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I. INTRODUCTION

Richard McCarty and Patricia McCarty were married in Portland, Oregon in March 1957, while Richard attended medical school.[1] Less than two years later, Richard commenced active duty with the United States Army.[2] During the next 19 years, he served successive tours of duty for the Army in five different cities across the United States.[3]

The couple separated in October, 1976.[4] On December 1, 1976, Richard McCarty initiated a divorce proceeding before the Superior Court for the City and County of San Francisco.[5] At the time of the divorce, he was Chief of Cardiology at the Letterman Hospital on the

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1. McCarty v. McCarty, 453 U.S. 210, 216 (1981).
2. Brief for Appellant at 6, McCarty v. McCarty, 453 U.S. 210 (1981) (copy on file at the *Pacific Law Journal*).
3. 453 U.S. at 216.
4. *Id.*
5. Brief, *supra* note 2, at 7.

Presidio Military Reservation in San Francisco and had attained the rank of colonel.[6] In his petition to the superior court, the appellant listed his nondisability military retirement benefits as separate property.[7] At the time of separation, the husband had served 220 months of the 240 months required for eligibility for receipt of Army retired pay.[8]

At the divorce proceedings Patricia McCarty contested her husband's characterization of the retirement interests.[9] The superior court held, in an unpublished opinion, that the military pension rights were divisible between the parties as quasi-community property pursuant to section 4803 of the California Civil Code.[10] The trial court ordered the pension to be divided as follows:

> [p]etitioner shall pay to respondent, as long as she lives, that portion of his total monthly pension or retirement payment which equals one-half (1/2) of the ratio of the total time between marriage and separation during which petitioner was in the United States Army to the total number of years he has served with the United States Army at the time of retirement, and the Court retains jurisdiction to make such determination at that time and to supervise distribution thereof.[11]

Richard appealed that part of the superior court's decision awarding his wife an interest in the military retirement pay. Appearing before the California Court of Appeal, he argued that the federal law creating military pension rights preempted the application of California's community property law. In an unpublished decision, the California Court of Appeal rejected his arguments and affirmed the lower court's division of the military retirement benefits.[12] The California Supreme Court denied Richard McCarty's petition for hearing, but the United States Supreme Court granted certiorari.

The sole issue presented to the Supreme Court in *McCarty* was whether federal statutes governing nondisability military retirement pay preempt California courts from treating such compensation as

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6. 453 U.S. at 216.

7. Brief, *supra* note 2, at 8. For a discussion concerning the distinction between separate and community property, see text accompanying notes 19-29 *infra*.

8. Brief, *supra* note 2, at 8.

9. 453 U.S. at 217. The other community property of the spouse consisted of two cars, cash and an uncollected debt. *Id.*

10. CAL. CIV. CODE §4803.

11. Brief, *supra* note 2, at 8-9. In September, 1978 appellant retired from the Army and began receiving his pension payment. Under the terms of the Court order, Ms. McCarty was entitled to approximately 45% of the retired pay. 453 U.S. at 218.

12. The court of appeal concluded that the precise issue presented by appellant had already been decided contrary to his interest in *In re* Fithian, 10 Cal. 592, 517 P.2d 449, 111 Cal. Rptr. 369, *cert. denied*, 419 U.S. 825 (1974). Moreover, the court determined that the Supreme Court's finding concerning benefits under the Federal Railroad Retirement Act of 1974 were inapposite to military pension benefits. *See* Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).

community property divisible upon divorce. In a 6 to 3 decision written by Justice Blackmun, the Supreme Court reversed the California Court of Appeal, holding that federal law did, in fact, preempt the application of state community property law in the area of military pension benefits.

Approximately one year after the Supreme Court's ruling in *McCarty*, Congress enacted the Uniformed Services Former Spouses' Protection Act.[13] The Act effectively overrules the narrow holding of the *McCarty* case.[14] It amends Title 10 of 28 U.S.C. to include the following new language: "a court may treat disposable [military] retired or retainer pay . . . either as property solely of the member or as property of the member and his spouse in accordance with [local] law."[15]

This article will evaluate the *McCarty* decision in light of the Supreme Court's most recent pronouncement concerning federal preemption of state family property law[16] and in light of the recent passage of the Uniformed Services Former Spouses' Protection Act. The purpose of the analysis is to highlight the possible continuing impact that the *McCarty* case will have upon the preemption standard as it is applied to cases involving community property law. In pursuance of that objective, this article will (1) provide a general survey of community property law in California, (2) present an analysis of the federal preemption doctrine and detail the past application by the Supreme Court of that doctrine in the area of community property law, (3) examine and analyze the holding and rationale of the *McCarty* decision, (4) evaluate the significance of the Supreme Court's decision in *Ridgway v. Ridgway*,[17] (5) consider the effect that the Uniformed Services Former Spouses' Protection Act[18] will have upon the preemption standard articulated by the Court in *McCarty*, and (6) assess the possible impact that the *McCarty* decision will have upon future case law and the federal preemption standard.

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13. S. 2248, 97th Cong., 2d Sess., 128 CONG. REC. H5953 (daily ed. August 16, 1982), H.R. Rept. No. 749, 97th Cong., 2d Sess. 13 (1982) [hereinafter cited as the Former Spouses' Protection Act]. Congress sent the bill to President Reagan on August 27, 1982, and President Reagan signed the bill into law on September 8, 1982.

14. For a discussion concerning the probable impact that the Uniformed Services Former Spouses' Protection Act will have upon the *McCarty* preemption standard see *infra* notes 122-130 and accompanying text *infra*.

15. 128 Cong. Rec. H5953, H5957 (daily ed. August 16, 1982), H.R. Rept. No. 749, 97th Cong., 2d Sess. 13, 15 (1982).

16. *I.e.*, Ridgway v. Ridgway, 454 U.S. 46 (1981). *See infra* notes 87-121 and accompanying text.

17. 454 U.S. 46 (1981).

18. Former Spouses' Protection Act, *supra* note 13.

II. COMMUNITY PROPERTY LAW IN CALIFORNIA

California is one of eight states[19] embracing a system of community property.[20] Fundamental to the community property concept is the notion that all property acquired during marriage, other than by gift, devise, or descent, belongs to the spousal community.[21] Community property law defines marriage in terms of a partnership.[22] Spouses are presumed to contribute "equally to acquisitions [of the community] regardless of the actual division of labor in the marriage and regardless of which spouse actually 'earned' the property."[23] Hence, husband and wife share a present, existing, and equal legal interest in the community's acquisitions.

Community property rules govern property division upon the dissolution of marriage. Consistent with the basic notion of spousal equality in community acquisitions, the California Civil Code[24] directs state courts to divide all community property equally between the spouses upon divorce.[25] Pension rights attributable to employment during marriage are among the divisible items of community property.[26] Pension benefits have long been considered community property, because those benefits "do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee."[27] A

19. The remaining community property jurisdictions are Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

20. Community property law stems both from statute and from case law.

21. Property held before the marriage and property acquired during the marriage by gift, bequest, devise, or descent is classified as separate property. W. REPPY & W. DEFUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 81 (1975). *See also* CAL. CIV. CODE §§5108-5110. [California has adopted a statutory provision that defines as "quasi-community property" "all real or personal property, wherever situate . . . heretofore or hereafter acquired . . . which would have been community property . . . [had the spouses] been domiciled in the state at the time of [the property's acquisition]." *Id.* §4803. Quasi-community property is governed by general community property principles. *Id.*

22. *See In re* Marriage of Brigden, 80 Cal. App. 3d 380, 389, 145 Cal. Rptr. 716, 722-23 (1978). W. DEFUNIAK AND M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY §§58-80 (2d ed. 1971); Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 U.C.L.A. L. REV. 1, 6-8 (1976).

23. Prager, *supra* note 22, at 6. The presumption is regarded as a rule of substantive property law. Hisquierdo v. Hisquierdo, 439 U.S. 572, 593 (1979).

24. CAL. CIV. CODE §4800. Section 4800 does allow voluntary agreements between the parties with regard to property division. Only in the absence of such agreement will the court define the property division.

25. A spouse's right to receive one-half of the community estate is a substantive property right wholly separable from the spouse's right to seek alimony or support.

