; and

consideration and valuation, the court stated that non-marital Social Security benefits need not be evaluated in the same manner as marital property.

It is enough if the court is generally aware of the relative wealth of the parties, in order that it can determine whether it would be equitable to award a greater share of marital property to the spouse owning less of the total property and having less wealth because of that spouse's greater need and the wealthy spouse's lesser need for additional assets.³⁴¹

Upon consideration of these factors, the court then has the discretion to grant a monetary award to adjust the equities of the parties with respect to the division of marital property.³⁴² Because the equitable factors allow the court to consider circumstances that are not limited to a party's property rights, the reasoning of *Hisquierdo* is inapposite, and considering Social Security—albeit a non-contractual interest—as an equitable factor with respect to the division of marital property, is appropriate.³⁴³ The reasoning of the court in *Jackson*, therefore, accommodates the approach taken by courts like *In re Zahm* and *In re Rockwell*, which prohibited the offsetting of Social Security benefits but effectively offset other marital property as a means of

(11) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in property described in subsection (a)(2) of this section, or both.

MD. CODE ANN., FAM. LAW § 8-205(b) (West 2017).

341. *Jackson*, 141 A.3d at 1140 (quoting *Melrod v. Melrod*, 574 A.2d 1, 9 (Md. Ct. Spec. App. 1990)).

342. *See id.* at 1140–41.

343. *See id.* at 1131–36; *see also* *Neville v. Neville*, 99 Ohio St. 3d 275, 2003-Ohio-3624, 791 N.E.2d 434, at ¶ 11 (“We believe that allowing consideration of Social Security benefits in relation to all marital assets is the more reasoned approach. . . . Although a party's Social Security benefits cannot be divided as a marital asset, those benefits may be considered by the trial court under the catchall category as a relevant and equitable factor in making an equitable distribution. Accordingly, . . . a trial court, in seeking to make an equitable distribution of marital property, may consider the parties' future Social Security benefits in relation to all marital assets.”).

considering Social Security without violating the broad application of *Hisquierdo*.

Likewise, in *Biondo v. Biondo*, much like the parties in *Simmons*,³⁴⁴ the parties entered a settlement in which they agreed to equalize their Social Security benefits.³⁴⁵ The Court of Appeals of Michigan held that federal law preempted the state court from enforcing the agreement, which it accepted as having been entered by the parties by mutual mistake, and the court remanded the case for the trial court to address the issue of “whether the amount of the parties’ anticipated social security benefits may play any part in a modified judgment reallocating marital property.”³⁴⁶ Like the courts in *In re Boyer* and *Jackson*, the *Biondo* court determined that in dividing marital property, the state court would consider statutory factors relevant to its determination and, therefore, held that “[t]he amount of a spouse’s anticipated or received social security benefits qualifies as relevant to several of the . . . factors, including the contributions each made to the marital estate, their ‘necessities and circumstances,’ and ‘general principles of equity.’”³⁴⁷ Relying on the *Boyer* court’s distinction between adjusting property division so as to invade actual benefits and making a general adjustment in assessing the equities of the parties,³⁴⁸ the court held that a circuit court may consider the parties’ anticipated Social Security benefits as one of the many factors to be considered when devising an equitable distribution of property, but the appellate court cautioned that “the court may not treat social security benefits as tantamount to a marital asset. Instead, the circuit court may take into account, in a general sense, the extent to which social security benefits received by the

344. *Simmons v. Simmons*, 709 S.E.2d 666, 666 (S.C. 2011).

345. *Biondo v. Biondo*, 809 N.W.2d 397, 398–99 (Mich. Ct. App. 2011).

346. *Id.* at 402.

347. *See id.* (quoting *Sparks v. Sparks*, 485 N.W.2d 893, 901 (Mich. 1992)).

348. *See supra* note 305 and accompanying text.

parties affect the . . . factors.”³⁴⁹ With respect to how a court might account for this, however, the court did not issue any specific directive for formulating an equitable property division.³⁵⁰

Undertaking that issue, however, several courts have attributed an unequal percentage of marital property to each spouse as a means of doing equity after generally considering the parties’ respective Social Security benefits as an equitable factor bearing on the ultimate division of property.³⁵¹ For example, in Delaware, in *Forrester v. Forrester*, the court determined that retirement benefits received “in lieu of” Social Security benefits are divisible as marital property and may not be offset.³⁵² However, the court held that the divorce court may consider the fact that they are divisible in determining an equitable distribution of property.³⁵³ The court added that it may consider “the existence and the amount of Social Security benefits in the course of an equitable property division, even where that consideration might lead the Family Court to alter its division of the marital estate.”³⁵⁴ In doing this, the trial court opted that, rather than determining the anticipated future value of hypothetical Social Security contributions and subtracting that value from the marital portion of the divisible estate, it could “rectify any imbalance by awarding a lesser or greater portion of the pension [of the non-

349. See *Biondo*, 809 N.W.2d at 403.

350. See *id.* at 402–03.

351. See *In re Marriage of Morehouse*, 121 P.3d 264, 267 (Colo. App. 2005); *Stanley v. Stanley*, 956 A.2d 1 (Del. 2008); *Forrester v. Forrester*, 953 A.2d 175 (Del. 2008); see also *Mahoney v. Mahoney*, 681 N.E.2d 852 (Mass. 1997); *Johnson v. Johnson*, 2007 SD 56, ¶ 27, 734 N.W.2d 801, 808–09.

352. See *Forrester*, 953 A.2d at 185.

353. *Id.*

354. *Id.* The statute that the court held to authorize this approach “permit[ted] the Family Court to consider the ‘economic circumstances of each party at the time the division of property is to become effective.’” *Id.* at 185 n.42 (quoting DEL. CODE ANN. tit. 13, § 1513(a)(8) (2008)).

participating spouse] after comparing the respective economic positions of the parties, their employment history, annual income, and assets as required by the statute.”³⁵⁵

In *Forrester*, the court concluded that fifty percent of the husband’s retirement that was in lieu of Social Security was sufficient to represent this equitable consideration.³⁵⁶ Thus, the court held that the trial court appropriately “considered” the parties economic equities.³⁵⁷ Of course, what this simply amounts to is an indirect offset with other marital property, which, in effect, is no different than what the State of Louisiana provides for by statute.³⁵⁸ Also, there was no direct evidence reported in the *Forrester* opinion that supported how a fifty percent division of other retirement benefits constituted an equitable division that rectified any imbalance that may have resulted given that the husband was not entitled to a portion of the wife’s accrued Social Security benefits. Thus, it seems that the court either did not truly “consider” the resulting inequities—(how could it, without calculating any hypothetical or actual Social Security value?³⁵⁹)—or it “actually” valued the wife’s future income of Social Security, along with the husband’s “in lieu of” benefits, to determine that fifty percent of the assets was the equitable division of property that accounted for the inherent inequity of federal preemption. Either way, the result is effectively the same—an offset of divisible marital property that compensates for the inequitable consequence of the federal preemption of Social Security benefits.³⁶⁰

355. *Id.* at 186 n.45.

356. *Id.* at 186.

357. *Id.*

358. *See supra* note 142 and accompanying text.

359. *See In re Marriage of Mueller*, 2015 IL 117876, ¶ 25; *Lorenzen v. Lorenzen*, 883 N.W.2d 292, 298 (Neb. 2016).

360. *But see In re Marriage of Anderson*, 252 P.3d 490, 494–95 (Colo. App. 2010) (stating that a court may not presume invalid offset just because of unequal distribution of property after considering Social Security, especially when other factors are relevant); *Hornung v. Hornung*, 146 A.3d 912, 926 (Conn. 2016)

Just one month after *Forrester*, the court decided *Stanley v. Stanley*.³⁶¹ In that case, the trial court ordered the husband to pay part of his Social Security Disability lump-sum benefits to the wife as part of a modification of a stipulated property division that was based upon the wife then receiving less than she would have received under the original agreement.³⁶² The court held that this violated federal law by directly dividing the husband's Social Security benefit.³⁶³ Therefore, as the court did in *Simmons*,³⁶⁴ the *Stanley* court held that it was appropriate to reopen and reconsider the equitable distribution of property and, as in *Forrester*, determined that Social Security may be considered as one of the factors when dividing property.³⁶⁵ However, the

(concluding that a lump sum alimony award does not necessarily constitute functional property distribution).

361. 956 A.2d 1 (Del. 2008).

362. The agreement was based on the wife receiving fifty percent, or \$1,341.00, of the husband's pension, but when the husband applied for SSDI, her benefit was reduced to \$367.00. *Id.* at 2.

363. *Id.* at 5.

364. See 709 S.E.2d 666, 668 (S.C. 2011).

365. See *Forrester v. Forrester*, 953 A.2d 175, 185–86; see also *In re Anderson*, 252 P.3d at 490 (holding that although Social Security Act prohibits distribution of marital property to offset computed value of Social Security, court may grant unequal distribution of property based on fact that one party is more likely to enjoy secured retirement than the other and in making that determination, court may not presume unequal distribution of property representing an impermissible offset of Social Security benefits, especially when justified by a combination of factors, only one of which was disparity in parties' future Social Security benefits); *In re Marriage of Morehouse*, 121 P.3d 264, 267 (Colo. App. 2005); *In re Marriage of James*, 950 P.2d 624 (Colo. App. 1997); *Skibinski v. Skibinski*, 2009 ME 13, ¶¶ 5–11, 964 A.2d 641, 642–43 (stating that although the court is prohibited from treating Social Security benefits as marital property, it considered those benefits as a relevant factor in reaching equitable division of parties' property); *Depot v. Depot*, 2006 ME 25, ¶¶ 9–10, 893 A.2d 995, 998–99 (stating that although Social Security may not be transferred or attributed a lump-sum value and offset, court may consider benefits as a relevant factor when fashioning an equitable division of parties' marital estate, particularly when anticipated benefits are relevant to a multiplicity of factors affecting parties' respective economic circumstances under state property distribution laws). *But see Bradbury v. Bradbury*, 2006 ME 26, ¶ 7, 893 A.2d 607, 609–10 (holding that trial court did not abuse discretion by not considering given facts of case).

court reversed the trial court's order that the husband's Social Security benefits be assigned to the wife and, instead, held that the "[h]usband's payment to [the w]ife must come from a different source, to be determined on remand."³⁶⁶

In *Stanley*, the court noted the *then*-existing split in authority regarding the treatment of Social Security benefits in the equitable division of the parties' assets.³⁶⁷ However, the court in *Stanley* opted for the "equitable consideration" approach, holding that,

while a trial court may not distribute marital property to offset the computed value of social security benefits, it may premise an unequal distribution of property—using, for example, a 60–40 formula instead of 50–50—on the fact that one party is more likely to enjoy a secure retirement. . . . [S]ocial security benefits may be considered as a factor, among others, when dividing marital property. This adheres to the federal restrictions, for it is not a direct division of [the husband's] social security.³⁶⁸

366. *Stanley*, 956 A.2d at 2.

