Georgia State University Law Review

Volume 39
Issue 3 *Spring 2023*

Article 11

5-2023

Degrees of Losing: A Challenge to the Federal "Frozen Benefit Rule"

Tuscan A. Fairfield
tfairfield1@student.gsu.edu

DEGREES OF LOSING: A CHALLENGE TO THE FEDERAL "FROZEN BENEFIT RULE"

Tuscan A. Fairfield*

ABSTRACT

The 2016 amendment to the Uniformed Services Former Spouses' Protection Act dramatically changed the level of discretion afforded to states in dividing military retired pay between divorcing parties. Now, all divorces involving an active service member at the time of divorce must adhere to Congress's strict formula when dividing the former spouse's interest in the service member's pension. This Note explores the question of whether Congress overstepped its constitutional limitations in directing the actions of state courts, whether the new rule may violate principles of equal protection doctrine, and whether a challenge to the novel scheme has any chance of success. This Note proposes a potential challenge and, finally, asks why we should treat military service members and their money differently in the first place.

* Associate Student Writing Editor, *Georgia State University Law Review*; J.D. Candidate, 2023, Georgia State University College of Law. Thank you to Steve and Patty Shewmaker for their insight and instruction on military family law; they quite literally wrote the book on the subject.

CONTENTS

INTRODUCTION

What sets a military pension apart from all others? Military recruiters often sing the praises of military retired pay when enticing young people to enlist, but retirement benefits factor into any long-term employment decision. Of course, the United States strives to provide for the men and women in uniform even after their terms of service have ended, but nothing about this philosophy explains why Congress has elected to treat the division of military retired pay differently when a service member seeks a divorce.

From the outset, the United States Constitution limited congressional appropriations for the armed services to two years.[1] In modern day, with visions of Redcoats in Boston a distant memory, fear surrounding military power has largely abated; to the contrary, American political leaders push an ever-vigilant and dominant military force.[2] In 1962, Congress adopted the practice of passing the annual National Defense Authorization Act (NDAA), an omnibus spending bill that provides the annual budget for all U.S. military programs.[3]

Members of Congress love the NDAA: It is one of those must-pass bills that allows representatives and senators to pass unpopular measures more easily.[4] In 2016, Representative Steve Russell, a

1. U.S. CONST. art. I, § 8, cl. 12.

2. *See* Jeremi Suri, Opinion, *History is Clear. America's Military Is Way Too Big.*, N.Y. TIMES (Aug. 30, 2021), https://www.nytimes.com/2021/08/30/opinion/american-military-afghanistan.html [https://perma.cc/2UMW-XLGK]; *see also* Trevor Thrall, *Primed Against Primacy: The Restraint Constituency and U.S. Foreign Policy*, WAR ON THE ROCKS (Sept. 15, 2016), https://warontherocks.com/2016/09/primed-against-primacy-the-restraint-constituency-and-u-s-foreign-policy/ [https://perma.cc/WY7V-7D42].

3. William McClellan "Mac" Thornberry, *The National Defense Authorization Act: The Sturdy Ox of Legislation*, 58 HARV. J. ON LEGIS. 1, 1 (2021) (noting that the NDAA has uniquely escaped the limitations of partisanship because "Congress, under majorities of both parties, and presidents of both parties, has passed and signed into law [an NDAA]" since 1962); *History of the NDAA*, HOUSE ARMED SERVS. COMM., https://armedservices.house.gov/ndaa/history-ndaa [https://perma.cc/ULB8-ZBRA].

4. Thornberry, *supra* note 3, at 2. The number of amendments proposed and made to the NDAA has

freshman representative from Oklahoma, resolved to use the NDAA as a vehicle to direct state courts in the division of military retired pay in divorce proceedings.[5] His proposal amended the Uniformed Services Former Spouses' Protection Act of 1982 (USFSPA) to require courts to calculate a former spouse's marital portion of military retired pay using the service member's base pay and years of service at the time of divorce.[6] The measure took the method for the division of marital property out of the hands of the state courts that otherwise enjoy broad discretion in dividing marital assets.[7] After Representative Russell referenced certain complaints he received from disgruntled

skyrocketed in recent years. *See id.* at 4, 6–7. Between fiscal years 2016 and 2021, the number of amendments submitted rose from 355 to 752, and those made in order climbed from 135 to 407. *Id.* at 4; *H.R. 1735 – National Defense Authorization Act for Fiscal Year 2016*, HOUSE OF REPRESENTATIVES COMM. ON RULES, https://rules.house.gov/bill/114/hr-1735 [https://perma.cc/BC2Z-E47B] (listing the 355 amendments); *H.R. 6395 – William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021*, HOUSE OF REPRESENTATIVES COMM. ON RULES, https://rules.house.gov/bill/116/hr-6395 [https://perma.cc/K43K-NA6Y] (listing the 752 amendments).

5. Karen Jowers, *'Radical' Proposal Would Change the Way Retired Pay Is Divided in Divorce Cases*, MILITARY TIMES (Aug. 1, 2016), https://www.militarytimes.com/pay-benefits/military-retirement/2016/08/01/radical-proposal-would-change-the-way-retired-pay-is-divided-in-divorce-cases/ [https://perma.cc/2WYZ-W75T]. Steve Russell, a Republican, served Oklahoma in the House of Representatives from 2015 to 2019 after serving in the Oklahoma state senate from 2008 to 2012 and the United States Army from 1985 to 2006. *RUSSELL, Steve*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/R000604 [https://perma.cc/NB42-8JSD]. In this Note, the term "divorce" will encompass all equivalent orders entered by a court of competent jurisdiction to divide marital property, such as dissolution, separation, or annulment.

6. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 641, 130 Stat. 2000, 2164 (2016). The Act, totaling more than 1,100 pages, imputes a mandatory formula to be applied by state court judges by amending 10 U.S.C. § 1408 to read:

> For purposes of [divorce that becomes final prior to the date of the member's retirement], the total monthly retired pay to which a member is entitled shall be—(i) the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order [for divorce, dissolution, annulment, or legal separation], as increased by (ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.

10 U.S.C. § 1408(a)(4)(B).

7. *See* Jowers, *supra* note 5.

veterans,[8] the amendment (the Frozen Benefit Rule) passed the House Armed Services Committee by unanimous voice vote and endured no floor debate.[9]

Importantly, Representative Russell passed similar legislation during his time in the Oklahoma Senate, but he complained that conflicts with federal law did not allow him to do enough.[10] So what, exactly, is enough? Apparently, Representative Russell felt that, in most states, judicial discretion on the division of military retired pay did service members an injustice by allowing their former spouses to enjoy benefits from continued service occurring after the marriage.[11] The Frozen Benefit Rule creates a legal fiction that permanently arrests the former spouse's entitlement at the time of divorce and calculates her benefits using the service member's rank and years of service at the time of divorce rather than at the time of retirement.[12] If a service member continues to serve and enjoys promotions, the resulting increase to his military retired pay—based on pay increases and

8. *Id.* Representative Russell, in advocating the amendment, was fond of the outlandish example of an airman "who served for 35 years in the Air Force, and was divorced from his first wife after two years of marriage, in the first years of his career. The former spouse was able to receive half of his retirement pay based on those two years of marriage." *Id.* Such an example certainly represents a miscarriage of justice; however, this result was neither supported by prevailing doctrine nor was it standard operating procedure for any state courts. *See* Mark E. Sullivan, *Military Pension Division and the 2017 Radical Rewrite*, NYSBA FAM. L. REV., Fall 2016, at 21, 22 (explaining that "[f]ewer than ten states . . . require[d] the [Frozen Benefit Rule]"). The USFSPA explicitly left division of military retired pay to the courts' discretion. 10 U.S.C. § 1408(c) ("[A] court *may* treat disposable retired pay payable to a member . . . 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." (emphasis added)).

9. *See House Panel Votes to End Military Pay-Benefit Slide, Tweak Ex-Spouse Law*, STARS & STRIPES (Apr. 28, 2016) [hereinafter STARS & STRIPES], https://www.stripes.com/theaters/us/house-panel-votes-to-end-military-pay-benefit-slide-tweak-ex-spouse-law-1.406741 [https://perma.cc/973Y-CC5G].