> A community property settlement merely distributes to the spouse property which, by virtue of the marital relationship, he or she already owns. An alimony award, by contrast, reflects a judgment that one spouse—even after the termination of the marriage—is entitled to continuing support by the other.

439 U.S. at 593-94.

Among the community property jurisdictions, only Texas does not permit a court to award alimony. Eichelberger v. Eichelberger, 582 S.W.2d 395, 402 (Tex. 1979).

26. *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1974). *See also* 439 U.S. at 594.

27. *In re* Marriage of Fithian, 10 Cal. 3d 592, 596, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371

spouse's interest in the pension attaches even if the pension has not formally vested.[28] Pension benefits therefore often constitute an important and sizeable community asset subject to division upon marital dissolution.

Prior to the *McCarty* decision, California courts accorded military pension benefits no special status; military pension benefits, like other pension benefits, were subject to division at divorce under community property principles.[29] In *McCarty*, the Court considered whether the approach followed by California courts was proper. In finding that it was not, the Court invoked the dictates of the federal preemption doctrine.

III. The Federal Preemption Doctrine

A. Generally

American federalism is defined in large part by the principle that the Constitution and congressional action exercised in pursuance thereof enjoy supremacy over the constitutions and laws of the several states. Federalism in general, and the Supremacy Clause[30] in particular, give rise to the doctrine of federal preemption. Defining the parameters of that doctrine, Chief Justice John Marshall wrote, "[w]hen acts of state legislatures . . . interfere with, or are contrary to, the laws of Congress, made in pursuance of the Constitution . . . the act of Congress . . . is supreme, and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."[31]

The Supreme Court has repeatedly held that "[p]reemption of state law by federal statute . . . is not favored."[32] This is especially true in matters involving the exercise of state police powers.[33] Because family

(1974). Even in the case of a "non-contributory" pension program, the benefits are still considered community property since those benefits are property rights acquired during marriage. *Id.*

28. *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). In Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), the Supreme Court indicated that a "State's decision to treat as property benefits that arguably are not 'vested' is one that it is free to make." *Id.* at 594.

California courts have devised two approaches to the mechanics of dividing nonvested pension rights. A court can either determine the present value of the future pension rights and award a spouse a sum based upon that estimate, or it can award each spouse an appropriate portion of each pension payment as it is paid. *Id.*

29. Note that pension benefits payable under the Federal Railroad Retirement Act of 1974, 45 U.S.C. §§231-231u (1976) are not subject to division pursuant to community property laws. *See* 439 U.S. at 590.

30. U.S. Const. art. VI, cl.2.

31. Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 92-93 (1824).

32. Chicago & North Western Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981). *See generally* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) (the exercise of federal supremacy is not lightly presumed).

33. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("[H]istoric police powers are not superseded by the federal act unless that is the clear and manifest purpose of Congress.").

law and family property law (i.e., community property law) fall within the area of state police powers, the Supreme Court has recognized that "[t]he whole subject of the domestic relationships of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States."[34]

But in spite of the peculiarly local jurisdiction of family law, that law does, under limited circumstances, remain subject to federal preemption. Recognizing the delicate balance that American federalism creates between state police powers and the supremacy clause, the Supreme Court has been particularly careful to fashion a narrow and stringently applied test for evaluating the constitutionality of state family laws. In *Hisquierdo v. Hisquierdo*,[35] the Court articulated the following two-part preemption test:

> On the rare occasions 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. *Wetmose v. Malkoe*, 196 U.S. 68, 77 (1904). A mere conflict in words is not sufficient. State family and family property law *must do 'major damage,' to 'clear and substantial' federal interests* before the Supremacy Clause will demand that state law be overridden. *United States v. Yazell*, 382 U.S. 341, 352 (1966).[36]

B. Past Application of the Preemption Doctrine in the Area of Community Property Law

The holding in *McCarty* follows directly from the majority's evaluation of the content and scope of the federal preemption doctrine. Therefore, it is essential to preface any analysis of the persuasiveness of the majority opinion with a survey of the Court's past application of the preemption doctrine in the area of community property law. On only five occasions prior to *McCarty* had the Supreme Court ordered the preemption of state community property law.[37] The following analysis illustrates the strictness of the past application of the preemption doctrine.

McCune v. Essig[38] was the first case in which the Court held that federal law preempted state community property law. The case arose

34. *In re* Burrus, 136 U.S. 586, 593-94 (1890).
35. 439 U.S. 572 (1979).
36. *Id.* at 581 (emphasis added).
37. Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979); Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962); Wissner v. Wissner, 338 U.S. 655 (1950); McCune v. Essig, 199 U.S. 382 (1905).
38. 199 U.S. 382 (1905).

when a deceased homesteader's daughter asserted, pursuant to community property law in Washington, a claim for an undivided one-half interest in her father's homestead. The Homestead Act[39] itself specifically provided that the full interest in the homestead passed to the widow first, and only in the case of her death did it go to the homesteader's heirs or devisees. Because the Court recognized a conflict in the terms of the federal and state statutory schemes, and because the Court believed damage to the federal interests would result from the application of Washington's community property laws, the Court ordered the state law to yield.

In *Wissner v. Wissner*,[40] the Court held that National Service Life Insurance (NSLI) proceeds were not subject to division under California's community property laws. The case involved an action by a deceased serviceman's wife to obtain the NSLI proceeds. The Court held that the insurance proceeds in question went to the deceased serviceman's parents, the named beneficiaries, rather than to his wife. The Court premised its decision upon the express dictates of the federal program. The federal act gave the insured "the right to designate the beneficiary or beneficiaries" as well as "the right to change the beneficiary or beneficiaries."[41] Moreover, the Court emphasized the fact that the federal program provided that "[payments] to the named beneficiary 'shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt.' "[42] Recognizing that the express language of the federal program conflicted with the normal operation of state community property rules, the Court declared that the state law was preempted.[43]

Hisquierdo v. Hisquierdo[44] provides a final illustration of the past application of the preemption test. *Hisquierdo* deserves special emphasis since the Court there provided a clear and precise definition of the preemption test. The *Hisquierdo* Court held that the Federal Railroad Retirement Act of 1974[45] preempted community property law. California

39. Homestead Act, ch. 75, 12 STAT. 392 (1862).

40. 338 U.S. 655 (1950).

41. 38 U.S.C. §802(g) (1976).

42. 338 U.S. at 659 (quoting 38 U.S.C. §454a (1976)).

43. Two other cases in which the Court found preemption of state community property law are Free v. Bland, 369 U.S. 663 (1962), and Yiatchos v. Yiatchos, 376 U.S. 306 (1964). Both cases involved the disposition of United States treasury bonds. In these two cases the Court held that federal laws and regulations preempted the application of state community property laws in determining the disposition of the United States Bonds. The Court, as in the two cases cited immediately above, emphasized the existence of conflicting language and the incompatibility of the state laws with the federal objectives.

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

45. 45 U.S.C. §§231-231t (1976).

courts were consequently precluded from dividing railroad retirement benefits pursuant to community property concepts. The Court utilized a two-part test in evaluating the preemption issues. First, the Court asked "whether Congress had 'positively required by direct enactment' that state law be preempted."[46] The Court found that California's community property law violated part one of the test, since the express language of section 231 of the Railroad Retirement Act provided that "[*n*]*ot withstanding any other law* of the United States, or *of any state* . . . no annuity . . . shall be assignable or be subject to any tax or to garnishment, or other legal process *under any circumstances whatsoever*."[47]

Noting that a "mere conflict in words is not [a] sufficient"[48] basis on which to find preemption, the Court introduced part two of the preemption test, asking whether the application of state community property law would "do 'major damage' to 'clear and substantial' federal interests."[49] The Court found that California's community property laws also violated part two of the test. Specifically, the Court declared that the application of community property laws would "reverse the flow of incentives Congress originally intended,"[50] because the effect of applying community property law would be to reduce the benefits received by those for whom they were intended. That effect, argued the Court, would discourage the divorced railroad employee from retiring, thereby frustrating the federal goals.[51] Because state law conflicted with the express terms of the federal statute and because the state law would cause major damage to clear and substantial federal interests, the Court ordered the community property law to yield.[52]

IV. THE *McCARTY* DECISION[53]

The structure of the majority opinion in *McCarty* closely parallels

46. 439 U.S. at 580. Note that the *McCarty* Court phrased part one of the preemption test somewhat differently. The *McCarty* Court instead asked whether "there [was] a conflict between the terms of the federal [and state] . . . statutes." 453 U.S. at 232. The difference in the wording would seem not to be critical since both forms ask essentially the same question—i.e., whether there is evidence of a clear congressional intent to preempt state law.