367. At the time of *Stanley*, twelve states "considered" Social Security benefits in arriving at an equitable division of the parties' other assets. See *Stanley*, 956 A.2d at 4 n. 6 (citing *In re Morehouse*, 121 P.3d at 267; then citing *In re Marriage of Boyer*, 538 N.W.2d 293, 293–94, 296 (Iowa 1995); then citing *In re Marriage of Brane*, 908 P.2d 625, 626, 628 (Kan. Ct. App. 1995); then citing *Pongonis v. Pongonis*, 606 A.2d 1055, 1058 (Me. 1992); then citing *Depot*, 2006 ME 25 at ¶¶ 14–17, 893 A.2d at 998; then citing *Pleasant v. Pleasant*, 632 A.2d 202, 206, 207, n.3 (Md. Ct. Spec. App. 1993); then citing *Mahoney v. Mahoney*, 681 N.E.2d 852, 856 (Mass. 1997); then citing *Rudden v. Rudden*, 765 S.W.2d 719, 720 (Mo. Ct. App. 1989); then citing *Dinges v. Dinges*, 743 N.W.2d 662, 671 (Neb. Ct. App. 2008); then citing *Neville v. Neville*, 99 Ohio St. 3d 275, 2003-Ohio-3624, 791 N.E.2d 434, at ¶ 11; then citing *Johnson v. Johnson*, 2007 SD 56, ¶ 27, 734 N.W.2d 801, 808; then citing *Olsen v. Olsen*, 2007 UT App 296, ¶22, 169 P.3d 765, 772; and then citing *In re Marriage of Zahm*, 978 P.2d 498, 502 (Wash. 1999) (en banc). Eight states prohibited "consideration." See *id.* at 4 (citing *Johnson v. Johnson*, 726 So. 2d 393, 396 (Fla. Dist. Ct. App. 1999)); *In re Marriage of Crook*, 813 N.E.2d 198, 204 (Ill. 2004); *In re Marriage of Berthiaume*, No. C5-90-2392, 1991 WL 90839, at *1–2 (Minn. Ct. App. June 4, 1991); *Wolff v. Wolff*, 929 P.2d 916, 921 (Nev. 1996); *English v. English*, 879 P.2d 802, 808 (N.M. Ct. App. 1994); *Olson v. Olson*, 445 N.W.2d 1, 11 (N.D. 1989); *In re Marriage of Swan*, 720 P.2d 747, 752 (Or. 1986); *Reymann v. Reymann*, 919 S.W.2d 615, 617 (Tenn. Ct. App. 1995); *In re Marriage of Mack*, 323 N.W.2d 153, 157 (Wis. Ct. App. 1982).

368. *Stanley*, 956 A.2d at 4–5.

Therefore, the court held that the trial court's order that the husband pay the wife money out of his SSDI lump-sum benefit violated federal law and must be revised "to provide for payment from any other source the court deem[ed] appropriate."³⁶⁹ Thus, the court simply held that Social Security benefits may be considered in determining a fair and equitable division of property, as long as the compensation for any inequity does not directly affect the receipt of Social Security benefits but, rather, is derived from some other property.³⁷⁰ Again, although this solution is framed in the context of a determination about the future equities of the parties, which includes a general consideration of Social Security benefits as a source of future disparate income, we must be realistic about what the court's solution entails—it is an authorization to offset the value of disparate Social Security benefits with other marital property, which, in effect, is nothing more than what the State of Louisiana authorizes by statute.

4. Total Preemption

There are at least four jurisdictions—including Alaska,³⁷¹ Illinois,³⁷² Nevada,³⁷³ and Vermont³⁷⁴—that adopt

369. *Id.* at 5.

370. *See id.*; *see also* Phipps v. Phipps, 864 P.2d 613, 616–17 (Idaho 1993) (enforcing agreement for husband to pay wife portion of retirement funds where agreement did not require transfer of Social Security funds and payment could be derived from other retirement fund sources).

371. *See Cox v. Cox*, 882 P.2d 909, 920 (Alaska 1994) (holding that given speculative nature of future benefits using Social Security as a factor in determining equities is simply not a "wise" approach).

372. *See infra* text accompanying notes 381–410.

373. *See Wolff v. Wolff*, 929 P.2d 916, 921 (Nev. 1996).

374. *See Manning v. Schultz*, 2014 VT 22, ¶¶ 11–12, 93 A.3d 566, 570 (holding that federal law preempts distribution and offset of Social Security benefits, and recognizing state division on issue of court's consideration of benefits as factor in determining equitable division of property, but holding that because its own state law authorized division of only property owned by parties, there is no basis in law for dividing, offsetting, or considering Social Security benefits in distribution of marital property).

the view that the scope of federal preemption extends to prohibit state courts from considering Social Security benefits *in any way* as part of the division of marital property.³⁷⁵ Of these jurisdictions, like the courts in Maryland, Illinois has considered the entire gamut of approaches to the issue of Social Security benefits, including direct distribution,³⁷⁶ offsetting³⁷⁷—even upon the

375. California is a total preemption state, but based only on California law. See *In re Marriage of Peterson*, 197 Cal. Rptr. 3d 588 (Cal. Ct. App. 2016). For a further discussion of *In re Peterson*, see *infra* text accompanying notes 412–21.

Some states are not clear on the issue of consideration. See, e.g., *English v. English*, 879 P.2d 802, 808 (N.M. Ct. App. 1994). In North Dakota, the Supreme Court in *Olson v. Olson* held that courts “shall not consider” Social Security, but actually only applied to offset. See 445 N.W.2d 1, 6–7 (N.D. 1989). Subsequent decisions have provided for consideration. See *Kluck v. Kluck*, 561 N.W.2d 263, 270 (N.D. 1997); *Vitko v. Vitko*, 524 N.W.2d 102, 103 (N.D. 1994). For a further discussion of *Vitko*, see *supra* note 285 and accompanying text. In Tennessee, the court in *Reymann v. Reymann* followed the Oregon Supreme Court’s decision in *In re Marriage of Swan*, 720 P.2d 747 (Or. 1986) to deny consideration, but the court really equated “consideration” with offsetting, so Tennessee is classified as “unknown.” See *Reymann v. Reymann*, 919 S.W.2d 615, 617 (Tenn. Ct. App. 1995); see also *Loudermilk v. Loudermilk*, 397 S.E.2d 905, 909–10 (W.V. 1990) (prohibiting offsetting based on *Olson v. Olson*, 445 N.W.2d 1, 6–7 (N.D. 1989), but taking no definitive position on manner of consideration).

376. See *In re Marriage of Evans*, 406 N.E.2d 916, 918 (Ill. App. Ct. 1980) (recognizing the basic concept that Social Security benefits are excluded from distribution upon divorce), *rev’d on other grounds*, 406 N.E.2d 916 (Ill. 1980). The court held that Congress has already expressly defined the parameters of its intent with respect to the scope of preemption by establishing specific requirements for the qualification of spouses. As long as the parties were married for at least ten years, and the under-employed spouse remains unmarried and is at least sixty-two years old, then the under-employed spouse has a statutorily defined interest in the ex-spouse’s Social Security benefits, which includes exceptions for alimony and child support. See *In re Evans*, 406 N.E.2d at 918 (discussing 42 U.S.C. § 659(a)); see also *In re Swan*, 720 P.2d at 751–52. Congress already contemplated the contingency of divorce and defined each spouse’s interest. Outside of this allowance, Social Security benefits simply cannot be divided upon divorce. *In re Evans*, 406 N.E.2d at 918.

377. See *In re Marriage of Hawkins*, 513 N.E.2d 143, 147 (Ill. App. Ct. 1987) (ruling that trial court’s award to wife of extra \$10,000 in property distribution to make up for disparity resulting from Social Security benefits husband was to receive upon retirement violated federal scheme and principles of federal supremacy).

agreement of the parties³⁷⁸—and equitable consideration.³⁷⁹ However, contrary to the conclusion of the Maryland courts, Illinois courts have rested on the policy of “total preemption.”³⁸⁰

In 2004, in *In re Marriage of Crook*, the Supreme Court of Illinois grappled with the issue of the court’s authority to consider the inequitable effect of preemption in its application of state property distribution laws, specifically in the context in which one spouse participates in a retirement plan in lieu of Social Security.³⁸¹ In *In re Crook*, upon divorce, the trial court equally divided the parties’ respective benefits.³⁸² Thus, the husband received half of his wife’s State University Retirement System (SURS) pension, but the wife, who was only fifty-five years old, received no part of the husband’s Social Security because she was not old enough to qualify under the statutorily defined marital entitlement.³⁸³ Therefore, the husband would receive \$850 in Social Security and \$460 a month from his wife’s pension, while the wife would receive \$460 a month, total.³⁸⁴ The wife appealed, arguing that the court should have considered the husband’s future Social Security benefits in making its award of marital property.³⁸⁵ Thus, she argued for the court to let her keep her pension and to let her husband keep his

378. See *In re Marriage of Hulstrom*, 794 N.E.2d 980, 985-86 (Ill. App. Ct. 2003) (holding that only exception to the anti-alienation provision of the Social Security Act was 42 U.S.C. § 659(a), which allowed former spouse to reach Social Security benefits for alimony or child support, but not for property division, and the parties’ agreement did not circumvent limitations of federal preemption).

379. See *In re Marriage of Crook*, 813 N.E.2d 198, 205 (Ill. 2004).

380. See cases cited *infra* notes 381–410.

381. *In re Crook*, 813 N.E.2d at 199–200.

382. *Id.*

383. *In re Marriage of Crook*, 778 N.E.2d 309, 312 (Ill. App. Ct. 2002), *aff’d in part, rev’d in part*, 813 N.E.2d 198 (Ill. 2004).

384. *In re Crook*, 813 N.E.2d at 199.

385. *Id.* at 200.