10. Press Release, Oklahoma Senate, Senate Bill Provides for Fair Division of Military Retirement in Divorces (Mar. 13, 2012, 1:21 AM), https://oksenate.gov/press-releases/senate-bill-provides-fair-division-military-retirement-divorces [https://perma.cc/R5E4-RQKD]; Jowers, *supra* note 5.

11. *See* Jowers, *supra* note 5; Sullivan, *supra* note 8, at 21 (noting the Frozen Benefit Rule "would overrule pension division requirements in all but half a dozen states").

12. *See* Sullivan, *supra* note 8, at 21.

increased longevity—belongs exclusively to him.[13] No other retirement scheme features such a requirement. Before state courts were required to adhere to the Frozen Benefit Rule, they enjoyed wide discretion in dividing military retired pay, with only five states applying the Frozen Benefit Rule.[14]

The foregoing paragraph intentionally employs gendered pronouns because men continue to comprise an overwhelming majority of the armed forces.[15] Thus, advocates of the Frozen Benefit Rule must have foreseen the resulting disproportionate impact on women. This Note addresses Congress's disparate treatment of military retired pay as it compares to other benefit plans and whether Congress exceeded its Article I power in enacting the Frozen Benefit Rule. Part I offers a comprehensive look at the evolution of military retired pay and its treatment by state courts before 2016. Part II analyzes the potential for possible challenges to the law. Lastly, Part III proposes a judicial challenge to the law or, in the alternative, an extension of the doctrine to encompass all benefit plans.

I. BACKGROUND

A. Where Does Military Retired Pay Come From?

The contemporary view of military retired pay has evolved somewhat but has remained relatively static since its inception.[16] To

13. Brentley Tanner & Amelia Kays, *Winds of Change: New Rules for Dividing the Military Pension at Divorce*, 30 J. AM. ACAD. MATRIM. LAWS. 491, 494–95 (2018).

14. *See id.* at 495; Mark E. Sullivan, *Just For Judges – Military Pension Division: The New Frozen Benefit Rule*, LEGAL ASSISTANCE FOR MIL. PERS., https://www.nclamp.gov/for-lawyers/additional-resources/just-for-judges-military-pension-division-the-new-frozen-benefit-rule/ [https://perma.cc/WS75-XP64] (Mar. 27, 2019).

15. NAT'L ACADS. OF SCIS., ENG'G, & MED., STRENGTHENING THE MILITARY FAMILY READINESS SYSTEM FOR A CHANGING AMERICAN SOCIETY 6 (Kenneth W. Kizer & Suzanne Le Menestrel eds., 2019) (stating that, in 2017, women comprised approximately 18% of all armed forces personnel). Military spouses are also overwhelmingly female, making up 92% of active duty and 87% of reserve service spouses. *Id.* at 98.

16. *See* JOHN CHRISTIAN, RAND NAT'L DEF. RSCH. INST., AN OVERVIEW OF PAST PROPOSALS FOR MILITARY RETIREMENT REFORM 2–3 (2006).

properly understand the present controversy this Note addresses, one must first appreciate the different flavors of military retirement: non-disability retirement, disability retirement, and reserve retirement.[17] Members earn non-disability retirement—a calculated fraction of the member's monthly salary payable immediately upon retirement—after twenty years of active-duty service in the armed forces.[18] This policy does not discriminate between enlistees and officers.[19] Reserve retirement operates much more like a traditional pension, making a portion of the member's monthly salary available upon the member's sixtieth birthday, but the minimum age drops proportionately to any time the member served on active duty.[20] This Note will not address the far more frequently appealed issue of divisibility of disability retirement.[21] Instead, what follows offers an overview of how military retired pay evolved from compensation for aging officers forced out of the armed forces into a property right akin to the rudimentary pension plan and fully divisible upon divorce.

Once Congress, through the USFSPA, affirmatively declared that state courts can and should determine whether military retired pay is a

17. *Preliminary Review of Military Retirement Systems: Hearings Before the Mil. Comp. Subcomm. of the H. Comm. on Armed Servs*, 95th Cong. 4 (1978) (statement of Col. Leon S. Hirsh, Jr., USAF, Director of Compensation, Office of the Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics).

18. 10 U.S.C. § 7311. With some exceptions, this calculus is done using the service member's average base pay during the member's highest earning 36 months in the armed services in the following equation: (0.025) x (years of creditable service) x (average high-36) – any pay exceeding 75% of the member's base pay. §§ 1401–1402, 1407.

19. *See* §§ 7311–7329.

20. §§ 12731, 12733.

21. If you hopped on this train for an in-depth discussion of U.S. Department of Veterans Affairs (VA) disability compensation, you will be sorely disappointed. The Supreme Court put the final nail in the coffin of this issue, forever precluding the former spouse from enjoying the member's VA disability. Howell v. Howell, 581 U.S. 214, 216, 222 (2017) (holding that a former spouse was not entitled to indemnification for reduction in the member's military retired pay due to the member's election to receive VA disability in lieu of a portion of his military retired pay because VA disability is not a marital asset).

marital asset,[22] division of military retired pay entered the ever-perilous realm of judicial discretion.[23] Indeed, it is the difficulty of controlling the state courts at a national level that convinced Representative Russell and others of the need to nationalize the Frozen Benefit Rule.[24]

1. Retiring the Old Guard

In the mid-nineteenth century, the officer corps was getting too old, placing an increased burden on younger officers' advancement.[25] The same service members who fought in the War of 1812 refused to retire from the armed forces well into the 1850s and, in addition to frustrating the advancement of younger officers, extracted their generous salaries from American taxpayers into their sixties.[26] As a result, Congress authorized the Secretary of the Navy to convene a board to force retirement for certain officers "who were deemed incapable or unfit for duty."[27] The legislation placed the officers on a "reserve list" which entitled them to half their salary at the time of retirement in perpetuity.[28] In 1861, the measure was extended to include the voluntary retirement of service members after forty years of service.[29]

22. U.S. DEP'T OF DEF., A REPORT TO CONGRESS CONCERNING FEDERAL FORMER SPOUSE PROTECTION LAWS 11, https://militarypay.defense.gov/Portals/3/Documents/Reports/finalrpt.pdf?ver=2019-05-10-090705-023 [https://perma.cc/X27R-BVW6].

23. Of course, Danny DeVito described the process best: In divorce, "there is no winning! Only degrees of losing!" THE WAR OF THE ROSES (Twentieth Century Fox 1989).

24. *See* Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 MIL. L. REV. 40, 44 (2001) (calling for greater federal oversight of state court orders to divide military pensions); Jowers, *supra* note 5; STARS & STRIPES, *supra* note 9.

25. *See* CHRISTIAN, *supra* note 16, at 2.

26. CONG. GLOBE, 37th Cong., 1st Sess. 16 (1861) (statement of Sen. James Grimes) ("[I]f you will examine your Navy Register, you will see that there is not a single captain in the American Navy that has not been more than forty-two years in the service."); *id.* at 159 (statement of Sen. Henry Wilson) ("We have colonels, lieutenant colonels, and majors in the Army, old men, worn out by exposure in the service, who cannot perform their duties; men who ought to be honorably retired, and receive the compensation provided for in this measure.").

27. CHRISTIAN, *supra* note 16, at 2.

28. *Id.*

29. *Id.*

At this juncture (setting aside for the moment that nineteenth-century divorces were exceedingly rare[30]), contemporaries considered military retired pay to be the equivalent of a salary as opposed to a property asset.[31]

In 1916, Congress adopted the formulation for military retired pay: 2.5% of a member's base pay, multiplied by the member's years of service, not to exceed 75%.[32] This formulation remains today.[33] Over the decades, the minimum number of service years for eligibility fluctuated, at one time falling as low as fifteen years but eventually settling at twenty years of service in 1946.[34] Thus arose modern military retired pay.

During the same period, the divorce rate in the U.S. climbed, and states began to liberalize women's property rights and access to divorce.[35] Historic gender inequality forced courts to closely consider providing for the newly single woman who possessed a lesser earning potential.[36] These opposing interests—military retired pay as a form of salary and a woman's right to spousal support—reached a head with

30. *See* Frank Olito, *How the Divorce Rate Has Changed over the Last 150 Years*, INSIDER (Jan. 30, 2019, 9:33 AM), https://www.insider.com/divorce-rate-changes-over-time-2019-1 [https://perma.cc/KSM7-4H5G].