47. 45 U.S.C. §231m (1976) (emphasis added).

48. 439 U.S. at 581.

49. *Id.*

50. *Id.* at 585.

51. *Id.* The Court did not develop its arguments in support of part two of the preemption test as fully as it did in support of part one. The incompleteness of the argument in support of part two of the test seems to result from the Court's finding that there was a conflict in express terms between the state and federal programs. Apparently, the *Hisquierdo* Court believed that a conflict in terms would produce an inherent conflict in operation.

52. In the final analysis, if the Court's supporting rationale fails to withstand close scrutiny, the Court, nevertheless, must be credited with providing a precise definition of the preemption test.

53. See text accompanying notes 37-52 *supra*.

the structure of the Supreme Court's past preemption cases. The Court clearly indicated that it would evaluate the constitutionality of California's community property laws vis-à-vis the two-part preemption test articulated in prior case law.[54]

The Court devoted most of its analysis to determining whether the express terms of the federal statutes governing military retirement pay conflicted with California's community property laws and found that a conflict did exist. Specifically, the Court pointed to congressional language defining military retired pay as the "personal entitlement" of the service member.[55] The Court reasoned that because community property laws permitted the division of retirement pay, those laws reduced the pension benefits to something less than a "personal entitlement." That unanticipated reduction therefore evidenced a conflict in express terms.

The Court next sought to strengthen its finding that military retirement pay represented the serviceman's "personal entitlement" by focusing on two statutory provisions governing pension benefits. First, the Court noted that Title 10 of the United States Code section 2771 permits a servicemember to designate a beneficiary other than his spouse to receive any unpaid arrearages in retired pay upon his death.[56] This, reasoned the Court, was inconsistent with the normal principles of community property law which grant an interest to the surviving spouse in all compensation earned by the deceased spouse during marriage. For the majority, therefore, the servicemember's statutory right to designate whomever he pleased indicated Congress' intent that military retired pay constitute a "personal entitlement."

The Court next examined the Survivor Benefit Plan[57] and the Re-

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54. The Court did offer a novel argument not offered in the other preemption cases. The Court indicated that military retirement pay could properly be classified as reduced compensation for reduced, but currently rendered services. This was so because the military retiree remains a member of the Army, is subject to the Uniform Code of Military Justice, may forfeit all or part of his retired pay if he engages in certain prohibited behavior, remains subject to recall to active duty at any time, etc. And if military retired pay was considered reduced compensation for currently rendered services, the divorced spouse would have no interest in such pay under community property law, since the compensation would constitute earnings after marriage. See note 21 *supra*.

Although the court noted that it had already defined military retired pay as reduced compensation for reduced current services, the Court nevertheless concluded that it would not rely on that argument but instead would decide the case under the preemption standard. 453 U.S. at 221-22.

55. *Id.* at 224 (quoting S. Rep. No. 1480, 90th Cong., 2d Sess., 6 (1968)).

56. Section 2771 provides in relevant part:

> (a) In the settlement of the accounts of a deceased member of the armed forces . . . an amount due from the armed forces of which he was a member shall be paid to the person highest on the following list . . . (1) Beneficiary designated by him in writing to receive such amount . . . (2) Surviving spouse, (3) Children . . . (4) Father and mother . . . (5) Legal representative . . .

10 U.S.C. §2771 (1976).

57. 10 U.S.C. §§1447-55 (1976 & Supp. III 1979).

tired Serviceman's Family Protection Plan.[58] Both plans permit a servicemember to reduce his retired pay in order to provide an annuity for the surviving spouse or children. Importantly, however, neither plan stipulates that the surviving spouse must be designated as the beneficiary. That finding led the Court to conclude that "it is clear that if retired pay were community property, the servicemember could not so deprive the spouse of his or her interest in the property."[59] Instead, reasoned the Court, retired pay represented a "personal entitlement."

The Court offered a third argument in support of its finding that military retired pay was not subject to community property laws. The Court traced the legislative history of the Survivor Benefit Plan and found that Congress had explicitly rejected a proposal "that would have allowed attachment of up to 50% of military retired pay to comply with a court order in favor of a spouse, former spouse or child."[60] That provision, according to the *McCarty* majority, evidenced Congress' desire that "military retired pay 'actually reach the beneficiary.' "[61]

Tracing the legislative history of the Survivor's Benefit Plan even further, the Court noted that although a 1975 amendment to the Social Security Act[62] provided that all federal benefits, including those payable under the Survivor Benefit Plan, were subject to legal process to enforce child support or alimony obligations, Congress had specified that alimony "does not include any payment or transfer of property [made] in compliance with any community property settlement."[63] The Court believed this reflected Congress' overriding concern that the servicemember actually receive the intended benefits.

Having found that the express terms of the military retirement scheme conflicted with the operation of community property laws, the Court next proceeded to evaluate the second part of the preemption test. The Court found that "the application of community property principles to military retired pay threatens grave harm to 'clear and substantial' federal interests."[64] The Court identified two federal interests involved in the retirement compensation scheme: (1) providing economic support for the military retiree, and (2) meeting the personnel management needs of the military. In the Court's estimation, the operation of community property laws would frustrate both objectives. First, the Court feared that the division of retirement pay pursuant to

58. *Id.* §§1431-46 (1976 & Supp. III 1979).
59. 453 U.S. at 226.
60. *Id.* at 228-29.
61. *Id.*
62. 42 U.S.C. §659 (1976).
63. 453 U.S. at 230 (quoting 42 U.S.C. §462(c) (1976 & Supp. III 1979)).
64. *Id.* at 232.

community property laws would diminish the financial protection Congress had intended for the military retiree. In the Court's estimation, Congress had carefully calculated the economic needs of the military retiree and therefore the division of the retirement benefits upon dissolution would undermine the servicemember's ability to sustain himself. Second, the Court objected to the frustrating effect community property laws would have upon military recruitment. The Court wrote that "[t]he value of retired pay as an inducement for enlistment obviously would be diminished to the extent that the servicemember recognized that he or she might be involuntarily transferred to a state that would divide that pay upon divorce."[65]

In summary, the Court found both parts of the federal preemption test satisfied. The application of community property law conflicted with the express terms of the federal statute, and the community property law threatened grave harm to clear and substantial federal interests.

V. THE *McCARTY* DECISION: SIDESTEPPING SUBSTANCE

Viewed in terms of form, the majority opinion appears cogent and perfectly consistent with prior case law. The Court unequivocally set forth the *Hisquierdo* preemption test and then structured its analysis in terms of that standard. Viewing the Court's analysis only in terms of form, however, proves unilluminating. Instead, emphasis must be placed on substance. Although it is undeniable that the Court paid homage to the words of the preemption test, a study of the Court's substantive application of the *Hisquierdo* test casts serious doubt upon the analytic persuasiveness of the majority opinion.[66]

A. Conflict in Express Terms?

The majority found that the express terms of the federal statute creating military retirement pay conflicted with California's community property law. That finding is analytically unpersuasive for three reasons: (1) the controlling statute contains no express language communicating Congress' intent to preempt community property law, (2) the express terms that the Court relied on come from the legislative histories of statutes only tangentially related to the statute in question,

65. *Id.* at 234.

66. "[I]n its constitutional aspect, *McCarty* combines the Supremacy Clause and the preemption doctrine in a push into outer space." Foster & Freed, *McCarty* v. *McCarty*: Farewell to Alms? at 1 (unpublished manuscript—copy on file at the *Pacific Law Journal*). *See also* Kornfeld, *Supreme Court Majority Shoots Down Community Property Division of Military Retired Pay*, 8 COMMUNITY PROPERTY JOURNAL 187 (1981).