Social Security benefits, and the court agreed.³⁸⁶ The husband then appealed to the Illinois Supreme Court, which held that because pension benefits were divisible marital property, the court was forced to consider the interplay between Illinois divorce law and the Social Security Act.³⁸⁷

Applying the reasoning of *Hisquierdo*,³⁸⁸ the court held that “[a]lthough the courts in a number of other states have permitted a trial judge to consider a spouse’s anticipated Social Security benefits as one factor, among others, in making an equitable distribution of the distributable marital assets, we reject that analysis.”³⁸⁹ The court reasoned that

[i]nstructing a trial court to “consider” Social Security benefits, as the appellate court did in this case, either causes an actual difference in the asset distribution or it does not. If it does not, then the “consideration” is essentially without meaning. If it does, then the monetary value of the Social Security benefits the spouse would have received is taken away from that spouse and given to the other spouse to compensate for the anticipated difference. This works as an offset meant to equalize the property distribution. That this type of “consideration” amounts to an offset is recognized in the well-reasoned decisions from other state jurisdictions holding that under *Hisquierdo*, it is improper for a circuit court to consider Social Security benefits in equalizing a property distribution upon dissolution.³⁹⁰

386. *Id.* at 200–01.

387. *See id.* at 200.

388. 439 U.S. 572, 590 (1979).

389. *See In re Crook*, 813 N.E.2d at 204–05 (first citing *In re Marriage of Zahm*, 978 P.2d 498 (Wash. 1999) (en banc); then citing *Mahoney v. Mahoney*, 681 N.E.2d 852 (Mass. 1997); then citing *In re Marriage of Boyer*, 538 N.W.2d 293 (Iowa 1995); then citing *In re Marriage of Brane*, 908 P.2d 625 (Kan. Ct. App. 1995); then citing *Eickelberger v. Eickelberger*, 638 N.E.2d 130 (Ohio Ct. App. 1994); then citing *Pleasant v. Pleasant*, 632 A.2d 202, 206, 207 n.3 (Md. Ct. Spec. App. 1993); then citing *Pongonis v. Pongonis*, 606 A.2d 1055, 1058 (Me. 1992); then citing *Holland v. Holland*, 588 A.2d 58 (Pa. Super. Ct. 1991); and then citing *Rudden v. Rudden*, 765 S.W.2d 719, 720 (Mo. Ct. App. 1989)).

390. *Id.* at 205 (citing *Wolff v. Wolff*, 929 P.2d 916 (Nev. 1996); then citing *Olson v. Olson*, 445 N.W.2d 1 (N.D. 1989); and then citing *In re Marriage of Swan*, 720 P.2d 747 (Or. 1986)).

Thus, the court held that allowing each party to keep their respective benefits was equivalent to an offset in that it anticipated future Social Security payments, thereby allowing the wife to receive her interest before the date Congress set for interests to accrue.³⁹¹ And, offsetting the “value” of the husband’s Social Security in this way had the same effect on the husband’s resources as if his Social Security benefit were directly reduced.³⁹² Therefore, although the court acknowledged that it was

fully aware of the potential inequities implicated by the federal preemption protection of one spouse’s Social Security benefits . . . [i]t remains a fact that it is not the province of this court—or of any state court—to interfere with the federal scheme, no matter how unfair it may appear to be. . . . [U]nfairness was a consequence of the statutory scheme as enacted by Congress, and . . . the federal scheme c[an] not be disrupted by state courts. . . .³⁹³

Accordingly, the court held that “it is up to Congress, and not the state courts, to correct any inequity in the federal system.”³⁹⁴

Additionally, the court in *In re Crook* recognized that other courts compensate for the unfairness when other retirement benefits were taken “in lieu of” Social Security benefits,³⁹⁵ but the parties did not assert the applicability of those cases in that scenario, and so the court declined to answer that question.³⁹⁶ However, subsequent to the holding in *Crook*, several Illinois appellate courts confirmed that Social Security benefits could not be directly divided or used as an offset during state dissolution proceedings, but that

391. *See id.* at 203–04.

392. *See id.* at 203.

393. *Id.* at 205 (referencing *Hisquierdo*, 439 U.S. at 588–90).

394. *Id.* at 206.

395. *See id.* (first citing *Cornbleth v. Cornbleth*, 580 A.2d 369 (Pa. Super. Ct. 1990); then citing *Walker v. Walker*, 677 N.E.2d 1252 (Ohio Ct. App. 1996); and then citing *In re Marriage of Kelly*, 9 P.3d 1046 (Ariz. 2000)).

396. *Id.*

Social Security benefits may be considered in determining maintenance awards.³⁹⁷

In turn, in 2015, the court in *In re Marriage of Mueller* answered the question that the *Crook* court left unaddressed regarding the consideration of retirement benefits received in lieu of Social Security.³⁹⁸ Relying on the *Crook* decision, the trial court in *Mueller* denied the husband's claim and affirmed the trial court's decision not to offset the wife's benefits with hypothetical benefits not actually received by the husband.³⁹⁹ The court acknowledged the unfairness of the process and the fact that courts in other states have both supported and rejected similar offsetting valuation methods,⁴⁰⁰ but it held that it was "intent on keeping . . . Social Security benefit[s] out of the pension, and basically the overall analysis of the marital estate."⁴⁰¹ The court reasoned that if parties have no property interest in Social Security benefits and, therefore, Social Security benefits are not marital property that are "acquired by" either party such that they are divisible upon divorce, then "surely hypothetical social security benefits . . . are not marital property and cannot be used to pare down the value of marital property."⁴⁰² Thus, the court determined that the "hypothetical" or "in lieu of" methods, by any other name, were still offsets that caused an actual difference in the asset distribution and, therefore, violate federal law, as

397. See *In re Marriage of Dea*, 2013 IL App (1st) 122213, ¶ 22, 1 N.E.3d 947, 953; *In re Marriage of Wojcik*, 838 N.E.2d 282, 301 (Ill. App. Ct. 2005); *In re Marriage of Rogers*, 817 N.E.2d 562, 565–66 (Ill. App. Ct. 2004).

398. *In re Marriage of Mueller*, 2015 IL 117876, ¶¶ 1–2, 34 N.E.3d 538. The husband sought a hypothetical offset of his pension benefits to compensate for the wife's receipt of Social Security benefits. See *id.* at ¶ 1, 34 N.E.3d at 539.

399. *Id.* ¶ 27, 34 N.E.3d at 541.

400. See *id.* at ¶ 8, 34 N.E.3d at 540–41.

401. *Id.* at ¶ 8, 34 N.E.3d at 540.

402. *Id.* at ¶ 25, 34 N.E.3d at 543 (citing *Reymann v. Reymann*, 919 S.W.2d 615, 617 (Tenn. Ct. App. 1994)).

interpreted by the *Crook* court.⁴⁰³ Like the court in *Crook*, the *Mueller* court held that “it is not the province of this court . . . to interfere with the federal scheme, no matter how unfair it may appear to be.”⁴⁰⁴

Like the *Jackson* court in Maryland, which favored the consideration approach, however, the dissenting appellate court justice in *Mueller* held that the state’s property distribution law *mandates* that the court “divide marital property in just proportions,” and that “ignoring a substantial asset, like a Social Security benefit, that was earned during the marriage runs afoul of that mandate.”⁴⁰⁵ The Illinois Supreme Court dissent also offered several of the policy arguments adopted by several other courts that support the view that either allows for offsetting other marital property as being materially different from offsetting Social Security benefits or that allows for Social Security benefits to be considered as an equitable factor.⁴⁰⁶

However, the majority court held that even considering the existence of anticipated Social Security benefits as an equitable factor under the state’s distribution laws creates a parallel benefit that would affect the division of marital property and, therefore, is preempted.⁴⁰⁷ Furthermore, in accordance with the *Lorenzen* court’s position, the majority court held that it is “nearly impossible” to apply a rule that allows courts to consider the existence, but not the value, of Social Security benefits.⁴⁰⁸ The court noted that simply defining the term “consider” is difficult, and that many

403. *See id.* at ¶ 23.

404. *Id.* at ¶ 27, 34 N.E.3d at 545 (quoting *In re Marriage of Crook*, 813 N.E.2d 198, 205 (Ill. 2004)).

405. *See id.* at ¶ 13, 34 N.E.3d at 541 (citing *In re Marriage of Mueller*, 2014 IL App (4th) 130918-U, ¶ 31 (Appleton, J., dissenting)).

406. *See id.* at ¶¶ 48–49, 51, 34 N.E.3d at 547–48 (Burke, J., dissenting).

407. *See id.* at ¶¶ 22–23, 34 N.E.3d at 542–43.

408. *Id.* at ¶ 25, 34 N.E.3d at 544. The *In re Mueller* opinion was cited for this proposition in *Lorenzen v. Lorenzen*, 883 N.W.2d 292, 298 (Neb. 2016).

courts' attempt to "mitigate the consideration problem with still more considerations" which runs a "real risk of crossing a line drawn by Congress."⁴⁰⁹ Therefore, the court held that total preemption of Social Security is the more coherent approach.⁴¹⁰

California is a state that also is postured as a "total preemption" state, but only on the basis that California state law mandates a total prohibition of state court consideration of Social Security. Thus, although California courts are prohibited from considering Social Security benefits in any way when dividing marital property, California has not addressed the issue of whether *federal* law requires such a prohibition. However, in 2016, the court in *In re Marriage of Peterson* suggested that federal preemption does not

409. *In re Mueller*, 2015 IL 117876, ¶ 25. The *In re Mueller* court questioned the utility of cases that allowed for consideration of Social Security without providing guidance on how to do so. *See id.* (citing *Litz v. Litz*, 288 S.W.3d 753, 758 (Mo. Ct. App. 2009) (holding that Social Security benefits should be considered when dividing marital property, "but not to such a degree that such consideration would have a material impact on the division of marital property"); *Biondo v. Biondo*, 809 N.W.2d 397, 403 (Mich. Ct. App. 2011) (holding that a trial court "may not treat social security benefits as tantamount to a marital asset," but may "take into account, in a general sense" the extent to which those benefits bear on the factors related to property division); *In re Marriage of Herald*, 322 P.3d 546, 557–58 (Or. 2014); *Johnson v. Johnson*, 2007 SD 56, ¶ 26, 734 N.W.2d 801, 808 ("while a trial court may not distribute marital property to offset the computed value of Social Security benefits, it may premise an unequal distribution of property—using, for example, a 60–40 formula instead of 50–50—on the fact that one party is more likely to enjoy a secure retirement") (internal quotation marks omitted).