31. *See* United States v. Tyler, 105 U.S. 244, 245 (1881) (holding that military retired pay was, at that time, compensation for present employment because retired soldiers are "by statute declared to be a part of the army, . . . and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of [the articles of war], and . . . may finally be dismissed on such trial from the service in disgrace").

32. CHRISTIAN, *supra* note 16, at 2.

33. *Id.* at 1–2.

34. *Id.* at 2–3.

35. ALEXANDER A. PLATERIS, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, 100 YEARS OF MARRIAGE AND DIVORCE STATISTICS UNITED STATES, 1867–1967, at 10 fig.3 (1973); Magdalene Zier, Note, *"Champion Man-Hater of All Time": Feminism, Insanity, and Property Rights in 1940s America*, 28 MICH. J. GENDER & L. 75, 98–99 (2021).

36. *See generally* Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989) (justifying awards of alimony through several different theories). For example, Ellman asserts that "the traditional wife makes her marital investment early in the expectation of a deferred return: sharing in the fruits of her husband's eventual market success" and that the wife is entitled to realize a return on that investment. *Id.* at 42–43.

the Supreme Court's decision in *McCarty v. McCarty* during the Reagan era.[37]

2. Who Gets a Slice of the Pie?

Throughout the twentieth century, state courts varied wildly in their treatment of military retired pay. Some states, especially community property states in the West,[38] held that the former spouse was entitled to a portion of the member's military retired pay in the same way one would have an interest in a pension.[39] Others rejected this idea, holding that the member alone held interest in the payments.[40]

In 1981, Justice Blackmun, writing for the majority of the Supreme Court, purported to settle this matter.[41] *McCarty* arose from an Army doctor who married his wife before entering military service and who

37. McCarty v. McCarty, 453 U.S. 210 (1981), *superseded by statute*, Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730, *as recognized in* Howell v. Howell, 581 U.S. 214 (2017); *see Ronald Reagan*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/ronald-reagan/ [https://perma.cc/ES9V-GFVR].

38. Nine states follow the community property doctrine: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Emily Starbuck Gerson, *What Is a Community Property State and How Does It Impact Finances?*, EXPERIAN (Apr. 27, 2022), https://www.experian.com/blogs/ask-experian/what-is-community-property-state/ [https://perma.cc/RB3L-7MKP]. Community property doctrine holds that "each spouse owns a one-half interest in all community property regardless of which spouse purchased, earned, or otherwise acquired the property." O'CONNOR'S TEXAS FAMILY LAW HANDBOOK *Management Rights over Community Property* Ch. 2-B § 2 (2023), Westlaw. Contrast this doctrine with the majority view of equitable division of property which "is not necessarily an equal division, but a fair one." 8 GA. JURISPRUDENCE: FAMILY LAW *Purpose of Equitable Division* § 4:48, Westlaw (database updated Feb. 2023). Under the equitable division doctrine, "the fact finder possesses broad discretion to distribute marital property to assure that property accumulated during the marriage is fairly divided between the parties." *Id.*

39. *E.g.*, *In re* Marriage of Fithian, 517 P.2d 449, 457 (Cal. 1974) (en banc) ("[W]e hold that military retirement pay properly can be characterized as community property in accordance with established principles of California law."); *In re* Marriage of Miller, 609 P.2d 1185, 1187 (Mont. 1980) ("[M]ilitary retirement pay resembles an ordinary private pension, and just as a private pension, it should be treated as a vested property right which can be distributed as part of a court's property division."); Kruger v. Kruger, 375 A.2d 659, 662 (N.J. 1977) ("Military retirement pay . . . is comparable to the pension which a retired employee is receiving under a private plan.").

40. *E.g.*, Ellis v. Ellis, 552 P.2d 506, 507 (Colo. 1976) (en banc) (holding that "military retirement pay is not property under [Colorado's] dissolution of marriage act" (internal quotation marks omitted)); Fenney v. Fenney, 537 S.W.2d 367, 367 (Ark. 1976) ("We do not consider the right to receive retirement pay from the armed forces to be personal property.").

41. *McCarty*, 453 U.S. at 232–33.

filed for divorce after eighteen years of active duty.[42] The California trial court ordered that the former spouse receive a portion of the doctor's military retired pay equal to one-half of the portion of the time that the member's military service overlapped with the marriage.[43] When the member retired, after reaching the requisite twenty years of active-duty service, the trial court ordered that the former spouse receive 45% of the member's payments (or 50% of the marital portion), and the California Court of Appeals affirmed.[44]

The U.S. Supreme Court rejected this ruling outright, seemingly characterizing military retired pay as compensation for current services rendered.[45] In support, Justice Blackmun reasoned that the service member—although technically retired—was still subject to the Uniform Code of Military Justice, could be called to active-duty service while receiving payments, and could still forfeit payments by engaging in certain conduct.[46] Relying primarily on Congress's characterization of military retired pay as a "personal entitlement" and dismissing provisions for the support of a member's beneficiaries, the Court found that the federal scheme preempted California's community property statute and precluded the trial court's award.[47]

Even considering Justice Rehnquist's fiery dissent,[48] the Court acted in accordance with the philosophy surrounding military retired pay that

42. *Id.* at 216.

43. *Id.* at 218. Note that the formulation provided by the California trial court is an example of the Time Rule, which is now preempted by the 2016 amendment to the USFSPA. *See id.*

44. *McCarty*, 453 U.S. at 218.

45. *Id.* at 221–23. Interestingly, after enumerating several reasons why the service member correctly characterized military retired pay as present compensation, the Court explicitly refrained from ruling on that issue, holding that Congress intended it to be a "*personal entitlement*." *Id.* at 223–24 (quoting S. REP. NO. 1480, at 6 (1968)).

46. *Id.* at 221–22.

47. *Id.* at 226–27, 236 ("Congress has weighed the matter, and '[i]t is not the province of state courts to strike a balance different from the one Congress has struck.'" (alternation in original) (quoting Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 (1979))).

48. *See id.* at 243 (Rehnquist, J., dissenting) ("[E]xamination of the analysis in the Court's opinion

had prevailed since its inception—that is, it operates more like a salary than a property right.[49] Military retired pay did not then and does not now behave like most pensions; some commentators refuse to even characterize it as such.[50] Under the Civil Service Retirement System, for example, U.S. Postal Service employees were never expected to return to their mail carrying routes by virtue of receiving the pension.[51] The Court met resistance not because of a flawed legal analysis but because times had changed.

B. Rejecting McCarty *to Protect the Former Spouse*

Almost immediately after its decision, the *McCarty* Court faced vehement criticism. One Texas publication lamented that Texas, which provided no statutory protection for alimony or garnishment of wages, would quickly become a refugee camp for "military personnel seeking to shed their spouses and enjoy Texas'[s] less onerous divorce laws."[52] Even before *McCarty*, the tide had turned. Congress passed the Employee Retirement Income Security Act (ERISA) in 1974, which, in part, standardized disclosures and management for private pension

convinces me that it is both unprecedented and wrong."). The dissent examined past Supreme Court decisions in which the Court held that federal law preempted state community property doctrine, noting that "the authority of the [s]tates should not be displaced except pursuant to the clearest direction from Congress." *Id.* at 237–38. Indeed, Justice Rehnquist warned that the precedent set by the majority constituted a dangerous "moving target" of jurisprudence that could preempt community property law. *Id.* at 244.

49. *See supra* Section I.A.1; *McCarty*, 453 U.S. at 223.

50. *E.g.*, Curtis G. Barnhill, *Dividing Federal Retirement Benefits in Divorce: Civil Service, Military Retired Pay & Railroad Retirement*, J. KAN. BAR ASS'N, Sept. 2019, at 28, 32 ("Military retirement pay is technically not a pension. Rather it is a federal entitlement . . . .").