(3) the express language relied upon is far too ambiguous to suggest that Congress has " 'positively required by direct enactment' that state law be preempted."[67]

1. Sections 3911-3929 Contain No Language Evidencing Congress' Intent to Preempt Community Property Law

Despite its efforts, the Court failed to present evidence that the express terms of the federal statute in question conflicted with state community property rules. The controlling statute is Title 10 of the United States Code, Chapter 367, sections 3911-3929.[68] Chapter 367 sets forth provisions governing retirement for length of service. Ultimately, the only provision in Chapter 367 cited by the Court was section 3929. Section 3929 simply provides that "[a] member of the Army retired under this Chapter is entitled to retired pay."[69]

The Court blandly asserted that "[t]he statutory language is straightforward."[70] Few would contest that point. But the plain meaning of the quoted language suggests no conflict whatsoever with California's community property law. The language contains nothing prohibiting the application of community property law, nor does it mention the general preemption of state law. All the statute specifies is that an Army retiree is entitled to retirement compensation.

Prior case law dramatically illustrates the deficiency of the Court's finding that section 3929 evidences a conflict in express terms. A return to the *Hisquierdo* case is instructive. As detailed above, the *Hisquierdo* court held that the Federal Railroad Retirement Act preempted the application of community property law. The Court was careful to pinpoint the statutory language evidencing the conflict in express terms between the federal and state statutory schemes. The Court cited the following language of section 231m of the Railroad Retirement Act: "Notwithstanding any other law of the United States, or of any state . . . no annuity . . . shall be assignable or be subject to any tax or to garnishment, attachment, or legal process under any circumstance whatsoever."[71] The unequivocal language cited by the *Hisquierdo*

67. 453 U.S. at 234.
68. 10 U.S.C. §§3911-3929 (1976).
69. *Id.* §3929. It is absolutely essential to note that the only statute really in question is section 3929. That section alone establishes army retirement pay based upon years of service. Later in the Court's analysis, it highlights Title 10, U.S.C. section 1434 and section 1450 (1976) (i.e., Survivor Benefit Plan, and Retired Serviceman's Family Protection Plan) in an effort to show conflict in express terms. Citing those provisions, however, is deceptive since at most they concern ancillary programs of the larger area of retirement pay. In order to evaluate the express terms of the applicable statute, the Court would have had to focus upon sections 3911-3929.
70. 453 U.S. at 223-24.
71. Hisquierdo v. Hisquierdo, 439 U.S. 572, 576 (quoting 45 U.S.C. §231m).

court poignantly illustrates the failure of the *McCarty* Court to identify language evidencing the necessary conflict.

Ironically, the Court itself probably recognized the absence of conflicting terms. As a result, the Court sought to redefine part one of the preemption test. The Court argued that because the army retirement scheme did not contain any language specifically endorsing the application of a community property concept, Congress did not intend such law to apply.[72] Quite casually, the Court turned the preemption test upside down. The court suggested that the presumption of constitutionality normally attaching to community property law was no longer operative. Implicitly, the Court advanced a novel test: community property law cannot apply in areas of federal programs unless Congress specifically declares its intent that state law shall apply.

The Court never expressly acknowledged the metamorphosis. Perhaps this was due to the force and clarity of prior case law. Instead, after having overturned the past application of the preemption test, the Court sought to support the holding along conventional lines. Thus, the Court commenced an analysis of the Survivor Benefit Plan and the Serviceman's Family Protection Plan in an effort to demonstrate that the express terms of those provisions conflicted with the dictates of community property law.

2. *The Survivor Benefit Plan and the Serviceman's Family Protection Plan Are Only Tangentially Related to the Statute in Question*

The Court noted that in adopting the Survivor Benefit Plan and the Serviceman's Family Protection Plan, Congress had expressly defined retirement pay as the serviceman's "personal entitlement." The Court latched onto the term "personal entitlement" and concluded that the phrase evidenced the conflict necessary to invoke the preemption doctrine. In the Court's estimation, a benefit could not remain a "personal entitlement" if it were subject to equal division under state community property laws.

The Court's reliance on the personal entitlement language is unpersuasive in two respects. First, the Survivor Benefit Plan and the Serviceman's Family Protection Plan are acts only tangentially related to the statute in question. As detailed above, Chapter 367 governs retire-

72. The Court noted that, under the Railroad Retirement Act, a spouse of a retired worker was entitled to a separate annuity that terminated upon divorce. The Court defined that program as evidencing a limited community property concept. But the Court found that "unlike the Railroad Retirement Act, the military retirement system does not embody even a limited 'community property concept.'" 453 U.S. at 224.

ment pay for length of service. Logically, the Court should have carefully analyzed the terms of Chapter 367, premising any finding of preemption upon the express dictates of that chapter. Instead, the Court identified language from Chapter 73 (sections 1431-1455). Chapter 73 provides for annuities based upon retired or retainer pay and sets forth the terms of the Survivor Benefit Plan and the Serviceman's Family Protection Plan. At the very most, the only connection Chapter 73 has with Chapter 367 is that Chapter 73 permits a serviceman to reduce a portion of his Chapter 367 retired pay upon election in order to provide an annuity for the surviving spouse or children. More importantly, however, Chapter 73 is not the statutory provision that governs retired pay for length of service. That the two programs intersect in a limited fashion is not justification for substituting the terms and legislative histories of the one act for the other. Writing in dissent, Justice Rehnquist bluntly castigated the majority for its "diverting analysis . . . of laws and legislative histories having little if anything to do with the case at bar."[73] The terms and legislative history of Chapter 73 appear to serve as an extremely weak foundation upon which to preempt the application of community property law as it pertains to Chapter 367 retired pay.[74]

A second fallacy also surfaces in the Court's "personal entitlement" argument. To see the fallacy, it is important to recall that the Court focused upon the "personal entitlement" language as proof that "the express terms of federal law" precluded the application of the community property concept. In a somewhat misleading fashion, however, the Court set forth the term "personal entitlement" as if it were an express term of the federal statute itself. The Court failed to properly underscore that the quoted language does *not* appear in the statute itself, but instead comes from a 1968 Senate Armed Services Committee Report.[75] The applicable test requires the Court to view the express terms of the statute, not terms found in legislative histories. Whereas the *Hisquierdo* Court cited the express terms of federal law, the *McCarty* Court quoted language from a committee report. Preemption based upon the former comports with prior case law; preemption premised upon the latter is far less persuasive.

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73. *Id.* at 237.

74. The Court analyzes the terms of the Survivor Benefit Plan as if Ms. McCarty were demanding payment thereunder. In reality, the Survivor Benefit Plan was not at issue. The facts presented by the Court do not even mention whether or not Richard McCarty participated in the plan. Ms. McCarty only argued that federal laws do not preempt the application of community property law to Chapter 367 retired pay. She did not assert that community property law could be used to defeat Congress' intentions concerning the Survivor Benefit Plan.

75. S. Rep. No. 1480, 90th Cong., 2d Sess., 6 (1968).

3. The Language that the Court Relies Upon As Evidence of a Conflict in Express Terms is Far Too Ambiguous to Suggest that Congress Has Positively Required By Direct Enactment that Community Property Law Be Preempted

Even if one concludes, as did the majority, that language discovered in various legislative histories constitutes "express terms of federal law," the Court's finding of preemption appears to lack justification on still other grounds. The term "personal entitlement" is far too ambiguous to satisfy the applicable test (i.e., "Congress has 'positively required by direct enactment' that state law be preempted."[76]) The exact meaning of "personal entitlement" is not self-evident. Black's Law Dictionary does not offer any definition.[77] In fact, other courts have considered the meaning of "personal entitlement" and have defined the phrase in terms far different than those offered by the *McCarty* Court. For example, the California Supreme Court wrote:

> Congress used the phrase "personal entitlement" to signify that retirement benefits cease with the death of the serviceman, and provide no continuing means of support for the serviceman's widow. . . . Congress' reference to military retirement benefits as the "personal entitlement" of the serviceman occurs in the context of underscoring the need for an annuity plan to provide for a deceased serviceman's family.[78]

The *McCarty* Court defined "personal entitlement" as the serviceman's absolute right to receive all vested retired pay until death. Conversely, the California Supreme Court believed that "personal entitlement" signified only the durational character of the serviceman's right to pension benefits. The differing interpretations illustrate the inherent ambiguity in the phrase "personal entitlement." Such an ambiguous term seems to fail to support the conclusion that "Congress has 'positively required by direct enactment' that state [community property] law be preempted." The Court's findings to the contrary seem unpersuasive, leading to the inevitable conclusion that the Court may well have failed to satisfy the first part of the preemption test.