410. In 2015, the appellate court in *In re Marriage of Frank* relied on the reasoning of *In re Crook* in holding that federal benefits, including Tier 1 railroad pension and Social Security payments may not be directly divided, used as an offset, or considered in marital property distribution proceedings. *See In re Marriage of Frank*, 2015 IL App (3d) 140292, ¶ 16, 40 N.E.3d 740, 744–45 (citing *In re Marriage of Crook*, 813 N.E.2d 198, 204 (Ill. 2004)). The Illinois Supreme Court held similarly, also relying on the reasoning of *In re Crook*, but held in accordance with *In re Marriage of Dea*, 2013 IL App (1st) 122213, ¶ 22, 1 N.E.3d 947, 953, that Social Security may be considered in determining a maintenance award. *See In re Marriage of Roberts*, 2015 IL App (3d) 140263, ¶ 21, 53 N.E.3d 17.

necessarily extend that far.⁴¹¹

In *Peterson*, the husband contributed to Social Security, but the wife participated in the Los Angeles County Employees Retirement Association (LACERA) plan and was prohibited from contributing to Social Security under the plan.⁴¹² The trial court held that it could not consider the husband's contributions from marital earnings to Social Security when allocating the wife's LACERA benefits because it would amount to an offset prohibited by federal law (with respect to Social Security) and state law (with respect to pension benefits).⁴¹³ Like the court in *Mueller*, the *Peterson* court held: “[W]hether the result is inequitable or not, this court cannot adjust the division of [the wife's] LACERA benefits or deviate from the requirement of equal division.”⁴¹⁴

The *Peterson* court specifically recognized that federal law prohibits both the direct assignment and the offset of Social Security benefits.⁴¹⁵ The court also specifically recognized the jurisdictional split on the issue of “whether mere ‘consideration’ of Social Security benefits in dividing a marital estate is preempted under the reasoning of *Hisquierdo*.”⁴¹⁶ However, the court never addressed this

411. See *In re Marriage of Peterson*, 197 Cal. Rptr. 3d 588, 599 (Cal. Ct. App. 2016).

412. *Id.* at 590.

413. *Id.* at 591.

414. *Id.*

415. *Id.* at 593 (first citing *In re Marriage of Cohen*, 164 Cal. Rptr. 672 (Cal. Ct. App. 1980); then citing *In re Marriage of Kelley*, 134 Cal. Rptr. 259 (Cal. Ct. App. 1976); and then citing *In re Marriage of Hillerman*, 167 Cal. Rptr. 240, 244–45 (Cal. Ct. App. 1980).

416. *Id.* at 596 (first citing *Smith v. Smith*, 2015 MT 256, ¶ 19, 381 Mont. 1, 358 P.3d 171; then citing *In re Marriage of Herald*, 355 Or. 104, 119–20 (Or. 2014); then citing *Johnson v. Johnson*, 2007 SD 56, ¶ 25, 734 N.W.2d 801, 808; then citing *Depot v. Depot*, 2006 ME 25, 893 A.2d 995, 1002; then citing *In re Marriage of Zahm*, 978 P.2d 498, 503 (Wash. 1999); then citing *Mahoney v. Mahoney*, 681 N.E.2d 852, 856 (Mass. 1997); then citing *In re Marriage of Boyer*, 538 N.W.2d 293, 293–94 (Iowa 1995); then citing *Harshbarger v. Harshbarger*,

issue because California state law, which prohibits courts from making unequal awards of community assets, which included the wife's pension benefits, mandated the equal division of those benefits and, therefore, the "total preemption" outcome, notwithstanding the "consideration" of the husband's Social Security benefits.⁴¹⁷ However, it is on this point that the court offered an insightful distinction.

The court noted that "[m]any other jurisdictions have fashioned various solutions to compensate a spouse who does not participate in Social Security, thereby preventing an unequal award resulting from the federal mandate that Social Security be deemed separate property"⁴¹⁸ and the court recognized that several of those jurisdictions, like California, are community property jurisdictions. However, the court distinguished California law from the various other community property jurisdictions that allow the trial court to consider Social Security in the division of the marital estate, in that California law is unique in its strict limitation of trial court discretion to divide the community estate unequally, as is authorized in other community property states like Washington, Arizona, and Louisiana.⁴¹⁹ The court recognized that if there are multiple community assets to be divided, the trial court may apportion the respective interests in the assets in a manner that is equitable under the circumstances of the case by, for example, offsetting community assets with other community assets, but the

2004-Ohio-3919, ¶ 15, 814 N.E.2d 105; then citing *Wolff v. Wolff*, 929 P.2d 916, 921 (Nev. 1997); then citing *In re Marriage of Crook*, 813 N.E.2d 198, 205 (Ill. 2004); then citing *Cox v. Cox*, 882 P.2d 909, 920 (Ala. 1994); then citing *Webster v. Webster*, 716 N.W.2d 47, 56 (Neb. 2006); and then citing *Manning v. Schultz*, 2014 VT 22, ¶ 11, 196 Vt. 38, 93 A.3d 566. The first eight cases the court cited to represent jurisdictions that allow some consideration of Social Security benefits in fashioning an equitable division of marital property, whereas the remaining five cases the court cited to represent a minority number of jurisdictions that bar all consideration of Social Security benefits.

417. *See id.* at 596.

418. *Id.* at 598 (citing *Kelly v. Kelly*, 9 P.3d 1046 (Ariz. 2000)).

419. *See id.* (describing respective state laws that allow discretion to divide the marital estate unequally).

ultimate division still must be equal.⁴²⁰ In this case, however, in considering the equitable division of the wife's pension benefits, Social Security benefits are deemed separate property and, thus, there is only one community asset at issue, thereby limiting the court's discretion to fashion an alternative equitable award.

Finally, the court stated that "it is within the parties' power to create a more equitable solution—even if the court may not do so" and made reference to specific California law that allows for an unequal division of property "upon the written agreement of the parties, or on oral stipulation of the parties in open court."⁴²¹ However, as has been discussed in this Article, most courts hold that any assignment or offset of Social Security benefits in a property settlement agreement between the parties directly violates federal law, specifically within jurisdictions that extend federal preemption to prohibit state courts from enforcing such agreements.⁴²² Any such agreement of the parties would have to be accommodated by state law in a manner that did not violate federal law, such as in the jurisdictions discussed here. Arguably, under those circumstances, as recognized by the court in *In re Peterson*, the court could enforce an agreement to equitably divide property in this manner, such as the court held in *Reffalt v. Reffalt*, where the court held that the parties may agree on the distribution of Social Security as alimony, as a form of equitable consideration, instead of property distribution.⁴²³

Thus, California stands as a jurisdiction that adopts a "total preemption" policy, but not based on an expanded view of the scope of federal preemption. Rather, California effectuates a similar result on the basis of its own state

420. *Id.* at 598 n.5.

421. *Id.* at 599 (quoting CAL. FAM. CODE § 2550 (West 2017)).

422. *See* cases cited *supra* note 115.

423. *See Reffalt v. Reffalt*, 2010-CA-01013-COA (¶¶ 13–14), 94 So. 3d 1222, 1226 (Miss. Ct. App. 2011).

property distribution laws. The *Peterson* court acknowledged those states that authorize trial court discretion to consider Social Security benefits in the division of marital property and to fashion an award that is more equitable to the parties,⁴²⁴ and even expressly provided that “the result of California’s strict policies on the division of property, intended to protect spouses . . . did not produce an equitable result”⁴²⁵ Accordingly, the court noted that the “[l]egislature is free to craft a statute similar to Louisiana’s . . . which directs courts to assign a portion of community assets to one spouse when the other spouse’s retirement plan is classified as separate property under federal law.”⁴²⁶ It is ironic that a court in California, where any consideration of Social Security benefits is prohibited, espoused the viability of legislation that provides for offsetting, such as in Louisiana, when Louisiana’s own Appellate Court suggests the unconstitutionality of such legislation. But therein lies the confounding dilemma confronted by state courts and the need for congressional clarification.

For all of the courts that reach this level of analysis, the crux of the “total preemption” position lies in the elimination of the practical distinction between “offsetting” and “considering” Social Security benefits in terms of its effect on the parties, as is recognized by the Supreme Court of Nevada in *Wolff v. Wolff*.⁴²⁷ In *Wolff*, the court held that an offset of the community interest in the husband’s retirement account based on the wife’s separate interest in future Social Security benefits “would upset the statutory balance and impair [the wife]’s economic security just as surely as would a regular deduction from [her] benefit check. . . . Any such anticipation threatens harm to the employee, and corresponding

424. *In re Peterson*, 197 Cal. Rptr. 3d at 596.

425. *Id.* at 599.

426. *Id.*

427. 929 P.2d 916, 921 (Nev. 1996).

frustration to federal policy, over and above the mere loss of wealth caused by the offset.”⁴²⁸ Like many of the “consideration” courts, the trial court specifically stated that in awarding an unequal distribution of property in the husband’s favor, the award was not based on an offset of the wife’s Social Security interest but, rather, it was based on the court’s consideration of the wife’s future Social Security payments in constructing an equitable division of the property.⁴²⁹ However, the court in *Wolff* held that, despite the court’s attempt to deny the unequal award as an offset, the court erred when it reduced the wife’s marital share of the husband’s PERS pension when it considered her payments to Social Security.⁴³⁰ The court provided: “Calling a duck a horse does not change the fact it is still a duck. ‘Considering’ [the wife]’s social security benefits does not change the fact that this is still an offset, and therefore, error.”⁴³¹ Thus, the court effectively addressed the approach taken by states like Washington, Iowa, Kentucky, and others, which implement an offset as a form of equitable consideration, and insightfully and essentially questioned, “What is the difference?”

Indicative of the dilemma, however, the dissenting court in *Wolff* responded that the difference is that to equate the consideration of the benefits that the spouses reasonably anticipate receiving in the future as an assignment or offset of Social Security benefits is “patently unfair,” even when the nonparticipating spouse qualifies for a modest statutory marital interest, and unduly extends the scope of federal preemption into the state court’s obligation to equitably divide property.⁴³² Additionally, if the Social Security Act authorizes courts to consider the parties’ future benefits in

428. *Id.* (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 588–89 (1979)).