51. *See generally* 5 U.S.C. §§ 8331–8351; *Civil Service Retirement System (CSRS)*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/employee-resources/benefits/retirement/csrs [https://perma.cc/Z5AN-2FA3] (Feb. 14, 2023) (explaining that the CSRS is a "defined benefit, contributory retirement system").

52. Louise B. Raggio & Kenneth G. Raggio, McCarty v. McCarty*: The Moving Target of Federal Pre-Emption Threatening All Non-Employee Spouses*, 13 ST. MARY'S L.J. 505, 506 (1982).

plans to provide a sense of security for aging Americans.[53] Additionally, contemporary opinion began to recognize the sacrifices made by career military spouses.[54] Even Justice Blackmun recognized in *McCarty* that "the plight of an ex-spouse of a retired service member is often a serious one."[55]

Congress took just over a year to respond to Justice Blackmun's implicit invitation for it to decide "that more protection should be afforded a former spouse of a retired service member."[56] With the USFSPA, Congress reaffirmed the idea so commonly ingrained in the federalist system that "[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."[57] Despite its momentous effect on state court decision-making, the USFSPA did not affirmatively direct the state courts to consider military retired pay the joint property of a couple.[58] Its language, true to its sponsors' intent, merely removes the question of preemption and permits the state

53. *See* Employment Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 and 29 U.S.C.); EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LABOR, FAQS ABOUT RETIREMENT PLANS AND ERISA 1, https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-compliance.pdf [https://perma.cc/U5KH-GGPM].

54. *See* Nancy Scannell, *Military Divorcees: 'We Also Served,'* WASH. POST (Dec. 4, 1980), https://www.washingtonpost.com/archive/local/1980/12/04/military-divorcees-we-also-served/1d2972b6-304a-43c8-8748-bb78e7153f4b/ [https://perma.cc/GHB4-A5CW].

55. McCarty v. McCarty, 453 U.S. 210, 235 (1981), *superseded by statute*, Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730, *as recognized in* Howell v. Howell, 581 U.S. 214 (2017).

56. *Id.* at 235–36; *House Ties Divorce to Military Pension*, N.Y. TIMES (July 29, 1982), https://www.nytimes.com/1982/07/29/garden/house-ties-divorce-to-military-pension.html#:~:text=The%20House%20voted%20today%20to,property%20settlement%20in%20a%20divorce [https://perma.cc/G9W2-CQ6M].

57. *See In re* Burrus, 136 U.S. 586, 593–94 (1890); *see also* Lehman v. Lycoming Cnty. Child.'s Servs. Agency, 458 U.S. 502, 511–12 (1982); Moore v. Sims, 442 U.S. 415, 435 (1979); Barber v. Barber, 62 U.S. 582, 603 (1858) (Daniel, J., dissenting); United States v. Windsor, 570 U.S. 744, 766–67 (2013).

58. *House Ties Divorce to Military Pension*, *supra* note 56 (explaining that the USFSPA "return[s] the legal situation to the way it was before the Supreme Court ruling in [*McCarty*], leaving jurisdiction in family and property matters to the state courts" and "allows state courts to consider military retired pay as they do other private and public pensions").

courts to consider the totality of the circumstances in dividing the pension.[59]

Congress's relatively hands-off approach in this realm is telling. The Supreme Court has commonly granted significant deference to Congress on matters of military authority and to the states on matters of domestic relations.[60] Although Congress codified the USFSPA under Title 10 (Armed Forces), its refusal to affirmatively orchestrate state court decisions demonstrates that it considered the division of military retired pay to be a domestic relations matter, not a military matter.[61] The USFSPA should have ended the controversy in 1983. Its passage corrected the Supreme Court by clarifying that, in no uncertain

59. 128 CONG. REC. 18314 (1982) (statement of Rep. Pat Schroeder) ("The primary purpose of the [USFSPA] is to remove the effect of the U.S. Supreme Court decision in [*McCarty*] which prohibited [s]tate courts from considering military retired pay as marital property according to their own domestic relations law. This amendment does not dictate that military retired pay be divided in a divorce proceeding. The amendment simply returns to [s]tate courts the authority to treat military retired pay as it does other public and private pensions."). Although Congress provided no direction to the state courts on the division of military retired pay incident to divorce, Congress did indicate its desire to care for the former spouse with other provisions of the USFSPA. "Another provision of [the USFSPA] provides greater flexibility to the military member or retiree by permitting them to voluntarily elect survivors benefits for a former spouse." *Id.* at 18315; *see* 10 U.S.C. §§ 1072, 1408(d). Congress, through these provisions, proved less than neutral in its passage of the USFSPA.

60. *E.g.*, Rostker v. Goldberg, 453 U.S. 57, 66 (1981) (noting "[t]he operation of a healthy deference to legislative and executive judgments in the area of military affairs is evident in several recent decisions of this Court"); Parker v. Levy, 417 U.S. 733, 756 (1974) (rejecting the argument that the Uniform Code of Military Justice was insufficiently clear to support prosecution under a court-martial in part because "we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the [military] shall be governed"); Middendorf v. Henry, 425 U.S. 25, 43 (1976) (rejecting Fifth and Sixth Amendment challenges to the provision which allows the military to convict a member at a court-martial without providing counsel, stating "we must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces"); *In re Burrus*, 136 U.S. at 593–94 (stating simply that "[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").

61. *See* Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (codified as amended in scattered sections of 10 U.S.C.); 128 CONG. REC. 18314–15 (1982) (statement of Rep. Pat Schroeder). Congress has historically rejected provisions that would tend to dictate the decisions of state courts on family law matters. For example, Representative Michael Turner (R-OH) introduced a proposed amendment to the Servicemembers' Civil Relief Act which would provide standardized protection for deployed service members in matters of child custody at least seven times (six of those times as an amendment to the NDAA), but each attempt failed to pass the Senate. DAVID F. BURRELLI & MICHAEL A. MILLER, CONG. RSCH. SERV. R43091, MILITARY PARENTS AND CHILD CUSTODY: STATE AND FEDERAL ISSUES 3 (2013).

terms, the federal government had no intention to meddle in the division of property.

C. How the States Used the USFSPA

Between 1983 and 2016, every state exercised its discretion to divide military retired pay.[62] Even those states that had historically refused to consider military retired pay property, like Colorado and Arkansas, incorporated military retired pay into state pension schemes.[63] What follows is a survey of differing state law treatments of military retired pay even though most states gave this matter no special treatment.[64] Once Congress addressed the "personal entitlement" question, state judges divided military retired pay in the same way as any other marital asset.

1. The Majority "Time Rule" Approach

Before 2016, most state courts adhered to the "Time Rule,"[65] which divides military retired pay (or any pension) by awarding the former spouse up to one-half of the marital portion of the total payments the

62. *See State-by-State Analysis of Divisibility of Military Retired Pay*, ARMY LAW., Aug. 2002, at 42, 43–49. As of 2002, Puerto Rico wasthe only American jurisdiction maintaining that military retired pay was not divisible marital property. *See id.* at 47.

63. *See id.* at 43, 44; *e.g.*, Young v. Young, 701 S.W.2d 369, 370 (Ark. 1986) (finding the member's argument that his military retired pay was not a marital asset without merit); *In re* Marriage of Beckham, 800 P.2d 1376, 1379 (Colo. App. 1990).

64. *See, e.g.*, D.C. CODE § 16-910 (2023) (granting the trial court broad discretion to divide all marital property, with no special provisions for military retired pay); CONN. GEN. STAT. ANN. § 46b-81 (West 2023) (providing no specific provision for military retired pay in an equitable division scheme); IDAHO CODE § 32-906(1) (2023) (designating all property acquired after the marriage as community property to be equally divided at the time of divorce); NEB. REV. STAT. ANN. § 42-366(8) (West 2022) (permitting the trial court to include pensions and other deferred compensation as a part of the marital estate); 15 R.I. GEN. LAWS § 15-5-16.1 (2022) (providing for the equitable division of all marital property, with no special treatment of military retired pay).