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76. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979). As Justice Rehnquist points out in his dissent, the Court "[f]or all its purported reliance on Hisquierdo v. Hisquierdo . . . fails either to quote or cite the [applicable] test." 453 U.S. at 236. The *McCarty* Court ignored the "positively required by direct enactment" standard. *Id.*

77. BLACK'S LAW DICTIONARY (5th ed. 1979).

78. *In re* Fithian, 10 Cal. 3d 592, 599 n.8, 517 P.2d 449, 453, 111 Cal. Rptr. 369, 373 (1974).

B. Do Community Property Laws Really Threaten Grave Harm to Clear and Substantial Federal Interests?

The Court recited that "a mere conflict in words is not [a] sufficient"[79] basis upon which to invoke the preemption doctrine. The Court indicated that under *Hisquierdo*, it had to determine whether "the application of community property principles to military retired pay threatens grave harm to 'clear and substantial' federal interests"[80] before it would invoke preemption. As with part one of the preemption test, however, it seems that the Court observed the form of the test, but refused to apply its substantive content.

For purposes of analysis, part two of the preemption test can be broken down into two components. First, the test requires a court to find that the federal statute in question develops "clear and substantial federal interests." The *McCarty* Court satisfied that requirement. The Court wrote that "Congress has enacted a military retirement system designed to promote two major goals: to provide for the retired service member, and to meet the personnel management needs of the active military forces."[81] The second component requires an inquiry into whether the state law in question "threatens grave harm" to the clear and substantial federal interests identified above. While the *McCarty* Court found that such actual conflict did exist, it offered only somewhat conclusory remarks to support that finding.

The Court asserted that community property laws would frustrate the personnel management needs of the military services. Those needs entail attracting a young, vigorous, and capable staff. The Court surmised that allowing an equal division of military retirement pay pursuant to community property law would discourage persons from enlisting in the armed services. In evaluating that argument, one must ask "[w]ho ever refused to enlist [in the armed services] because a spouse upon divorce might get a share of military pay?"[82] An intelligent answer to that question is impossible without statistical information of some sort. Yet the Court provides no such documentation to support its conclusions. Interestingly, the Court seems not to have been without some information directly on point. One of the several amicus briefs submitted to the Court presented information concerning a study by the President's Commission on Military Compensation.[83] The re-

79. 453 U.S. at 232.
80. *Id.*
81. *Id.*
82. Foster & Freed, *supra* note 66, at 7.
83. Report of the President's Commission on Military Compensation (April 1979). It is true that the Court makes brief reference to the Report in a footnote. *See* 453 U.S. at 234 n.26. ("A recent Presidential Commission has questioned the extent to which the military retirement system

port concluded that:

> The retirement plan apparently has little influence on prospective recruits. . . . This phenomenon results from the strong preferences among young people for current income rather than deferred income. For such persons, upfront compensation in the form of pay or bonuses can be a much more effective incentive than retirement [compensation]. . . .[84]

It appears, then, that not only did the Court fail to document the putative adverse effects community property law has upon recruitment, but that the Court actually ignored evidence that retirement benefits themselves do not even constitute a meaningful recruitment device.

The Court also failed to apply the test with the rigidity that the words of the test demand. The standard is "grave harm," not "possible impact." Therefore, even if one concedes that the fear of losing retirement benefits in a divorce proceeding retards military recruitment, it does not necessarily follow that such deterrence would rise to the level of grave harm. The Court presented no evidence that the past operation of community property law has in fact retarded military recruitment in our present, all voluntary military system. If that result has not occurred, then it seems logical to conclude that applying community property rules will not inflict *grave harm* upon military recruitment. Any minuscule impact that those laws do have fails to justify preemption, since the test itself requires a showing of grave harm.

In a second effort to demonstrate the grave harm that community property laws inflict upon the military scheme, the Court announced that community property rules impair the retiree's ability to support himself. In particular, the Court lamented that an equal division order upon divorce would reduce the retiree's compensation below a carefully considered level adopted by Congress.

The argument has some merit. It is important to consider whether community property awards create state welfare dependents out of retired servicemen. As in the case above, however, the Court seems to fail to provide any evidence stronger than conclusory statements. Further, the Court seems to ignore the fact that federal law currently allows the garnishment of up to one-half of the serviceman's retirement pay in order to satisfy an alimony or child support judgment.[85] Evi-

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accomplishes [its stated] goals."). But the Court makes no real attempt to integrate the findings of the Report into its own analysis. Having cited the report, the Court simply proceeds as if there were no available evidence questioning the effectiveness of the military retirement program as a stimulus to military recruitment.

84. Brief Amici Curiae on Behalf of Certain Members of Congress and Organizations at 34, McCarty v. McCarty, 453 U.S. 210 (quoting, Report of The President's Commission on Military Compensation 27 (April, 1979)) (copy on file at the *Pacific Law Journal*).

85. 42 U.S.C. §659 (1976).

dently, Congress is concerned with more than the serviceman's ability to sustain himself. Congress is also concerned about the welfare of the serviceman's ex-spouse and family. It must also be realized that the maximum community property award (50% of serviceman's retirement benefits) would be no greater than the amount of retirement pay subject to garnishment for alimony and child support. A community property award would not reduce the serviceman's income below a level Congress has implicitly regarded as sufficient for basic support.

The military pension benefits issue has sparked emotional responses from all sides, revealing a paucity of analytically sound reasoning. For that very reason, an amicus of the Court urged the Court not to be influenced by such emotionalism, but rather to pursue a rigorous, analytical approach. The amicus wryly admonished that

> [It] has been argued that a decision upholding community property law would unjustly reduce retirement benefits of the bachelor sailor who has too much to drink one evening and wakes up the next morning only to find that he got married the night before. While such stories may be the grist of Hollywood script writers, we suggest that the incidence of such events in real life is so slight that the argument can fairly be disregarded.[86]

The lack of documentation for the Court's assertions that community property law inflicts grave harm upon the military retirement system leads one to the conclusion that the Court's decision may well have been a product of the very emotionalism it was cautioned to avoid. The Court did not present persuasive support for its finding of preemption under the two-part *Hisquierdo* test.

VI. *RIDGWAY V. RIDGWAY*: HISQUIERDO/MCCARTY CONFLICT

1. Introduction: The Conflict

In the *McCarty* case the Supreme Court used a preemption test materially different from that offered by the Court in *Hisquierdo*. With regard to part one of the preemption test, *McCarty* implied that state family property law would not apply in the area of federal programs unless Congress specifically provided that such law should apply.[87] Conversely, *Hisquierdo* clearly held that state community property law did apply to federal programs unless Congress had positively preempted state law by direct enactment.[88] The two decisions also differ as to the application of part two of the preemption test. While the Court in both cases acknowledged that a mere conflict in words was not

86. Brief, *supra* note 84, at 33-34.
87. *See* note 72 and accompanying text *supra*.
88. *See* note 46 and accompanying text *supra*.

a sufficient basis upon which to predicate preemption, and while both Courts set forth identical language in defining part two of the test,[89] only the *Hisquierdo* Court applies the test with the rigidity that the words of the test would seem to demand. Commentators have viewed that the *McCarty* formulation of part two of the test is whether "there is *potential* harm to possible federal interests."[90]

In his dissent in *McCarty*, Justice Rehnquist commented on the uncertainty that follows in the wake of the *McCarty* decision. He wrote, "I am not certain whether the analysis was wrong in *Hisquierdo* or in [*McCarty*], but it is clear that both cannot be correct. One is led to inquire where this moving target will next appear."[91] The subject of Justice Rehnquist's concern appeared only four and one-half months later when the Court again addressed the problem of federal preemption of state family law in *Ridgway v. Ridgway*.[92]

The *Ridgway* Court embraced the novel preemption standard advanced in *McCarty* rather than the traditional approach set forth in *Hisquierdo*. The following analysis will illustrate the force and effect that the *McCarty* decision has exerted on the preemption standard as it is applied in the area of family property law.