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.* at 922 (Rose, J., dissenting).

determining an appropriate *alimony* award to accommodate the future financial equities of the parties, then “consideration” states, likewise, might posit, “What is the difference?”—particularly when there is no statute or U.S. Supreme Court authority that mandates such a prohibition? The irony, of course, is that, for the majority court in *Wolff*, and for the courts in several other states that adopt the “total preemption” approach, it is *precisely because there is no difference* that federal preemption must be held to extend broadly to preclude the assignment, offset, and consideration of Social Security benefits, altogether.

III. THE NEED FOR CLARIFICATION OF THE SCOPE OF FEDERAL PREEMPTION OF SOCIAL SECURITY BENEFITS

The reasoning of the “total preemption” approach effectively takes courts on a circular return to the interpretation of the language of the Social Security Act and the limits of the holding in *Mansell*. Since *Mansell*, there remains no authoritative determination that resolves the dilemma of the scope of federal preemption of Social Security. The result has been nearly four decades of interpretative variation among states and inequity between and among divorcing parties.

A. Clarification by the U.S. Supreme Court

In May 2017, the U.S. Supreme Court’s holding in *Howell v. Howell*, which involved the remuneration of military retirement and disability benefits, was the closest the Court or Congress has come to clarifying the dilemma since its decision in *Mansell* in 1989.

1. *Howell v. Howell* (2017)

In *Howell*, the husband and wife divorced in 1991.⁴³³ Pursuant to the parties’ agreement, the divorce decree

433. *Howell v. Howell*, 137 S. Ct. 1400, 1404 (2017).

awarded to the wife “[fifty percent] (50%) of [the husband’s] military retirement,” once it began to be distributed through a direct pay order.⁴³⁴ The husband retired from the Air Force in 1992, and the parties began receiving their one-half share of the husband’s military retirement pay pursuant to their agreement.⁴³⁵ In 2005, the husband received a twenty percent disability rating as a result of degenerative joint disease in his shoulder, which entitled him to monthly, tax-exempt VA disability benefits.⁴³⁶ As required by the USFSPA and *Mansell*, to receive his disability benefits, he elected to waive an equivalent amount of military retired pay.⁴³⁷ Consequently, the husband’s monthly retirement pay was reduced by roughly \$250,⁴³⁸ thereby reducing the wife’s monthly payment of the husband’s pay by approximately \$125.00.⁴³⁹

In 2013, the wife sought to enforce the divorce decree’s division of military retirement pay and sought judgment against the husband for her lost share of the retirement pay resulting from the husband’s subsequent disability waiver.⁴⁴⁰ The trial court held that the wife had a vested property right in fifty percent of the husband’s retirement pay pursuant to the existing divorce decree and that neither federal law preempting the division of military retirement pay waived for disability pay, nor state law prohibiting a state court from offsetting waived military retirement pay

434. *Id.*

435. The parties shared roughly \$1500.00 per month in total military retirement pay. *Id.*

436. *See id.*

437. *Id.*; see 38 U.S.C. § 5305 (2004) (“Waiver of Retired Pay”); *Mansell v. Mansell*, 490 U.S. 581, 583 (1989).

438. *Howell*, 137 S. Ct. at 1404. The actual amount was \$255.00. *See In re Marriage of Howell*, 361 P.3d 936, 937 (Ariz. 2015), rev’d by *Howell*, 137 S. Ct. at 1406.

439. *Howell*, 137 S. Ct. at 1404. The actual amount was \$127.50. *See In re Howell*, 361 P.3d at 937.

440. *In re Howell*, 361 P.3d at 937–38.

with other marital assets, could deprive her of that right.⁴⁴¹ The court determined that “the family court order did not ‘divide’ [the husband’s] waived military retirement pay, the order did not require [the husband] ‘to rescind’ his waiver, nor did the order ‘direct him to pay any amount to [the wife] from his disability pay.’”⁴⁴² Therefore, the court awarded the wife her \$3,813 in military retirement pay arrearages and ruled that the husband was “responsible for ensuring [the wife] receive[d] [thereafter] her full 50% of the military retirement without regard for the disability.”⁴⁴³

The court of appeals affirmed,⁴⁴⁴ but not because it construed a limited scope of federal preemption with respect to the distribution of military retirement pay; rather, the court held that the state statute prohibiting offsetting as a remedy to federal preemption, by its terms, did not apply to post-decree enforcement proceedings.⁴⁴⁵ Therefore, the court held that the trial court in *Howell* did not violate the USFSPA or *Mansell* because it did not treat the husband’s disability pay as marital property; “[r]ather the family court simply ordered [the husband] to ‘reimburse’ [the wife] for ‘reducing . . . her share’ of military retirement pay.”⁴⁴⁶ The Supreme Court of Arizona granted review because of the recurring nature and importance of the federal preemption issue.⁴⁴⁷

Upon review, the U.S. Supreme Court held simply that “*Mansell* determines the outcome here.”⁴⁴⁸ It held that “federal law completely pre-empts the States from treating waived military retirement pay as divisible community

441. *Id.* at 938.

442. *Howell*, 137 S. Ct. at 1404.

443. *In re Howell*, 361 P.3d at 938.

444. *Id.*

445. *Id.*

446. *Howell*, 137 S. Ct. at 1404.

447. *In re Howell*, 361 P.3d at 938.

448. *Howell*, 137 S. Ct. at 1405.

property” and that giving the wife a “vested” interest in the husband’s retirement pay and ordering that the wife receive her share of his retirement pay “without regard for the disability” violated federal law.⁴⁴⁹ Although the Arizona Supreme Court attempted to distinguish *Mansell* on the basis of the timeliness of the waiver vis-à-vis the divorce proceeding, the U.S. Supreme Court held that that distinction simply highlighted the contingent nature of the parties’ ownership rights in retirement benefits, not a limitation on the scope of federal authority to determine those rights or a distinguishing authorization for state courts to extinguish those rights.⁴⁵⁰

The Court further held that the reimbursement award to the wife was nevertheless an award of the portion of retirement pay that the husband waived for disability benefits, which is what Congress prohibited.⁴⁵¹ Simply referring to the wife’s interest as “vested” does not change the contingent nature of the benefit.⁴⁵² Likewise, the Court held that referring to the award as an order to “reimburse” or “indemnify” the wife does not change the fact that it was an order to divide property.⁴⁵³ The Court stated that the reason for indemnifying the wife was “to restore the amount previously awarded as community property” thus, “[t]he difference is semantic and nothing more” particularly since “the amount of indemnification mirrors the waived retirement pay, dollar for dollar.”⁴⁵⁴ The Court held that “[r]egardless of their form, such reimbursement and

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.* at 1405–06.

453. *Id.* at 1406.

454. *Id.* At oral arguments before the Court, Justices Sotomayor and Ginsberg asked specifically about the issue of offsetting, which Chief Justice Roberts described as “a charade” to skirt *Mansell* and as “the sort of thing that gives . . . law a bad name.” See Transcript of Oral Argument at 40–42, *Howell v. Howell*, 137 S. Ct. 1400 (2017) (No. 15-1031), 2017 WL 1048380.

indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus pre-empted.”⁴⁵⁵

Thus, in *Howell*, the U.S. Supreme Court determined that with respect to military disability benefits (and, arguably, Social Security benefits, assuming the two are sufficiently analogous to be determinative, which, in itself, is an issue that may distinguish the Court’s reasoning as inapposite),⁴⁵⁶ Congress intends that federal law totally preempts state law with respect to the distribution of federal benefits and that indemnifying a spouse for his or her lost share of retirement pay as a result of disability waiver violates federal law, regardless of how a court describes such an award.⁴⁵⁷ To this extent, within the context of the various approaches adopted by courts in the Social Security context, the Court in *Howell* seemed to opt for the “total preemption” approach as well.

If the Court’s opinion in *Howell* ended there, it essentially would resolve the dilemma in the Social Security context. However, the Court added three sentences to its analysis that indicate that its holding in *Howell* is too narrow to resolve the issue addressed in this Article or to determine the means by which a state court may “consider” Social Security benefits in dividing marital property. The Court added:

We recognize, as we recognized in *Mansell*, the hardship that congressional pre-emption can sometimes work on divorcing spouses. . . . But we note that a family court, *when it first determines the value of a family’s assets*, remains free to take account of the

455. *Howell*, 137 S. Ct. at 1406.

456. See, e.g., *In re Marriage of Crook*, 813 N.E.2d 198, 200–01 (Ill. 2004) (recognizing Railroad Retirement Act and Uniformed Services Former Spouses’ Protection Act (“USFSPA”) as statutorily being subject to applicability of state laws, but distinguishing Social Security Act); *Wolff v. Wolff*, 929 P.2d 916, 920–21 (Nev. 1996); *Manning v. Schultz*, 2014 VT 22, ¶19 n.2, 196 Vt. 38, 93 A.3d 566.

457. *Howell*, 137 S. Ct. at 1405–06.

contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value *when it calculates or recalculates the need for spousal support*. . . . We need not and do not decide these matters⁴⁵⁸

Thus, the Court recognized the inequity resulting from federal preemption and noted that state courts have the authority to exercise their discretion to “take account of” or “consider” the resulting inequities “*when it first determines the value of a family’s assets*” or “*when it calculates or recalculates the need for spousal support*.”⁴⁵⁹ Therefore, the Court suggests that a state court has limited discretion to consider the inequities resulting from federal preemption, exclusive of its valuation of property and inclusive of its determination of alimony, which is already provided for in Section 659 of the Social Security Act. Outside of these procedural parameters, a state court order that divides the parties’ share of marital property by adjusting the percentage of marital property that each spouse would otherwise receive but for the court’s consideration of the separate nature of Social Security benefits, violates federal law. Arguably, these conclusions are consistent with the language of the Social Security Act and with the cases supporting a “total preemption” approach, nevertheless, this begs the question of whether, or how, a court’s consideration of the effect of preemption may affect the court’s final equitable division of property. In any case, the Court expressly provided that it did not decide these matters in its opinion in *Howell*.

Accordingly, the Court’s opinion in *Howell* is limited in terms of resolving the specific Social Security issue addressed in this Article because nothing within the opinion itself necessarily refutes the distinctions upon which so many state courts have drawn to circumvent the U.S. Supreme Court decisions in *Hisquierdo* and *Mansell*. In fact,

458. *Id.* at 1406 (emphasis added).