65. *See* Sullivan, *supra* note 8, at 21 ("In virtually every state, [the former spouse] would receive 50% of [the marital portion of the member's] *actual retired pay*.").

member receives.[66] Advocates justify this method with the foundation theory, which asserts that the member (or employee) could not have enjoyed pay grade increases or additional years of service without the support of the former spouse in building the foundation for a successful career.[67] The Time Rule thus recognizes the former spouse's sacrifices, such as moving throughout the country or around the globe in support of the service member, and the former spouse's interest in what is often the most valuable asset that military couples acquire.[68]

Further, many states adhering to the Time Rule did not do so pursuant to a particular statute or controlling precedent.[69] In the absence of such constraints, trial judges enjoyed broader discretion to alter the formula as equity demanded.[70] Judicial discretion represents a feature rather than a bug of family law practice.[71] When conduct,

66. For instance, suppose the member serves twenty-five years in active-duty service, retiring as a master sergeant (E-8), and divorces his wife after the first fifteen years of service when he had a pay grade of E-6. That equation looks like (1/2) x (15/25) = 30%. For a similar example, see *id.* With the Time Rule, courts had the option to provide a hypothetical formula in the military pension division order, leaving the denominator (the total years of service) blank or to retain jurisdiction to divide military retired pay after the member retires and this number is certain. *See id*. (explaining that, with the Frozen Benefit Rule, courts lost some discretion because the spouse's "share would be frozen as of the date of the [military pension division order]").

67. *Id.* at 24; *see* S. REP. NO. 97-502, at 1601 (1982) (noting that after hearing testimony from a number of civilians and service members, the Senate Committee on Armed Services concluded that it "believes that the unique status of the military spouse and that spouse's great contribution to our defense require that the status of the military spouse be acknowledged, supported and protected").

68. Mansell v. Mansell, 490 U.S. 581, 602 (1989) (O'Connor, J., dissenting); 1 NEW YORK MATRIMONIAL LAW AND PRACTICE *Importance of Pensions and Deferred Compensation Plans* § 5:4, Westlaw (database updated Nov. 2022) (observing that pensions "may well constitute the most valuable asset acquired by either spouse during marriage").

69. *See* statutes cited *supra* note 64.

70. *See generally* Lee R. Russ, Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R. 4th 481 (1985) (providing a comprehensive analysis of the equitable distribution doctrine in states practicing equitable distribution, including the various factors to be considered in providing an equitable distribution of marital property incident to divorce, the level of discretion afforded to state courts of different jurisdictions, and the presumptions with which the court must work).

71. *See* Sullivan, *supra* note 8, at 21. In addition to divesting the state courts of discretion in dividing military retired pay, the Frozen Benefit Rule worked to divest the couple—the individuals generally considered to be in the best position to divide their own property—of any leeway in settlement negotiations, providing only a "one-size-fits-all" rule. *See id.*

character, and respective earnings all factor into a judge's or jury's award, discretion offers an opportunity to personalize every order.

2. The Minority Frozen Benefit Rule Approach

Before 2016, fewer than ten states followed the Frozen Benefit Rule, and fewer still mandated its application.[72] As briefly explained in the Introduction, the Frozen Benefit Rule uses the same formula for dividing the pension as the Time Rule but only awards the former spouse a percentage of a hypothetical retirement based on if the member had retired on the date of divorce.[73] Proponents of the Frozen Benefit Rule argue that it more effectively protects the service member from unjust judicial decisions and produces a more equitable result.[74]

72. *Id.* at 22; *e.g.*, Grier v. Grier, 731 S.W.2d 931, 931–32 (Tex. 1987) (affirming an appellate court award that entitled the former spouse to a 37.45% share of the member's disposable retired pay "payable to a major who would have retired on the date of the [parties'] divorce"); *In re* Marriage of Fuchser, 477 N.W.2d 864, 866 (Iowa Ct. App. 1991) (awarding a fixed dollar amount the court deemed to be marital property, noting specifically that "[a]ny increases in [the member's] military pension as a result of his continued Air Force service is entirely his property and not distributable to [the former spouse]"); Salazar v. Salazar, 583 So. 2d 797, 797–98 (Fla. Dist. Ct. App. 1991) (reversing the trial court's denial of the member's motion for modification to readjust the trial court's order according to the Frozen Benefit Rule); OKLA. STAT. tit. 43, § 134(F) (2023) (restricting the operation of the trial court by providing that if the court determines the pension is marital property, the court "shall award an amount consistent with the rank, pay grade, and time of service of the member at the date of the filing of the petition, unless the court finds a more equitable date due to the economic separation of the parties").

73. Under the same facts explored *supra* note 66, the former spouse does not receive 30% of the *total* pension; she receives 30% of a hypothetical pension for a member who retired with fifteen years of service with the member's pay grade at the time of divorce (E-6). *See* Sullivan, *supra* note 8, at 21 (providing a similar example). Using 2021 pay tables, this results in our hypothetical former spouse receiving less than half of what she could receive under the Time Rule (roughly $470 as opposed to $1,140 per month). *See 2021 Military Pay Charts*, VETERAN.COM (Dec. 23, 2022), https://veteran.com/2021-military-pay-charts/ [https://perma.cc/9V3F-6RE2]. It is worth noting that this method does not affect couples who divorce after the member's retirement; the hypothetical date of retirement is rendered moot.

74. *E.g.*, Bradley, *supra* note 24, at 102 (stating that "[u]sing the time of retirement method to calculate percentage of retired pay can result in an unfair award to the former spouse" despite recognizing the congressional intent in passing the USFSPA was to "acknowledge the spouse's contribution to the military community and individual service member" (internal quotation marks omitted)). *But see* Sullivan, *supra* note 8, at 23 ("As a practical, factual matter, there are NO windfalls in the world of military divorce and pension division."); STANDING COMM. ON LEGAL ASSISTANCE FOR MIL. PERS., SECTION OF FAM. L., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 1, 5–6 (Oct. 5, 2017) (advocating for the repeal of the federal Frozen Benefit Rule due to lack of deference to state courts and lack of overriding federal interest justifying enactment).

This argument is not wholly without merit, and such a method may equitably divide military retired pay in certain situations, but it raises the question: What makes military retired pay so special?

II. ANALYSIS

A. A Challenge Under the Fourteenth Amendment

The Frozen Benefit Rule treats one group of individuals—former spouses of military members—differently than another group of individuals—former spouses of civil servants and other employees entitled to receive a pension.[75] When a state or federal government passes legislation that classifies and treats certain groups differently, such action raises equal protection concerns.[76] Former spouses' classification as military spouses alone, however, does not provide sound protection under the Fourteenth Amendment.[77] The potential issue arises out of the fact that an overwhelming majority of military spouses are women.[78]

Since its inception, and especially since the civil rights era, the Fourteenth Amendment has been a powerful tool for invalidating laws that discriminate on the basis of race, sex, national origin, and a

75. *See generally* Barnhill, *supra* note 50 (explaining spousal rights to many types of pensions).

76. *See* Geinosky v. City of Chicago, 675 F.3d 743, 747 (7th Cir. 2012) ("The Equal Protection Clause of the Fourteenth Amendment . . . is most familiar as a guard against state and local government discrimination on the basis of race, national origin, sex, and other class-based distinctions."); Scarborough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 260 (6th Cir. 2006) ("The threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers.").

77. An equal protection claim requires plaintiffs to allege they are "member[s] of a protected class," that they were "treated differently from similiarly situated individuals," and that "this disparate treatment was based on [their] membership in the protected class." Kaul v. Christie, 372 F. Supp. 3d 206, 254 (D.N.J. 2019). Another test, the "class of one" test, does away with the protected class requirement, but it does not apply in this scenario as it ordinarily applies only to individuals. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). The insufficiency of military spouses as a class is explored further *infra* Section II.A.1.

78. NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 15.

number of other immutable characteristics of a person.[79] In the modern era, Fourteenth Amendment jurisprudence is tricky, often political, multidimensional, and evolving.[80] Probably more than any other area of constitutional law, precedent set by Fourteenth Amendment challenges depends heavily upon who sits on the Supreme Court.[81] Even with a sympathetic bench, the outcome will inevitably turn on which of the three tests the Court deems appropriate.