2. Background

On December 7, 1977 a Maine divorce court granted Richard and April Ridgway an order terminating their marriage.[93] The court ordered Richard, a sergeant in the United States Army, to provide continuing child support for his three children.[94] As part of that order the court directed Richard " 'to keep in force the life insurance policies on his life [then] outstanding for the benefit of the . . . three children.' "[95] At the time of the divorce, Richard maintained a life insurance policy issued under the Serviceman's Group Life Insurance Act[96] ("SGLIA").

89. The language used in both cases was whether the application of state law would "do 'major damage' to 'clear and substantial federal interests." 453 U.S. at 220; 439 U.S. at 581.

90. Comment, *McCarty v. McCarty*, 12 FAM. L. REP. 1650, 1662 (1981).

91. 453 U.S. at 244 (Rehnquist, J., dissenting).

92. 454 U.S. 46 (1981).

93. *Id.* at 48.

94. *Id.*

95. *Id.* (citation omitted).

96. 38 U.S.C. §§765-79 (1976). SGLIA is a federally sponsored life insurance program adopted for the benefit of military servicemembers. In providing the background history of the SLGIA, the *Ridgway* Court wrote

> In order to make the insurance available through a commercial carrier at a reasonable rate, notwithstanding the special mortality risks that service members often must assume, Congress undertook to subsidize [a federal] program. . . . A sum representing the extra premium for special mortality risks is periodically deposited by the United States into a revolving fund that is used to pay premiums on the master policy. . . . The fund otherwise is derived primarily from deductions withheld from service members' pay. . . .

Richard remarried less than four months after the dissolution of his first marriage.[97] Almost immediately thereafter, he changed the policy's beneficiary designation, directing that the insurance proceeds be paid "as specified 'by law.' "[98] Richard died less than a year later.[99] His first wife, April, then instituted an action to enjoin the payment of the policy proceeds and to obtain a declaratory judgment stipulating that the benefits were properly payable to the three children of the first marriage.[100] The Maine trial court denied April the relief she requested, but the Supreme Judicial Court of Maine granted her request and directed that she be named as constructive trustee of the policy proceeds.[101] The United States Supreme Court then granted certiorari.[102]

The precise issue addressed in *Ridgway* was whether "an insured serviceman's beneficiary designation under a life insurance policy issued pursuant to the Servicemen's Group Life Insurance Act[103] prevails over a constructive trust imposed upon the policy by a state court decree."[104] Finding that the pertinent federal statute[105] preempted the application of state family property law, the Court held that the insurance proceeds were not subject to the constructive trust established by the Maine Supreme Judicial Court.[106]

3. The Rationale: McCarty *Reapplied*

The *Ridgway* Court applied part one of the preemption test in a fashion very similar to the approach taken by the Court in *McCarty*. It is important to note that the Court in *Ridgway* did not set forth the language of part one of the *Hisquierdo* preemption test,[107] but instead cited the less rigorous *McCarty* test which had failed to cite or quote

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> Accordingly, depending upon the conditions faced by the service members at any given time, the program may be financed in part with federal funds. . . .

454 U.S. at 52 (citations omitted).

97. *Id.* at 48.

98. *Id.* Section 770(a) of the Act, 38 U.S.C. §770(a) (1976), provides that in the absence of a named beneficiary, the proceeds of the policy are payable "to the widow or widower of such member or former member." *Id.* By removing April's name and stipulating that the beneficiary be chosen as provided "by law," Richard sought to have the policy payments directed to his second wife (*i.e.*, the only legal widow). *Id.*

99. 454 U.S. at 49.

100. *Id.*

101. *Id.* at 50.

102. Ridgway v. Ridgway, 450 U.S. 979 (1981).

103. 38 U.S.C. §§765-79 (1976).

104. 454 U.S. at 47.

105. *I.e.*, the Servicemen's Group Life Insurance Act, 38 U.S.C. §§765-79 (1976).

105. 454 U.S. at 60.

107. *Hisquierdo* defined part one of the test as follows: "whether Congress has 'positively required by direct enactment' that state law be pre-empted." 439 U.S. at 581 (citing Wetmore v. Markoe, 196 U.S. 68, 77 (1904)).

the precise test advanced in part one of *Hisquierdo*.[108] Rather than asking "whether Congress has 'positively required by direct enactment' that state law be preempted,"[109] the *Ridgway* Court simply asked whether there were "clearly conflicting federal enactments."[110]

Having discarded the strictures of the *Hisquierdo* standard, the Court determined that preemption was appropriate even though the Court identified no evidence that Congress had addressed the question of the applicability of state family property law and had specifically decided that state law should not apply. The Court cited two statutory provisions in support of its holding. First, the Court noted that SGLIA and implementing statutes[111] permit the insured to "designate any person as a policy beneficiary."[112] Secondly, the Court cited section 770(g) of the Act. Section 770(g) specifies that "[p]ayments of benefits [under SGLIA] . . . shall be exempt from the claims of creditors, and shall not be liable to attachment . . . under any legal or equitable process."[113]

Read together, the two provisions above fail to indicate that Congress has *positively required* that SGLIA displace the normal operation of state family and family property law. In finding that the language of SGLIA satisfied part one of the preemption test, the Court applied the type of reverse presumption of constitutionality adopted by *McCarty*. In other words, the Court suggested that because SGLIA did not specifically endorse the application of state marital property law, Congress

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108. Rehnquist in his dissent in *McCarty* chastised the Court for failing "either to quote or cite the test for pre-emption which *Hisquierdo* established." 453 U.S. at 236 (Rehnquist, J., dissenting).

109. 439 U.S. at 581 (citation omitted).

110. 454 U.S. at 55.

111. 38 C.F.R. §§916(a) & (d) (1980).

112. *Id.* (emphasis added).

113. 38 U.S.C. §770(g) (1976). Writing in dissent, Justice Stevens persuasively argues that the anti-attachment provision (§770(g)) was enacted to protect the policy proceeds from the claims of *commercial creditors* and not to prevent dependent children from asserting rights therein. 454 U.S. at 73-74 (Stevens, J., dissenting). Justice Stevens writes

> The language cited in the "anti-attachment" provision of SGLIA is comparable to that found in so-called "spendthrift clauses" that have protected trust beneficiaries from the claims of commercial creditors for centuries. As stated by Dean Griswold, "[i]t is widely held, however, that even where such trusts are valid, the interest of the beneficiary may be reached for the support of his wife or children, or for the payment of alimony to his wife."

Id. at 74 (Stevens, J., dissenting) (citations and footnotes omitted). Justice Stevens concludes by writing

> The federal interest incorporated within exemption statutes is an interest in preventing federally-supported benefits from satisfying claims of commercial creditors. Although such claims are certainly valid, they arise solely from a personal obligation of the debtor, and should not be borne by the public through payment from general revenues. Claims based on familial obligation, however, are of a different character, and indeed may be precisely the type of claim for which the federal benefit was intended. *Absent some indication that Congress intended the standard exemption provision contained in the SGLIA to bar a minor child's claim for support, I am unwilling to conclude that this provision of the statute preempts the application of state law in this case.*

Id. at 78-79 (Stevens, J., dissenting) (footnote omitted) (emphasis added).

intended such law not to apply. The Court evidently was moved by the fact that "[t]he legislation itself says nothing about contrary dictates of state law or state judgments."[114]

The *Ridgway* Court also followed the *McCarty* analysis with regard to the application of part two of the preemption test. Like the Court in *McCarty*, the *Ridgway* Court began its analysis of part two of the test by citing the words of the *Hisquierdo* test.[115] The Court specified that "[s]tate family and family property law must do 'major damage' to 'clear and substantial' federal interests"[116] before preemption would occur. But as was the case in *McCarty*, the Court in *Ridgway* failed to apply the test consistently with the plain meaning of the language. One commentator explained that the real test applied by *Ridgway* was whether "there is *potential* harm to possible interests."[117]

The Court identified servicemember *morale* as the primary federal interest at stake. The majority reasoned that the "[p]ossession of government insurance, payable to the relative of his choice, might well directly *enhance the morale of the serviceman*."[118] The Court went on to explain that SGLIA makes "insurance available through a common carrier at a reasonable rate, notwithstanding the special mortality risks that servicemembers often must assume."[119] Although the *Ridgway* Court was able to identify the clear and substantial interests at stake, the Court failed to take the additional step of showing how the application of state marital property law would cause *major damage* to those interests.[120] The Court mentioned that the divorce decree ordered by the Maine Supreme Judicial Court would defeat Richard's ability to

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114. *Id.* at 54. The criticism Justice Rehnquist directed toward the majority in *McCarty* is appropriate here. The criticism was paraphrased by a commentator as follows:

> Under *Hisquierdo*, the absence of any federal community property scheme at all would have been thought to suggest that there was no preemption. . . . The majority in *McCarty* [and *Ridgway*] has turned this reasoning around and we are told that preemption of state community property law is suggested in the case because there is no community property concept at all in the federal statutory scheme.

