FROM: Phyllis Schlafly

68 FAIRMOUNT, ALTON, ILLINOIS 62002 / (618) 462-5415

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THE SERVICEMEN'S PENSION CASE

A serviceman's ex-wife cannot be awarded up to half of his military retirement pay by a state divorce court. That's what the Supreme Court ruled in McCarty v. McCarty when it preempted California's domestic relations statute by extending the reach of the Federal retirement pay statute far beyond what its language says.

It was unfortunate that this decision came only a day after Rostker v. Goldberg, which held that it is constitutional to exempt all women from the miltary draft. Much of the media lumped these cases together as though they had been cut from the same cloth.

On the contrary, the ideology behind the two decisions is completely opposite. This difference is underscored by the fact that Justice William Rehnquist, who wrote the Court's opinion in Rostker, wrote a strong dissent in McCarty.

In our unique American federal system of government, which distributes powers between the Federal Government and the several states, it has always been recognized that domestic relations, family law, and family property law are firmly in the sanctuary of state jurisdiction rather than federal. Even the majority in McCarty had to make its bow to that principle, noting that "This Court repeatedly has recognized that 'the whole subject of the domestic relations of husband and wife ... belongs to the laws of the states and not to the laws of the United States.'"

And then Justice Blackmun proceeded to deny Mrs. McCarty the benefits which the state court had awarded her under California's community property law. He's the same Justice who wrote the majority opinion in Roe v. Wade (1973), the case that knocked out state anti-abortion laws and legalized abortion-on-demand.

Eight states, including California, have what is called community property law. These laws are based on the French and Spanish concept that marriage is an economic partnership and that any income earned during the marriage is owned equally by the wage-earning spouse and by the spouse who keeps the home and raises the children.

Upon dissolution of the marriage, each spouse has an absolute right to a half

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interest in all community property. Each spouse may also own and retain his or her separate property, which includes assets owned before marriage or acquired by gift.

The McCarty marriage had endured for 18 of the 20 years required for a serviceman to receive retirement pay. Based on that, California's highest court awarded Mrs. McCarty 45 percent of her ex-husband's retirement pay. This community property division rests on the premise that military retirement pay, like a typical pension, represents deferred compensation for services performed during marriage.

Blackmun and the Court's majority reversed California's ruling, leaving Mrs. McCarty out in the cold. Rehnquist's dissent calls the Court's opinion "curious" and based on "vague implications" from "Congress' failure to act." The emphasis is Rehnquist's; Congress has not enacted any law at all governing ex-spouses' rights to military retirement pay.

Justice Rehnquist spelled out the sound principle that "both family law and property law have been recognized as matters of peculiarly local concern and therefore governed by state and not federal law. ... The authority of the states should not be displaced except pursuant to the clearest direction from Congress."

Rehnquist concluded that the McCarty decision is "both unprecedented and wrong" and that most of the majority opinion has "little if anything to do with the case."

How, then, can we explain this incursion by the Supreme Court into the domain of state law? Perhaps it's just another federal power grab like Orr v. Orr (1979) in which the Supreme Court decided that it would rewrite the alimony laws of a dozen or more states by inventing the new right of an ex-husband to collect alimony from his ex-wife.

The McCarty decision is another Supreme Court attack on states' rights, as well as a blow to wives' rights. It can and should be reversed by Congress in order to get the Federal Government out of the business of trying to dictate state family property law. After that, the 42 non-community-property states should consider revising their own laws in line with the rationale that marriage is an economic partnership.

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