1. Which Test Is Best?

In evaluating whether an act of Congress violates equal protection, the Supreme Court grants one of three levels of deference to Congress.[82] First, strict scrutiny applies to laws, regulations, and other governmental actions that infringe on a fundamental right or discriminate against members of a "protected" class.[83] Courts identify members of a suspect class as individuals who have been historically discriminated against and excluded from society, such as persons of

79. *See* Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning*, 49 CONN. L. REV. 1069, 1083–84 (2017) (referencing Congress's intent to intervene against unspeakably harsh treatment of former slaves in southern states); Samuel Estreicher, Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 450–51 (1974) (addressing Congress's increased use of the enforcement clause of the Fourteenth Amendment to address discrimination outside the context of state action and the end of jurisprudence based on the Civil Rights Cases).

80. *See* Daniel O. Conkle, *Judicial Activism and Fourteenth Amendment Privacy Claims: The Allure of Originalism and the Unappreciated Promise of Constrained Nonoriginalism*, 14 NEXUS: CHAPMAN'S J.L. & POL'Y, 31, 36–37 (2009) (criticizing the extension of Fourteenth Amendment jurisprudence to encompass an atextual "right of privacy" through ends-based analysis).

81. *See* Richard L. Hasen, *The Supreme Court's Pro-Partisan Turn*, 109 GEO. L.J. ONLINE 50, 73–74, 73 n.122 (2020) (describing the Supreme Court's partisan tilt, especially when discussing election integrity challenges brought under the Fourteenth Amendment).

82. Hope v. Comm'r of Ind. Dep't of Corr., 9 F.4th 513, 529 (7th Cir. 2021).

83. *Id.* ("[The Court] appl[ies] strict scrutiny to the law if the plaintiffs' unequal treatement is based on membership in a protected class—race, national origin, religion, or alienage—or denial of a fundamental right."); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) ("[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." (footnote omitted)).

color and immigrants.[84] Laws explicitly discriminating against members of suspect groups are presumptively invalid and, to survive strict scrutiny, must be "narrowly tailored to serve compelling state interests."[85] Because women have not historically been considered a suspect group, strict scrutiny fails to attach at the outset.[86]

Second, courts apply intermediate scrutiny to laws intended to discriminate against members of certain other groups, such as sex or gender groups.[87] Courts do not make any initial presumption regarding these laws and will uphold them when they are substantially related to a "sufficiently important governmental interest."[88] Importantly, the courts lift the requirement that the law go no further than necessary to address that interest; legislatures enjoy a longer leash here than under the Court's strict scrutiny.[89]

84. Calvary Chapel of Ukiah v. Newsom, 524 F. Supp. 3d 986, 1005 (E.D. Cal. 2021) ("Suspect or quasi-suspect classes have four characteristics: (1) a history of discrimination; (2) a defining characteristic that often bears a relationship to its ability to perform or contribute to society; (3) a defining trait that is immutable or distinguishable and establishes it as a discrete group; and (4) political powerlessness or minority status.").

85. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

86. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985); Bassett v. Snyder, 951 F. Supp. 2d 939, 961 (E.D. Mich. 2013). *But see* Frontiero v. Richardson, 411 U.S. 677, 687–89 (1973) (holding that laws discriminating against women should be subject to "strict judicial scrutiny," though this term does not appear to mean the same thing in this context as the Court applied intermediate scrutiny). Importantly, *Frontiero* was a plurality opinion where only four Justices "conclude[ed] that sex should be regarded as a suspect classification for purposes of equal protection analysis." Craig v. Boren, 429 U.S. 190, 218 (Rehnquist, J., dissenting). "Subsequent to [*Frontiero*], the Court has declined to hold that sex is a suspect class . . . ." *Id.*

87. *See City of Cleburne*, 473 U.S. at 441; *Craig*, 429 U.S. at 218 (explaining that intermediate level scrutiny is "invoked in cases dealing with discrimination against females").

88. *City of Cleburne*, 473 U.S. at 441; United States v. Virginia, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action." (internal quotation marks omitted); *see* 1 LAW OF LAWYER ADVERTISING *Tiers of Scrutiny in Modern Constitutional Law—Intermediate Scrutiny Review* § 2:4, Westlaw (database updated Sept. 2022).

89. *See* 1 LAW OF LAWYER ADVERTISING, *supra* note 88 (stating that intermediate scrutiny still requires a "narrow tailoring" of the discriminatory legislation, a more lenient standard than strict scrutiny prescribes).

Finally, all legislation lacking an intent to discriminate is subject to the rational basis test.[90] This test only invalidates legislation that is not rationally related to *any conceivable*, legitimate government interest.[91] Most legislation, regardless of any discriminatory impact, survives under the rational basis test.[92]

Alone, the Frozen Benefit Rule's disproportionate impact on women is insufficient to subject the law to strict or intermediate scrutiny. Though many have advocated for a test that addresses legislatures' awareness of the near-certain disparate impact in similar cases,[93] precedent has repeatedly required an actual *intent* to discriminate.[94] Thus, to have any hope of invalidating the nationalized Frozen Benefit Rule, its opponents must establish such intent. If Congress intended to discriminate on the basis of sex, or at least intended the amendment to have a disproportionate effect, the burden then shifts to the law's defenders to show that the law advances a "sufficiently important governmental interest."[95] Those most vocal on this issue have not hesitated to point out that leaving the division of

90. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976) (describing "the rational-basis standard" as "employ[ing] a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task"); Lyng v. Int'l Union, UAW, 485 U.S. 360, 370 (1988) (applying the rational basis test after determining that the law did not facially discriminate against a protected group).

91. *Lyng*, 485 U.S. at 370; FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–14 (1993) ("On rational-basis review, . . . [there is] a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to 'negate every conceivable basis which might support it.'" (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 394 (1973))).

92. *Lyng*, 485 U.S. at 370; Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 603, 606 (2000).

93. *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 283–84 (1979) (Marshall, J., dissenting) ("Although [gender] neutral in form, the [Massachusetts' veterans' preference] statute is anything but neutral in application. . . . Where the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the [s]tate to establish that sex-based considerations played no part in the choice of the particular legislative scheme.").

94. *Id.* at 258 ("'[D]iscriminatory purpose' implies more than intent as volition or intent as awareness of consequences; it implies that the decision maker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

95. *See City of Cleburne*, 473 U.S. at 441; Veasey v. Abbott, 830 F.3d 216, 231 (5th Cir. 2016) ("We recognize that evaluating motive [to discriminate against a specified group], particularly the motive of dozens of people, is a difficult enterprise.").

military retired pay to the states does not produce unjust results and that Congress purported to cure a phantom ill.[96]

Conversely, if a court were to apply the rational basis test to the national Frozen Benefit Rule, as it almost certainly would, the statute stands.[97] Congress's stated interest, seemingly voiced exclusively by Representative Russell, was to protect military members from an unjust deprivation of military retired pay.[98] Mandating application of the Frozen Benefit Rule certainly advances this interest by significantly decreasing the dollar amount to which a former spouse is entitled.[99]

2. Finding Discriminatory Intent: The Needle in the Haystack

Courts have noted that when discrimination on the alleged basis does not clearly appear in the law, claimants face an uphill battle in proving it.[100] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court conveniently provided a non-exhaustive list of the factors a court may consider in determining whether the legislature intended to discriminate on the alleged basis.[101] These factors include: "(1) the historical background of the decision, (2) the specific sequence of events leading to the decision, (3) departures from the normal procedural sequence, (4) substantive departures, and (5) legislative history, especially contemporary statements by members of the decisionmaking body."[102]

Little (if any) evidence points to Congress's discriminatory intent in nationalizing the Frozen Benefit Rule. The historical background of

96. *See, e.g.*, Sullivan, *supra* note 8, at 22–24.

97. *See* Saphire, *supra* note 92, at 639 ("As things now stand, expecting that a court might invalidate a classification subject to rational basis scrutiny is like expecting to win the lottery.").

98. *See supra* notes 5–9 and accompanying text.

99. *See supra* note 73 and accompanying text.

100. *E.g.*, *Veasey*, 830 F.3d at 231; Hunter v. Underwood, 471 U.S. 222, 228 (1985).

101. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–71 (1977).