459. *Id.* (emphasis added).

in its opinion in *Howell*, the Court does not even mention *Hisquierdo*. Therefore, although the Court's dicta extends the scope of federal preemption to its arguable "total" limit, the Court's actual holding stops at *Mansell*—the case from which nearly forty years of Social Security federal preemption law has evolved into a starting point for varied state interpretation and factual distinction that only contradicts the purposes of the Social Security Act. This stands as a clear message to Congress that clarification is needed to resolve the issues addressed here and which are left unanswered in *Howell*.

2. State Court Application of *Howell*

The U.S. Supreme Court suggests in its opinion in *Howell* that what Congress likely intends is total preemption. Within the limited context of military disability benefits, state courts have already begun to apply the Court's holding in *Howell*, and the effect of the *Howell* decision on existing state property distribution laws has been significant. For example, in *Hurt v. Jones-Hurt*, upon divorce, the parties were subject to an order for the distribution of property in which the wife was entitled to one-third of the husband's military pension.⁴⁶⁰ As occurred in *Howell*, subsequent to the court's division of property, the husband increased his disability rating and consequently opted to waive a greater percentage of his retirement benefits for disability benefits, thereby reducing the amount the wife received from his disposable retired pay.⁴⁶¹ The wife sought a declaratory judgment entitling her to the amount she had been receiving pursuant to the parties' divorce judgment.⁴⁶² The trial court held that the wife was entitled to the amount she previously had been receiving from the husband's total military benefits, notwithstanding the

460. *Hurt v. Jones-Hurt*, 168 A.3d 992, 994 (Md. Ct. Spec. App. 2017).

461. *Id.* at 994–95.

462. *Id.* at 995.

reduction in his pension payout upon his additional disability waiver.⁴⁶³

On appeal, the court determined that “[this] result was consistent with three reported decisions of [the Court of Special Appeals of Maryland] and the greater weight of cases across the country.”⁴⁶⁴ However, subsequent to the appellate argument in *Hurt*, the U.S. Supreme Court issued its opinion in *Howell*, and the court in *Hurt* recognized the effect of the Court’s decision, holding: “We need not revisit our earlier decisions . . . because the Supreme Court of the United States’s opinion in *Howell v. Howell*, . . . effectively overrules our precedents and compels us to reverse the judgment of the circuit court.”⁴⁶⁵ Commenting on the effect of *Howell*, the court observed:

Before *Howell*, our decisions . . . supported the circuit court’s decision here. And as a matter of real-world logic, those decisions made sense. . . . *Howell* effectively overrules these cases. . . . To be sure, the Supreme Court recognized that its holding might work as a hardship on divorcing spouses . . . [b]ut of course, that doesn’t help Wife in this case Without *Howell*, our precedents would have supported a decision to affirm the judgment of the circuit court. *Howell* changed the superseding federal law on the question before us in this case, and compels us to reverse the circuit court.⁴⁶⁶

Likewise, in *Mattson v. Mattson*, pursuant to the parties’ stipulated divorce decree, the wife was to receive forty percent of the husband’s gross monthly military retirement pay and disability compensation.⁴⁶⁷ When the husband failed to satisfy his obligations under the decree, the wife sought to enforce the decree and collect the substantial arrearages to which she was entitled under the terms of the court’s

463. *Id.* at 996–97.

464. *Id.* at 994.

465. *Id.* (internal citations omitted).

466. *Id.* at 1001–02.

467. *Mattson v. Mattson*, No. A16-1535, 2017 WL 4341787, at *1 (Minn. Ct. App. Oct. 2, 2017).

stipulated decree.⁴⁶⁸ The court recognized the inequity that results from a disability waiver of military retirement benefits⁴⁶⁹ and the state precedent that applied equitable principles that “could render a stipulated decree indemnifying an ex-spouse enforceable, even if it ran afoul of *Mansell*,”⁴⁷⁰ but the court held that “[i]n light of *Howell*, we conclude that our [previous] holding . . . has been functionally overruled . . . [and that,] as clarified in *Howell*, such equitable compensation decrees do not escape federal preemption”⁴⁷¹

Thus, in the first two cases to apply the U.S. Supreme Court’s holding in *Howell*, the result has been to overrule existing state property distribution laws through which the state divorce court sought to provide equity to military spouses deprived of their marital share of federal military retirement benefits by the preemptive effect of federal law.⁴⁷² Both courts interpreted and applied the holding in *Howell* so as to find that such equitable compensation schemes “displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress.”⁴⁷³

At the same time, both courts recognized, as this Article recognizes, that even in the context of military disability benefits, the Court’s holding in *Howell* does not entirely resolve the issue raised in this Article regarding the *extent* to

468. *Id.* at *2.

469. *Id.* at *4 (quoting Flannery, *supra* note 2, at 297, 302).

470. *Id.* at *6 (discussing *Gatfield v. Gatfield*, 682 N.W.2d 632, 637 (Minn. Ct. App. 2004)).

471. *Id.* at *6.

472. In *Hurt*, the court opined that the existing precedent “sought, in the context of state law divorce proceedings, to blunt the opportunity for veterans to game their divorce judgments through after-the-fact elections.” *Hurt v. Jones-Hurt*, 168 A.3d 992, 1001 (Md. Ct. Spec. App. 2017). In *Mattson*, the court noted that its previous precedent “rel[ie]d on the sanctity of contract to escape federal preemption.” See *Mattson*, 2017 WL 4341787, at *6.

473. *Id.* at *5 (quoting *Howell v. Howell*, 137 S. Ct. 1400, 1402 (2017)).

which Congress intends federal law to preempt state law. Both courts that have applied *Howell* recognize not only the limited context within which *Howell* applies—federal military benefits—but they also recognize the scope of *Howell*'s preemptive effect on state law as limited to the classification of military disability benefits as distributable marital property. The court in *Hurt* recognized that “the preemptive scope of *Howell* governs only the treatment of . . . [federal military benefits] in the analysis of marital property awards . . . and that is as far as [the court] think[s] it reaches”⁴⁷⁴ The court in *Hurt* provided:

Howell now has redefined (or maybe re-redefined) the federal retirement and disability benefits that may be considered “marital property.” But a Maryland trial court’s equitable division of marital property only truly begins “once property is determined to be ‘marital’ in the first place. . . . [I]t is still up to our trial courts to determine . . . the totality of the circumstances, and, alongside that process, to make other decisions about the parties’ post-marital financial future. To posit one . . . example, the impact of *Howell* may in a particular case constitute a change in circumstances entitling a court to revisit an alimony award We don’t have any of these questions before us in this case, and *Howell* leaves them to be decided by trial courts—our State’s trial courts—in the first instance.”⁴⁷⁵

Likewise, the court in *Mattson* provided:

District courts, when they determine the value of marital assets, remain free to account for the possibility that some military retired pay might later be waived in favor of disability compensation. And district courts may account for reductions in the value of these assets when calculating or recalculating the need for spousal support. . . . We encourage district courts to keep these avenues in mind as they navigate the changing landscape involving military disability compensation.⁴⁷⁶

Thus, although the courts that have applied *Howell* have

474. *Hurt*, 168 A.3d at 1002–03.

475. *Id.* at 1003.

476. *Mattson*, 2017 WL 4341787, at *6.

been limited to the military disability context and have cautioned that the preemptive effect of *Howell* may be to overrule otherwise applicable state property distribution laws that authorize the court to account for military disability benefits in dividing marital property, the courts nevertheless recognize that *Howell* does not necessarily prohibit a state court from considering the preemptive effect of federal law in determining an equitable division of property or the propriety of an alimony or maintenance award. Accordingly, the courts that have applied *Howell* support the conclusion posited in this Article that, in the context of Social Security, congressional clarification of the intended scope of federal preemption is required, not only to resolve the arguable analogousness of Social Security benefits and military disability benefits, but to resolve the preemptive scope of federal law outside the context of the classification of Social Security benefits as divisible marital property. Even in the context of federal military disability benefits, the Court's dicta in *Howell* clearly suggests that its holding does not answer these questions, and the courts' decisions in *Hurt* and *Mattson*, which are the first to interpret and apply the Court's holding in *Howell*, have confirmed that these questions must be resolved by Congress if state courts are to reconcile the purposes of federal preemption and the obligation of state courts to equitably divide property upon divorce.

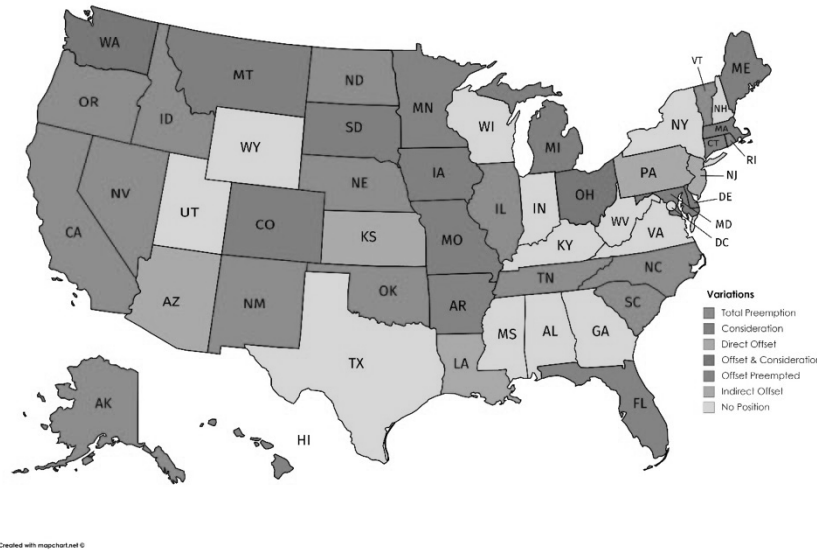
B. *The Need for Congressional Clarification*

It is time for Congress to clearly define its intended scope of federal preemption under the Social Security Act so as to accomplish its goals of uniformity of application, financial security for its participants, and equity for divorced spouses. This Article asserts that since the U.S. Supreme Court decided *Hisquierdo* and *Mansell*, and states began to interpret and distinguish their meaning and application, the Social Security Act has served none of its purposes well. Individual states may be providing equity to individual

spouses in individual cases, but it is at the expense of congressional intent for national uniformity and what Congress views as financial security for Social Security participants and their spouses.

The existing variation among state approaches is represented in the national map depicted in Figure 1.

FIGURE 1. The existing variation among state approaches to preemption.