Kornfeld, *supra* note 66, at 193.

115. The reader should be reminded that the *Ridgway* Court did not pay part one of the *Hisquierdo* test the same deference. While the Court in *Ridgway* cited part two of the *Hisquierdo* test, it did not cite the language of part one of that test. *See* notes 107-110 and accompanying text *supra*.

116. 454 U.S. at 54 (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)).

117. Comment, *supra* note 90, at 1828 (emphasis in original).

118. 454 U.S. at 56 (quoting *Wissner v. Wissner*, 338 U.S. 655, 660 (1950) (emphasis added)).

119. 454 U.S. at 52. The Court also wrote that "[t]he federal interest is especially strong because a substantial share of the proceeds of an SGLIA policy may be attributable to general tax revenues." *Id.* at 57. The Court here seems to confuse the purpose of the analysis at hand. The fact that taxpayers spend a lot of money on the SGLIA program does not evidence the federal interest per se; the expenditure of large sums of money simply illustrates the commitment the public has made towards advancing the federal interest of building serviceman morale.

120. Writing in dissent, Justice Stevens makes specific reference to the Court's failure to satisfy part two of the test. Justice Stevens wrote, "[n]otwithstanding the absence of any such major damage," the Court has ordered preemption. 454 U.S. at 72 (Stevens, J., dissenting).

designate whomever he wished to receive the SGLIA insurance proceeds. It failed to demonstrate, however, how the application of such state family property law would destroy morale in general. The applicable test cited by the Court was *major harm* not *possible impact*;[121] yet the Court did not produce evidence satisfying the terms of the test it cited as controlling.

VII. The Congressional Response: The Impact of the Uniformed Services Former Spouses' Protection Act Upon the *McCarty* Preemption Standard

In August, 1982 the United States Congress enacted the Uniformed Services Former Spouses' Protection Act.[122] The Act stipulates that

> court[s] may treat disposable [military] retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or *as property of the member and his spouse in accordance with the law of the jurisdiction of such court[s]*.[123]

The legislative history of the Act unequivocally indicates that the purpose of the measure is to reverse the result dictated by *McCarty*.[124] In other words, the Act specifically contemplates permitting state courts to

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121. Justice Stevens points out in his dissent that the preemption of state law (not its application) would pose the real threat to the servicemen. He writes

> [I]t is ironic that today's decision may harm federal interests in a more tangible way than that ascribed to the decision of the Maine Supreme Judicial Court. As a result of the holding today, a commitment to keep military insurance in effect for one's children is not legally binding. In the future, a serviceman in divorce negotiations may be forced to purchase new insurance from a private insurer in order to provide fair assurance that his support obligation will remain satisfied in the event of his death. For many servicemen, such private insurance may not be easy to obtain. Surely there is no federal interest in depreciating the value of this insurance.

454 U.S. at 82 (Stevens, J., dissenting).

122. Former Spouses' Protection Act, *supra* note 13. The Act was attached as a rider to the Department of Defense Authorization Act of 1982. *Id.*

123. §1408(c)(1). The language of the Act originated in a Senate bill introduced by Senator Jepsen, the Chairperson of the Senate Armed Services Subcommittee on Manpower. *See* S. 1814, 97th Cong., 2d Sess. (1981); *see also* 127 Cong. Rec. S12901-04 (daily ed. Nov. 4, 1981) (statement of Senator Jepsen regarding S. 1814). In considering the legislative history of the Former Spouses' Protection Act, one should consider the other congressional bills relating to the same subject matter. *See* S. 1453, 97th Cong. 2d Sess., (1981) S. 1648, 97th Cong., 2d Sess. (1981); S. 1772, 97th Cong., 2d Sess. (1981); H.R. 1711, 97th Cong. 2d Sess. H.R. 3039, 97th Cong. 2d Sess. (1981); H.R. 4902, 97th Cong., 2d Sess. (1981). The scope and the content of the proposals vary widely, reflecting conflicting goals among the drafters. Nevertheless, the bills read as a whole indicate that the congressional response to *McCarty* was quite strong.

124. The House Report documenting the purpose of the Act specifies that the measure "would have the effect of reversing the decision of the United States Supreme Court in the case of *McCarty v. McCarty* which held that a court could not order a division of nondisability retired pay as part of a distribution of community property incident to a divorce proceeding." H.R. Rep. No. 749, 97th Cong., 2d Sess. 165 (1982). *See also* 128 Cong. Rec. H4717 (daily ed. July 28, 1982) (comments of Rep. Schroeder) ("The primary purpose of the bill is to remove the effect of the United States Supreme Court decision in *McCarty* . . . which prohibited State courts from considering military retired pay as marital property according to their own domestic relations law").

divide military pension benefits at divorce pursuant to local family property law.

In assessing the impact that the Uniformed Former Spouses' Protection Act will have upon the *McCarty* decision, it is crucial to determine the scope of the congressional response. An inquiry into the breadth of the action taken by Congress reveals that Congress intended only to change the result dictated by *McCarty*, not to disturb the rationale offered by the Court in support of its holding. Thus, the preemption test formulated by the *McCarty* Court retains precedential value.[125]

A review of the legislative history surrounding the enactment of the Uniformed Services Former Spouses' Protection Act indicates the limited scope of Congress' response to the *McCarty* decision. In introducing the legislation before the House of Representatives, Congresswoman Patricia Schroeder stated that the "purpose of the bill is to *remove the effect* of the United States Supreme Court's decision in *McCarty*."[126] Congresswoman Schroeder made no mention that Congress' underlying intent was to force the Court to apply a different preemption standard. Instead, her comments indicate that Congress' concern was only to circumvent the narrow holding reached by *McCarty*. In essence, Congress viewed the task before it as one of clarification. The *McCarty* Court had found that Congress did not wish state marital property law to apply. Congress sought to inform the Court

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125. The *McCarty* preemption test will retain precedential value notwithstanding the enactment of the Uniformed Services Former Spouses' Protection Act. That proposition derives support in two ways. First, if Congress did not even address the issue of whether the Court articulated a constitutionally permissible preemption standard, then there could be no authority for the proposition that the *McCarty* standard was overruled by the congressional action. Second, case law is replete with examples of cases retaining precedential value even after Congress has overruled the narrow holding of the case. The First Circuit faced the issue in Marriott In-Flite Servs. v. NLRB, 652 F.2d 202 (1st Cir. 1981). In *Marriott*, the court wrote

> [A]lthough Congress effectively overruled the Supreme Court's holding in *Packard Motor Car Co. v. NLRB*, 330 U.S. 685 . . . (1947), that foremen could organize into a unit for purposes of collective bargaining, *Packard* is still cited for the proposition that the Board's selection of an appropriate bargaining unit is rarely to be disturbed. See, for example, *Southern Prairie Constr. Co. v. Local No. 627, International Union of Operating Engr's*, 425 U.S. 800, 805 . . . (1976) (per curiam).

652 F.2d at 205, n.6 (citations omitted). The precise holding in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) has also met congressional disapproval. In *Gilbert* the Court ruled that an employer's exclusion of pregnancy related benefits from coverage under disability benefit plans did not constitute discrimination within the meaning of Title VII of the Civil Rights Act. *Id.* at 145-46. Congress later amended Title VII "to overrule the Supreme Court's decision in . . . *Gilbert*." *See* Kirkhuff v. Cleland, 516 F. Supp. 351, 365 n.23 (D.D.C. 1981). But despite that fact, courts have continued to recognize the precedential value of *Gilbert*. *See* Watt v. Alaska, 451 U.S. 259, 273 (1981).