102. *Veasey*, 830 F.3d at 231 (quoting Overton v. City of Austin, 871 F.2d 529, 540 (5th Cir. 1989)); *Arlington Heights*, 429 U.S. at 267–71.

the Frozen Benefit Rule lacks any repeated attempts by the legislature to discriminate in different ways, a pattern which ordinarily must be present under the first *Arlington Heights* factor to support a claim of intentional discrimination.[103] Even so, the historical background, unless relatively recent and sufficiently related, is of little probative value.[104] Similarly, the sequence of events leading to the decision does not betray any real intent. This amendment's passage seemed to be the personal cause of one highly interested representative rather than a widespread movement to divest women of an interest in their spouses' military retired pay.[105]

The strongest card in a former spouse's hand is the extent to which Congress departed from its standard operating procedure. Although Congress has long regulated pensions of all kinds, it does not routinely prescribe formulae for their division incident to divorce.[106] In fact, Congress has never before taken action of this kind. Such a departure, however, does not show any real intent to discriminate against women,

103. For examples of cases where courts have found that the historical background indicated a pattern of discrimination, see *Veasey*, 830 F.3d at 231–32 (citing repeated historical attempts by Texas to exclude Black voters from the polls); *Hunter*, 471 U.S. at 230–31 (recognizing the same in Alabama); Overton v. City of Austin, 871 F.2d 529, 541 (5th Cir. 1989) (noting attempts to suppress Black participation in local government); Ave. 6E Invs., LLC v. City of Yuma, 818 F.3d 493, 502–03 (9th Cir. 2016) (citing the history of discriminatory housing ordinances as motivation for Congress to prohibit disparate treatment in the Fair Housing Act).

104. McCleskey v. Kemp, 481 U.S. 279, 298 n.20 (1987) (rejecting petitioner's argument that Georgia laws in force "during and just after the Civil War" were sufficient historical evidence of discriminatory intent because the laws were not "reasonably contemporaneous with the challenged decision").

105. *See supra* notes 5–9 and accompanying text.

106. *See generally* Employment Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 and 29 U.S.C.). ERISA employs measures through the U.S. Departments of the Treasury and Labor to standardize and protect employee pension plans. *See* 29 U.S.C. § 1001(c). ERISA does not regulate the division of employee pension plans incident to divorce but provides specified methods for submitting a qualified domestic relations order to the plan administrator for payments to a child or ex-spouse. *See* 10 U.S.C. § 1056(d).

but it does appear to be an unprecedented encroachment on the realm of family law.[107]

Finally, the legislative history lacks any explicit reference to discrimination. Because Congress gave the amendment short shrift, opponents can only rely on the contemporaneous statements of Representative Russell.[108] As continually referenced herein, Representative Russell predicated this law on the secondhand anecdotes of disgruntled male veterans.[109]

Consideration of each of these factors does not produce a conclusion that Congress intended to discriminate against women. Unless a differently positioned Supreme Court departs from the discriminatory purpose test in favor of a test that assumes a discriminatory intent based on knowledge that the law will produce a disparate impact, the Frozen Benefit Rule will survive a Fourteenth Amendment challenge.

B. Infringement on the States' Power over Family Law

Historically, the states have reserved the power to decide all matters of domestic relations.[110] The federal district courts do not have original jurisdiction over divorces, child custody, adoption, legitimation, or any

107. This is not to say that Congress has *never* enacted provisions which have a substantial effect on family law. *See* 29 U.S.C. § 1056(d) (providing guidance on assigning benefits, such as employee pensions, incident to divorce); International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (codified as amended at 22 U.S.C. §§ 9001–9011) (resolving international jurisdictional disputes related to child abduction pursuant to the Hague Convention on the Civil Aspects of International Child Abduction treaty, to which the United States is a signatory); 50 U.S.C. § 3938 (disallowing consideration of a deployed service member's absence as the sole factor in determining the best interests of the child when entering a permanent custody order or modification but permitting heightened state standards in conflict with this law).

108. *See supra* notes 5–9 and accompanying text.

109. *See supra* note 8 and accompanying text.

110. De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) ("[T]here is no federal law of domestic relations, which is primarily a matter of state concern."); *In re* Burrus, 136 U.S. 586, 593–94 (1890) ("The 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.").

other matter dealing directly with family relations.[111] Certain national legislation, such as the Servicemembers Civil Relief Act (SCRA), has only ever gone so far as to provide additional safeguards regarding notice to service members.[112] Even the Uniform Child Custody Jurisdiction and Enforcement Act is not federal law;[113] each of the states, aside from one, independently adopted these provisions to avoid lengthy litigation to determine which court will make an initial ruling.[114] Although the government will argue that it has the power to regulate military matters, mandating that state courts follow the Frozen Benefit Rule takes the matter outside the power of the sword and into the domain of family relations.

1. Jurisprudence Surrounding the Interplay of Family and Military Law

The distinction between family and military law, although often related, is essentially binary when it comes to Congress's power. Congress has broad power to regulate military matters, but it is

111. Bradley G. Silverman, Note, *Federal Questions and the Domestic-Relations Exception*, 125 YALE L.J. 1364, 1366 (2016); *see, e.g.*, McLaughlin v. Cotner, 193 F.3d 410, 411–12 (6th Cir. 1999) (upholding the district court's sua sponte dismissal of a suit brought under diversity jurisdiction to enforce a divorce decree requiring the husband to sell the marital residence because the "district court clearly lack[ed] jurisdiction"); Binks v. Collier, No. 20-cv-78, 2020 WL 7495218, at *1, *4 (S.D. Ohio Dec. 21, 2020) (dismissing former husband's claim that wife breached a domestic relations court order for lack of subject matter jurisdiction).

112. *See* Servicemembers Civil Relief Act, Pub. L. No. 108-189, 117 Stat. 2835 (codified as amended at 50 U.S.C. §§ 3901–4043). *See generally The Servicemembers Civil Relief Act (SCRA)*, CONSUMER FIN. PROT. BUREAU, https://files.consumerfinance.gov/f/documents/cfpb_servicemembers-civil-relief-act_factsheet.pdf [https://perma.cc/2KA9-7QAJ] (providing a summary fo the SCRA's main protections for service members).

113. *See* Patricia M. Hoff, *The Uniform Child-Custody Jurisdiction and Enforcement Act*, JUV. JUST. BULL. (Off. of Juv. Just. & Delinq. Prevention, U.S. Dep't of Just., Washington, D.C.), Dec. 2001, at 1, https://www.ojp.gov/pdffiles1/ojjdp/189181.pdf [https://7HD4-YJGS] (explaining that the Act is a "uniform [s]tate law" that states have the option to adopt).

114. *See Child Custody Jurisdiction and Enforcement Act*, UNIF. L. COMM'N https://www.uniformlaws.org/committees/community-home?CommunityKey=4cc1b0be-d6c5-4bc2-b157-16b0baf2c56d#LegBillTrackingAnchor [https://perma.cc/L3S3-SRQS]; Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA) – A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N.D. L. REV. 301, 301 (1999).

effectively powerless in regulating marital relations.[115] The Supreme Court originally held in *McCarty* that federal law designating military retired pay a personal entitlement preempted state law to the contrary.[116] Congress corrected this error, but not because it lacked the ability to designate a personal entitlement.[117] The determinative question is whether Congress may go beyond disallowing division to ultimately dictate the terms of that division.

Several factors weigh on this question. First, the states broadly exercised the power to determine the division of military retired pay before 2016.[118] Trial courts adopted different practices and procedures for dividing military retired pay consistent with their treatment of other retirement benefits.[119] For most retirement benefits—military retired pay is no exception—Congress passed legislation to standardize the form of court orders to increase clarity and reduce inconsistencies.[120] Although this history is not in itself instructive, it shows Congress's historical restraint and the traditional division of powers.

Next, the Supreme Court's decisions in *Mansell v. Mansell* and *Howell v. Howell* play a key role.[121] In these cases, the Court held that disability payments from the U.S. Department of Veterans Affairs could not be considered marital property and that the trial court could

115. *Compare In re Burrus*, 136 U.S. at 593–94 ("The 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."), *with* Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981) (noting that "perhaps in no other area has the Court accorded Congress greater deference" than in the area of "national defense and military affairs").