As seen in the variation throughout the map, if Congress intends uniformity of application, it is clear that the existing language of the Act does not accomplish it. To the contrary, as the many cases discussed in this Article have demonstrated, this variation of approaches not only fragments uniformity, it arguably deprives Social Security participants of the financial security that Congress sought to guarantee, and it facilitates inequity, at least among spouses of different states. In fact, the courts adopting these various approaches have nevertheless acknowledged the resulting

inequities.⁴⁷⁷

Based on the development of these approaches, however, there does seem to be a momentum of courts moving toward the general expansion of the scope of federal preemption of state property distribution laws as applied to Social Security. This is demonstrated by the courts' decisions in Vermont,⁴⁷⁸ Illinois,⁴⁷⁹ Montana,⁴⁸⁰ California,⁴⁸¹ and most recently, Arizona, as well as the U.S. Supreme Court, all of which, just since 2014, have adopted (or indicated a reasoned preference for) the total preemption approach.⁴⁸² This momentum is consistent with the observations of many leading scholars studying other areas of federal preemption.⁴⁸³ The momentum across contexts is gradual, but consistent. In adopting the broader scope of federal preemption in the Social Security context, these courts necessarily have had to address a host of broader relevant issues, such as: the analogousness of different federal benefit contexts;⁴⁸⁴ the concomitant relevance of Supreme Court precedent, such as *Hisquierdo*;⁴⁸⁵ the propriety and effect of reclassifying

477. See *In re Marriage of Peterson*, 197 Cal. Rptr. 3d 588, 599 (Cal. Ct. App. 2016) (“[T]he result of California’s strict policies on the division of property, intended to protect spouses . . . did not produce an equitable result. . . .”); *Tucker v. Tucker*, 47,373 (La. App. 2 Cir. 08/01/12); 103 So. 3d 493, 497–98 n.1.

478. See *Manning v. Schultz*, 2014 VT 22, ¶ 11, 196 Vt. 38, 93 A.3d 566.

479. See *In re Marriage of Mueller*, 2015 IL 117876, ¶ 22, 34 N.E.3d 538, 542.

480. See *Smith v. Smith*, No. A-15-1234, 2016 WL 6956771, at *3–5 (Neb. Ct. App. Nov. 29, 2016).

481. See *In re Peterson*, 197 Cal. Rptr. 3d at 599.

482. See *Howell v. Howell*, 137 S. Ct. 1400, 1406 (2017).

483. See Langbein, *supra* note 2, at 1666; Waggoner, *supra* note 2, at 1636–37; Raymond C. O’Brien, *Selective Issues in Effective Medicaid Estate Recovery Statutes*, 65 CATH. U. L. REV. 30 (2016).

484. Although there is disagreement on this point among some state courts, the United States Supreme Court has repeatedly concluded that the contexts are sufficiently analogous. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 576–77 (1979).

485. See *supra* text accompanying notes 131–41.

marital property under state law;⁴⁸⁶ the effect of offsetting property other than Social Security;⁴⁸⁷ the distinction between hypothetical and actual valuation methods;⁴⁸⁸ the financial impact of retirement plans in lieu of Social Security;⁴⁸⁹ the enforceability of the agreement of the parties and its capacity to circumvent federal preemption; and, the appropriate timing and nature of courts' consideration of the receipt of Social Security benefits as a result of federal preemption and its effect on the distribution of property and, arguably, on the federal scheme—i.e., is the court's consideration of Social Security a calculated component of its determination of the equitable division of property or merely one of many other generalized equitable considerations that factor into its determination? Or, is the court's consideration of Social Security reserved for its determination of the parties' respective needs for alimony, secondary to any division of property?⁴⁹⁰ All of these issues bear on the scope of federal preemption and must be addressed. However, as described in this Article, many courts have not addressed these issues. And, as clearly demonstrated in Figure 1, most states that *have* addressed these issues are not resolving them uniformly; rather, they are resolving them with wide variation and, often, flat disagreement.

Alternatively, uniform agreement and application of broad federal preemption by state courts would present as depicted in Figure 2.

486. *See supra* text accompanying notes 196–200.

487. *See supra* Section II.B.1.a.

488. *See supra* Section II.B.1.b.

489. *See supra* Section II.B.1.b.

490. *See supra* Section II.B.3.

which of the seven different state approaches are most advantageous; what ought to be the correct jurisprudential relationship between federal sovereignty and state law; and, whether there is simply too much federal preemption going on, are all questions far beyond the scope of this Article. These are matters best studied and resolved by the likes of Professors John Langbein, Lawrence W. Waggoner, and Raymond C. O'Brien. Instead, the purpose of this Article is simply to demonstrate that the existing federal preemption jurisprudence in the context of Social Security has become so fragmented that Congress's federal plan for uniformity in the distribution of Social Security benefits and long-term security for qualified retirees is being dissolved by the idiosyncrasies of state property distribution laws in divorce. Notwithstanding the predictive relevance of the U.S. Supreme Court's holdings for analogous federal benefits, including the recent decision in *Howell*, there is arguably sufficient basis for distinguishing analogous contexts and cases, as well as a host of other relevant issues upon which state courts disagree and for which federal common law simply has not yet developed. Therefore, the purpose of this Article is simply to urge Congress to clarify its intent for the scope of federal preemption under the Social Security Act. In light of the body of law that has developed, as discussed herein, if Congress does clarify its intent, it likely will be for total preemption.

C. Anticipating Congressional Intent

Despite significant U.S. Supreme Court precedent addressing the issue, the opportunity for varied state court interpretation of the plain but limited language of the Social Security Act—specifically, the anti-assignment provision of Section 407 and its exception stated in Section 659—and the damage to the purposes of the federal plan that seems to have resulted, highlight the need for congressional clarification. Admittedly, the Court's holding in *Howell* is limited in scope and dictates no authoritative direction for

any state to do anything in the Social Security context other than what it is already doing. And, if Congress is content to sacrifice the uniform distribution and protection of federal benefits to intended beneficiaries so that state courts may reconsider the effect of limited preemption under federal law on the equities of the parties based on the application of individual property distribution laws of individual states, then Congress need not do anything, since this is what is occurring now in most states. After all, there are sound reasons supporting a limited scope of preemption in this area.

For example, domestic relations is an area of law traditionally reserved for the state,⁴⁹¹ and any inequity to the parties resulting from minimum preemption against the classification of benefits as divisible marital property under federal law may be remedied by the equitable considerations afforded within state law. As this Article has shown, depending on the facts of any given case, there is a variety of viable options through which a state court may provide for the equity it deems appropriate in its determination of the division of property. And, if Congress has authorized state courts to exercise such discretion in its consideration of alimony, which often is tied so closely to property distribution, then what is the difference?—especially if there are broader jurisprudential reasons that support pulling-back the reins on the expansive momentum of federal preemption?⁴⁹² The fact that Congress has not been inclined to intercede to clarify its intent after 1989 may demonstrate that, in fact, Congress is willing to tolerate a lack of uniformity in this area and that, perhaps, this is not an area ripe for expanded federal preemption.⁴⁹³ However, as this

491. See *supra* text accompanying note 19.

492. See Langbein, *supra* note 2, at 1666; Waggoner *supra* note 2, at 1637; O'Brien, *supra* note 485, at 30.

493. See *Brown v. Ames*, 201 F.3d 654, 661 (5th Cir. 2000) (noting that case for federal preemption is particularly weak when Congress is aware of operation of state law and nevertheless stands by both concepts and tolerates whatever

Article has demonstrated, this is not likely what Congress intends. In fact, Congress has already indicated that, in balancing the purposes of the federal plan, what it deems to be equitable, notwithstanding any resulting inequity for divorcing parties in the distribution of marital property under state law, is the uniform application of the guaranteed receipt of benefits for intended beneficiaries.⁴⁹⁴ Therefore, since most of the state court decisions since *Mansell* have been toward circumventing congressional intent through reinterpreting the plain language of the Social Security Act and distinguishing U.S. Supreme Court precedent so as to provide, essentially, a second level of equity to divorcing parties in the division of property, Congress should expressly clarify what it intends under the Social Security Act.

As is evident by the holdings in *Hurt* and *Mattson*, if, in fact, the U.S. Supreme Court's implied prediction in *Howell* is correct, and Congress, in fact, clarifies its intent that federal law totally preempts even the consideration of Social Security in the application of state property distribution laws upon divorce, there are significant consequences for the states that adopt a view of minimal federal preemption under the Social Security Act. For example, in states like Louisiana, Pennsylvania, and others, which allow for offsetting with other property by contending that the language of the Social Security Act is perfectly clear as to what it preempts and, therefore, as long as the court avoids what is preempted—classifying Social Security benefits as community property—then it is free, if not obligated, to divide other property in whatever manner it deems to be equitable, such a view will be deemed unconstitutional as a violation of the Supremacy Clause of the U.S. Constitution.⁴⁹⁵ For Louisiana, specifically, which is the only state that statutorily provides for the direct offset of Social

tension might exist between them).

494. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 584 (1979).

495. See, e.g., *Tucker v. Tucker*, 47,373 (La. App. 2 Cir. 08/01/12); 103 So. 3d 493, 497, 498 n.1.

Security in the division of marital property, it would have to amend its property distribution scheme to prohibit state courts from offsetting the value of either party's Social Security benefits with other marital property or considering Social Security as an equitable factor affecting the division of property.

For states such as Arizona, New Jersey, Ohio, and Pennsylvania, which do not specifically legislate state court authority on this issue, but in which courts nevertheless attempt to remedy any arguable inequity resulting from the preemption of Social Security by offsetting other divisible marital property, state courts will no longer be able to offset other property if such offset is based on either the actual or hypothetical value of Social Security benefits received or anticipated by either spouse. To the extent that the property distribution provisions in these states expressly provide for the court to calculate such values as a basis for any such disposition of marital property, such provisions would have to be amended to exclude Social Security as such a basis. Otherwise, state provisions that provide for offsetting in-kind property values are not necessarily unconstitutional, provided they are not applied to Social Security.

For states such as Arkansas, Florida, New Mexico, and Tennessee, for example, which prohibit offsetting based on a broad common law application of the Court's reasoning in *Hisquierdo* but which have not specifically addressed the issue of whether the court may more generally consider Social Security as a factor in the equitable distribution of property, and for those "unknown" states, such as, for example, Alabama, New Hampshire, and Virginia, which have not yet addressed these issues, the only concern would be the extent to which the applicable state property distribution provisions allow for such consideration to affect the division of marital property. To the extent that such provisions are so applied, they would be unconstitutional; to the extent that they limit such consideration to a determination of the respective parties' future financial

circumstances for purposes of determining alimony, they would be constitutional.