Even if one ignores the case law above and urges that the overruling of the narrow holding in *McCarty* would affect *McCarty's* precedential value, the fact remains that *Ridgway* incorporated the *McCarty* preemption test into its own analysis. Congress' recent enactment does not affect the factual basis upon which *Ridgway* was decided. Therefore, at the very least, the *McCarty* test is fully incorporated into a case that clearly has not been overruled by Congress. *McCarty* will continue to have precedential value.

126. 128 Cong. Rec. H4717 (daily ed. July 28, 1982) (emphasis added).

that it had reached a faulty conclusion. Congressman Donnelly explained that the Act simply "clarifies the intent of Congress concerning military pensions."[127]

Rather than undermining the preemption standard set forth in *McCarty*, the Congressional action reinforces the strength of the new test. Commentators have recognized that *McCarty* formulated a novel approach when it held that preemption would occur unless Congress expressed its intent that state family property law should apply.[128] There can be no doubt that Congress itself recognized the general nature of that new preemption test. Several congressmen echoed the sentiment that *McCarty* stood for the proposition "that military retirement pay could no longer be considered a marital asset subject to division in divorce proceedings *because* of the lack of a federal statute permitting such action."[129] To correct that result, Congress adopted a federal statute expressly providing for the applicability of state law.[130]

VIII. The Aftermath: Possible Implications of *McCarty* and *Ridgway*

The precise impact that the *McCarty* and *Ridgway* decisions will have upon future case law and the federal preemption standard is unclear at this point. The following analysis will briefly highlight three possible trends.

A. De Minimis Effect

In the first instance, the McCarty case may prove to have no more than a *de minimis* effect upon future case law and the preemption standard. Specifically, courts and commentators might overestimate the scope of recent congressional action. Rather than viewing the enactment of the Uniformed Former Spouses' Protection Act as a narrowly tailored political response aimed at circumventing the result dictated

127. 128 Cong. Rec. H4720 (daily ed. July 28, 1982).

128. For a general discussion of the reformulation of the *McCarty* standard see notes 66-86 and accompanying text *supra*.

129. 128 Cong. Rec. H4725 (daily ed. July 28, 1982) (comments of Rep. Bedell) (emphasis added). *See also* 128 Cong. Rec. H4722 (daily ed. August 16, 1982) (Congressional Whitehurst commented that "the McCarty decision . . . held that in the absence of a Federal statute permitting such action, a State court may not order a division of military retired pay."); 128 Cong. Rec. H4723 (daily ed. August 16, 1982) (Congresswoman Oakar stated that "[t]he Supreme Court has ruled that in the absence of a Federal Statute to the contrary, a State court may not order a division of military retired pay.").

130. Former Spouses' Protection Act, *supra* note 13. To illustrate that Congress accepted the *McCarty* preemption standard, reference is made to the statement of Congressman Donnelly. He stated that the "amendment clarifies the intent of Congress concerning military pensions as urged by the Supreme Court's 1981 decision in *McCarty*." 128 Cong. Rec. at H4720 (emphasis added). Donnelly seems to indicate that Congress acted only because state family property law would not have applicability unless Congress enacted a federal statute directly on point.

by *McCarty*,[131] the congressional action may be interpreted as a directive requiring the Court to readopt the *Hisquierdo* preemption analysis. In short, courts and commentators might believe that the Act specifically addressed the efficacy of the new preemption standard and ordered the Court to revise its evaluation of the analytical process compelled by the Supremacy Clause.

B. Impact Upon Special Military Programs

As a second possibility, the *McCarty* decision may have a pervasive impact, but one limited to the area of federal military programs. The Supreme Court recently noted in a case involving federal draft registration[132] that in matters involving "Congress' authority over national defense and military affairs, . . . the Court [has] accorded Congress greater deference [than usual]."[133] The belief that Congress is entitled to special deference when it acts in areas involving military affairs may well explain the preemption test formulated in *McCarty* and later adopted in *Ridgway*. After all, the *McCarty* standard creates a presumption against the applicability of state family property law. Such a presumption could possibly insulate Congress' military programs from unanticipated state intereference. It should be recalled that military benefit programs were at issue in both *McCarty* and in *Ridgway*. If courts adopt the above interpretation, the *Hisquierdo* standard will continue to apply in cases that do not involve military programs, while the *McCarty* standard will apply only in cases involving special military programs.[134]

Even if courts do not interpret *McCarty* as having established a special preemption test for cases involving military programs and family property disputes, courts may nevertheless accept *McCarty* as requiring a "hands off" approach to cases involving special military benefits. Both *McCarty* and *Ridgway* stress the point that certain military benefits are the "personal entitlement" of those actually serving in the military.[135] Although Congress has recently indicated that military pension

131. See note 124 and accompanying text *supra*.
132. Rostker v. Goldberg, 453 U.S. 57 (1981).
133. *Id.* at 64-65.
134. *I.e.*, the *McCarty* Court's presumption of the non-applicability of state marital property law. Stated another way, because the law of domestic relations belongs to the states and not the federal government, the *Hisquierdo* presumption of constitutionality will apply in most family law cases. But where family law becomes intertwined with military programs, there will be a presumption of the nonapplicability of state family law. To overcome that latter presumption, *McCarty* indicates that Congress must specifically declare that state marital property law can apply to military programs.
135. The Court in *McCarty* stated that the military pension benefits were the "personal entitlement" of the service member. 453 U.S. at 224. In *Ridgway*, the Court wrote that certain rights under SGLIA were "personal to the member alone." 454 U.S. at 60.

benefits are divisible under state property law, Congress has not addressed itself to countless other special military benefit programs. Because of that, the "hands off" approach of *McCarty* could find further expression in judicial opinions.

C. Widespread, General Impact

The third possibility, and by far the most ominous, is that courts will view the *McCarty* and *Ridgway* decisions as overruling past standards governing the preemption of marital property laws. In that case, a new preemption standard would apply—preemption would occur "1) whenever Congress has not specifically permitted the application of state law, [and] 2) when there is *potential* harm to *possible* federal interests."[136]

Congress' recent enactment of the Uniformed Services Former Spouses' Protection Act also recognizes and responds to the Court's new formulation of the preemption standard.[137] Comments found in the legislative history of the Act indicate that Congress read *McCarty* to stand for the proposition that "in the absence of a Federal statute to the contrary,"[138] state marital property law cannot apply. If *McCarty* actually does require Congress to detail its intent that state family law should apply, then Congress' response can only be described as evidencing compliance with a court imposed requirement of specificity.

D. Conclusion

The precise impact that the *McCarty* decision will continue to have upon the preemption standard, as it is applied to cases involving marital property law, is presently uncertain. Nevertheless, what is clear is that the true significance of *McCarty* lies not in its now antiquated interpretation of Congress' intent concerning military pension benefits, but rather in the Court's analysis of the preemption standard itself. Broad implications arise from the Court's analysis of the preemption standard. Those implications involve notions concerning American federalism. Before *McCarty*, there could be no doubt that "[t]he whole subject of the domestic relation of husband and wife . . . [belonged] to the laws of the States and not to the laws of the United States."[139] Preemption occurred only when Congress " 'positively required by direct enactment' "[140] that state family property law should yield. After *Mc-*

136. Comment, *Ridgway v. Ridgway*, 6 FAM. L. REP. 1822, 1828 (1982).
137. *See supra* note 90.
138. 128 Cong. Rec. H4723 (daily ed. July 28, 1982) (Statement of Rep. Oakar).
139. *In re* Burrus, 136 U.S. 586, 593-94 (1890).
140. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (citing Wetmore v. Markoe, 196 U.S. 68, 77 (1904)).

Carty, and particularly in light of *Ridgway*, those notions carry less force. *McCarty* seems to have reversed the presumption of constitionality formerly protecting state family property law. At the very least, the case introduces novel elasticity in the application of the preemption test. Either way, the approach toward federal preemption advanced by *McCarty* represents an unsupported intrusion upon the "power [of the states] to determine laws concerning marriage and property in the absence of Congress' 'direct enactment' to the contrary."[141]

141. McCarty v. McCarty, 453 U.S. 210, 246 (1981) (Rehnquist, J., dissenting).