For the many states that allow for the court to consider Social Security income as one of possibly several equitable factors that affect the court's determination of the respective future financial circumstances of the parties and, thereby, the court's division of marital property, as typified by states like Delaware, Iowa, Maryland, and Washington, for example, courts would no longer be able to include Social Security as such a consideration. Rather, the only permissible consideration of Social Security would be that which is relevant to alimony.

Finally, for states like Alaska, California, Illinois, Minnesota, Nevada, and Vermont, which already conform to the required limitations predicted by the Court in *Howell*, application of existing property distribution schemes would continue to be viable and constitutional. The concern within these states, as with any state that eventually may satisfy the parameters of *Howell*, however, is the extent to which a court may draw a calculable distinction between the disparate effect of the parties' respective incomes and future financial circumstances on the court's determination of the equitable division of property and the disparate effect of the same considerations on the parties' respective need for alimony, both of which, typically, are affected by Social Security interests.

The Court's decision in *Howell* suggests that a state court considering Social Security benefits in divorce proceedings would be required to draw this distinction. The difficulty is not in justifying such a consideration or in calculating a monetary award based on such considerations. To the contrary, Section 659 of the Social Security Act provides for such considerations, and courts regularly calculate and apply such exceptions to federal preemption.⁴⁹⁶

496. See *Kaplan v. Kaplan*, No. HH DFA780223144S, 2014 WL 6996673, at *2 (Conn. Super. Ct. Nov. 6, 2014) (ordering garnishment of plaintiff's Social

Rather, the only concern, as recognized by many courts,⁴⁹⁷ is the fact that the equitable division of property and the award of alimony are so often interconnected, and so often relied upon as a means by which parties may agree on the equitable division of property, that it may be difficult, impractical, inequitable, or ultimately impossible for a court to consider Social Security in one context but to disregard it in the other. Nevertheless, if Congress intends an expanded application of federal preemption under the Social Security Act, then these are the parameters within which all state courts must work to provide equity to divorcing parties.

Despite any practical concerns to the contrary, there are sound reasons to anticipate that Congress likely intends a broad scope of federal preemption. Primarily, broad federal preemption better accomplishes the purposes of uniformity of application, guaranteed financial security for its participants, and equity for divorced spouses. First, with regard to equity, applying broad federal preemption is not to prohibit state courts from considering Social Security benefits at all or to prohibit state courts from compensating parties for the inequities that result from federal preemption. Rather, it simply prohibits state courts from considering Social Security benefits or compensating for the unequal receipt of benefits *in its division of property*. A court is authorized to evaluate and provide for equity in its

Security payment pursuant to § 659 exception for satisfaction of alimony support order); *Cassello v. Cassello*, No. FA104042807S, 2013 WL 3119433, at * 3 (Conn. Super. Ct. May 24, 2013) (citing *In re Marriage of Schonts*, 345 N.W.2d 145, 147 (Iowa Ct. App. 1983)), which held that § 659 reinforces state law and reflects the importance that Congress attributes to support payments); *Reffalt v. Reffalt*, 2010-CA-0103-COA (¶ 13), 94 So. 3d 1222, 1226–32 (Miss. Ct. App. 2011) (allowing Social Security allocation for alimony); *Urbaniak v. Urbaniak*, 2011 S.D. 83, ¶¶ 23–24, 807 N.W.2d 621, 627–28 (holding that trial court did not err in merely considering Social Security benefits in determining whether an alimony award was appropriate, since such benefits are subject to garnishment under federal law).

497. See *In re Marriage of Mueller*, 2011 S.D. 83, ¶¶ 23–24, 34 N.E.3d 538, 545; *Luttrell v. Luttrell*, 10 N.E.3d 1002, 1003 (Ind. 2014) (David, J., dissenting); *Lorenzen v. Lorenzen*, 883 N.W.2d 292, 298 (Neb. 2016); *Simmons v. Simmons*, 709 S.E.2d 666, 668 (S.C. 2011).

determination of alimony, based on the respective parties' future financial circumstances. Indeed, Congress has already provided for this in the plain language of Section 659 of the Social Security Act.

Second, because a state court may still evaluate and satisfy the parties' financial needs outside its determination of the equitable division of property, no state court determinations will directly affect the distribution and receipt of actual federal benefits by the intended beneficiary.⁴⁹⁸ Thus, state courts may consider and provide for the parties' respective needs without affecting the security of the intended beneficiary spouse in receiving the protected benefits to which they are entitled under federal law.

Finally, under a broad scope of federal preemption, the distribution of federal benefits is not affected by the idiosyncrasies of the various state property distribution laws. For example, consider the various titles and conceptualizations that state courts use to describe and justify the consideration of Social Security benefits in providing equity under their respective state property distribution schemes: direct offset;⁴⁹⁹ indirect offset;⁵⁰⁰

498. The irony, of course, is that an order to pay alimony based on the court's consideration of the disparate receipt of Social Security affecting the parties' future financial circumstances may "impair [the participant's] economic security just as surely as would a regular deduction from his [or her] benefit check." *Johnson v. Johnson*, 726 So. 2d 393, 396 n.4 (Fla Dist. Ct. App. 1999). Thus, the same logic that prohibits the consideration of Social Security benefits as affecting the division of marital property applies equally to the court's determination of alimony and, therefore, potentially damages the federal scheme just as unconstitutionally. If the only source for paying an alimony award is Social Security, then calling it a monetary award based on need is no different than calling an offsetting property award based an "equitable consideration." However, the trade-off may be the uniformity of application with which states may exercise their discretion to effectively offset the disparate receipt of Social Security benefits.

499. *See supra* text accompanying notes 142–43 (regarding Louisiana's statutory provision allowing for offset with other marital property).

500. *See supra* Section II.B.1.b (regarding states allowing for offset with property received in lieu of Social Security).

hypothetical offset “in lieu of” Social Security;⁵⁰¹ offset “in lieu of” Social Security using actual present value;⁵⁰² equitable consideration;⁵⁰³ “general adjustment;”⁵⁰⁴ and, alimony.⁵⁰⁵ Call it what you want. But, as the U.S. Supreme Court so clearly evaluated in *Howell*, we must cut through the many hollow semantic distinctions on which so many of the courts rely to “displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress.”⁵⁰⁶ Rather, under a broad scope of preemption, courts of every state are limited to considering the disparate receipt of Social Security benefits only if it bears on the future financial needs of the parties within any given case, notwithstanding the application of individual state property distribution laws.

Specifically for divorcing parties, there will remain additional issues and concerns under a broad scope of federal preemption. For example, although parties may not be able to enforce an agreement that includes a direct distribution or offset of Social Security benefits as part of the division of marital property, parties may agree to, and enforce, a monetary award based, in whole or in part, on each party’s anticipated Social Security as a source of income affecting their respective need for alimony. The parties would have to confront the same difficulty of the interdependence of

501. *See supra* Section II.B.1.b.i (regarding states allowing for offset using hypothetical value of Social Security).

502. *See supra* Section II.B.1.b.ii (regarding states allowing for offset using actual Social Security value).

503. *See supra* Section II.B.2 (regarding states prohibiting offset but allowing court to consider Social Security as one equitable factor bearing on the future financial circumstances of the parties).

504. *See In re Marriage of Boyer*, 538 N.W.2d 293, 296 (Iowa 1995).

505. *See supra* Section II.B.4 (regarding states foreclosing courts from considering Social Security in determining the appropriate distribution of marital property).

506. *Howell v. Howell*, 137 S. Ct. 1400, 1406 (2017).

alimony and property distribution,⁵⁰⁷ and the court would have to be satisfied that the parties were not falling victim to the temptation to simply exchange the rights and equities of property division for their respective need for alimony, which courts have cautioned against as improper,⁵⁰⁸ but there is nothing in the Court's opinion in *Howell*, or in the courts' opinions in *Hurt* and *Mattson*, which have interpreted and applied *Howell*, that would prevent the court from enforcing such agreements. In light of the differences among states on the law applied to this and other miscellaneous issues on which many courts disagree, such issues may be resolved in a manner that accommodates Congress's clarified intended scope of preemption as the federal common law in this area develops.

CONCLUSION

The body of law that has developed around the scope of federal preemption under the Social Security Act has fragmented into a kaleidoscope of state court interpretation and the individual application of state property distribution laws that, in most cases, violates the Supremacy Clause of the U.S. Constitution. This development took root in 1989, after the U.S. Supreme Court's decision in *Mansell v. Mansell*, and it has led to no less than seven different interpretations and applications of the scope of federal preemption under the Social Security Act by various states. Such variation continues to dilute the intended purposes of the Social Security Act and usurp the sovereignty of federal law, as defined by Congress.

507. See *Wolfe v. Wolfe*, 46 Ohio St. 2d 399, 411 (1976) ("most awards of property incident to a final divorce are readjustments of the party's property rights, and . . . whether in the judgment such adjustment is called 'alimony' or 'division of property' . . . has not been considered important . . . by parties, bench or bar."), *superseded by statute*, Am. Sub. H.B. No. 358, 141 Ohio Laws, Part II, 3388, 3389, *as recognized in* *Morris v. Morris*, 148 Ohio St. 3d 138, 2016-Ohio-5002, 69 N.E.3d 664, at ¶¶ 23–24.

508. See *Smith v. Smith*, 2015 MT 256, ¶ 19, 381 Mont. 1, 358 P.3d 171.

In May 2017, in *Howell v. Howell*, the U.S. Supreme Court clarified what it perceives to be Congress's intended scope of federal preemption for analogous federal benefit plans, but the Court's holding was limited in scope and context, and its opinion, therefore, was merely predictive with respect to the scope of federal preemption under the Social Security Act. Consequently, we must rely on Congress to clarify its intent in this context.

No clarification of congressional intent will eliminate all of the inequities inherent in the division of marital property upon divorce, particularly when the issue of federal preemption is a factor, but at least it will provide uniformity of application and expectation in the context of Social Security. Based on the Court's analysis in *Howell*, it is likely that in the context of Social Security, Congress intends a broad scope of federal preemption. Even if this is *not* what Congress intends, it is time for Congress to say so. Until Congress clarifies its intent for the scope of federal preemption of Social Security benefits in divorce, however, most states will continue to apply their own state property distribution laws to compensate for the perceived inequities resulting from the application of federal law, and they will do so narrowly, without uniformity, arguably inequitably, and in most cases, unconstitutionally.