116. McCarty v. McCarty, 453 U.S. 210, 232–35 (1981), *superseded by statute*, Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730, *as recognized in* Howell v. Howell, 581 U.S. 214 (2017).

117. *See* Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (codified as amended at 10 U.S.C. § 1408).

118. *See supra* Section I.C.

119. *Id.*

120. *See, e.g.*, 29 U.S.C. § 1056(d) (providing methods for dividing employee pensions incident to divorce); 5 C.F.R. §§ 838.221, 838.222 (2023) (prescribing the application process to register court orders with the U.S. Office of Personnel Management for division of civil service pensions); 20 C.F.R. § 295.5 (2023) (constructing limitations around which parts of a railroad pension may be considered marital property).

121. Howell v. Howell, 581 U.S. 214 (2017); Mansell v. Mansell, 490 U.S. 581 (1989).

not compensate former spouses for decreases in a member's military retired pay to receive such payments.[122] Congress did not direct state courts on *how* to divide disability payments; it instructed state courts not to divide them at all, either directly or indirectly.[123] Moreover, this precedent, unlike the Frozen Benefit Rule, tracks federal law regarding other forms of federal disability compensation.[124]

Finally, a proposed amendment to the SCRA that would bear on a state court's determination of child custody has routinely failed to pass the Senate for its imposition on state power.[125] Admittedly, child custody determinations have a far more intimate standard of proof—the best interests of the child—than the division of marital property.[126] Still, leaving the division of marital property to the trial court has the same justification: matters involving domestic relations within a family are fact-specific and should rarely, if ever, be governed by a

122. *Howell*, 581 U.S. at 216, 222; *Mansell*, 490 U.S. at 588–89. In both cases, the retired service member waived military retirement pay to receive VA disability benefits. *Howell*, 581 U.S. at 216; *Mansell*, 490 U.S. at 583.

123. Anthony L. McMullen, Howell v. Howell*: A Refresher on Dividing Military Retirement in a Divorce*, 52 ARK. LAW., Fall 2017, at 26, 26–27.

124. *See, e.g.*, Severs v. Severs, 837 N.E.2d 498, 499, 501 (Ind. 2005) (holding the Social Security Act's antiassignment provision prevented division of social security benefits in a community property settlement); Hisquierdo v. Hisquierdo, 439 U.S. 572, 574–75, 590 (1979) (holding that a retiree's Tier I benefits under the Railroad Retirement Act, which are similar in purpose to social security benefits, were not divisible in a community property settlement).

125. The amendment in question sought to standardize the method by which state courts made determinations in child custody cases. *See* sources cited *supra* note 61. The proposed legislation did eventually pass both houses, but it included narrow language which prohibited courts from making a determination based on the absence of a deployed parent and limited a temporary award of custody to the length of the deployment. *See* 50 U.S.C. § 3938(a), (b). This law is likely subject to the same challenges as the Frozen Benefit Rule, but its effects are so minimal that it has not been challenged. Roy L. Kaufmann, *SCRA Child Custody Protections*, SERVICEMEMBERS CIV. RELIEF ACT CENTRALIZED VERIFICATION SERV., https://www.servicememberscivilreliefact.com/blog/scra-child-custody-protections/ [https://perma.cc/7RBN-SQXJ]. Like the Frozen Benefit Rule, this is a solution in search of a problem.

126. *Compare* 22 AM. JUR. TRIALS *Best Interest of Child Theory—§ 402 of Uniform Marriage and Divorce Act* 347 § 3, Westlaw (database updated Feb. 2023) (noting that courts employ the best interests of the child, which can encompass many personal and societal considerations, in determining custody), *with* Russ, *supra* note 70 (noting that courts make an amorphous inquiry into what may be equitable for division of marital property, including the financial circumstances, marital misconduct, foregone opportunities, social obligations, and other nonfinancial factors).

bright-line rule.[127] Thus, no concrete precedent directly governs whether the national Frozen Benefit Rule is a valid exercise of Congress's power of the sword or an improper foray into family law.

2. A Question of First Impression

Reaching any decision on a question of first impression depends enormously on advocacy.[128] Again, the question is whether Congress may enact legislation directing state courts to employ a specific formula when dividing military retired pay incident to divorce when such legislation overturns the formula routinely employed by most states and makes no exemption for the wishes of the parties. The outcome will rest on persuasive authority regarding military retired pay, the traditional role of state courts in domestic matters, and policy-based arguments for or against a national standard.

As previously discussed, Congress has total power to regulate the administration and payment of military retired pay. Congress has more recently defined military retired pay as a property interest rather than a personal entitlement[129] and has provided mechanisms for the direct payment of military retired pay to former spouses from the Defense Financing and Accounting Service (DFAS) when the USFSPA's conditions are met.[130] Because the federal government acts as the payor, these regulations appear to be well within its power. Indeed, Congress has taken similar steps to regulate railroad retirement

127. *See* Russ *supra* note 70, at § 2[a] (noting that "states making equitable distribution available only under enumerated circumstances generally do not have statutes governing the matter, while states which make equitable distribution generally available . . . have enacted statutes expressly requiring that application").

128. *See* Michael F. Smith, *Litigating Cases with Questions of First Impression*, IADC COMM. NEWSL.: APP. PRAC. (Int'l Ass'n of Def. Couns., Chi., Ill.), Nov. 2013, at 1, *reprinted in* 81 DEF. COUNS. J. 101, 102 (2014) ("A question of first impression gives trial counsel the opportunity to use the well-reasoned rationale of persuasive authority from other jurisdictions as well as public policy arguments to advocate a client's position.").

129. *See* 10 U.S.C. § 1408(c).

130. *See* DEF. FIN. & ACCT. SERV., https://www.dfas.mil/Garnishment/usfspa/legal/ [https://perma.cc/EXW2-LNKJ] (Mar. 19, 2019).

benefits, social security benefits, and civil service pensions.[131] Nationalizing the Frozen Benefit Rule, however, departs from administration of the armed forces into the division of marital property.

Further, Congress intruded on the domain of state power by passing the 2016 amendment to the USFSPA, nationalizing the Frozen Benefit Rule. Congress may define a benefit as a personal entitlement or not, but it may not regulate the way state courts divide a marital asset.[132] Although division of marital property does not carry the same intimate weight as determining child custody, that power too falls under the family law sphere of jurisprudence and should be entitled to the same deference. Rather than residing in the broad category of military administrative power, the Frozen Benefit Rule improperly preempts legitimate state power to make fact-based determinations at the time of divorce.

Finally, returning this power to the states reflects sound public policy. In any domestic relations case, the parties are best equipped to determine the proper division of marital property.[133] In the absence of agreement, the trial judge or jury, not Congress, stands the best chance of handling the equitable division of property. It cannot be overstated that such consideration does not create a windfall in either party.[134] More often than not, military spouses make considerable sacrifices in their career opportunities in support of service members, partly in

131. *See supra* note 120 and accompanying text.

132. This is most evident when considering the "domestic relations exception" to diversity jurisdiction in federal courts. *See supra* note 111 and accompanying text; 28 U.S.C. § 1332; Ankenbrandt v. Richards, 504 U.S. 689, 698, 700 (1992); Barber v. Barber, 62 U.S. 582, 584 (1858).

133. *See* 1 MARITAL PROPERTY LAW *Construction as Contract* § 26.3, Westlaw (database updated July 2022) (equating settlement agreements to other contract agreements to which the parties are competent to agree but explaining that some "courts scrutinize separation agreements more closely than ordinary contracts[] and may set such an agreement aside upon the demonstration of good cause"). Importantly, the 2016 amendment makes it so there are "no exceptions for the parties' agreement to vary from the [Frozen Benefit Rule]. Everyone must do it one way, regardless of what the husband and wife decide they want the settlement or consent order to say." Sullivan, *supra* note 14.

134. Sullivan, *supra* note 8, at 23.

reliance on the assumption that they will receive military retired pay to support their retirement.[135]

It may be said that a nationalized rule on the division of military retired pay minimizes possible disputes and streamlines the often contentious divorce process.[136] Though this argument may hold water given the size of the asset involved, ease does not fully justify this approach. Of course, federal regulation on any number of issues could streamline the divorce process, but Congress would not presume to regulate any other kind of marital property in this way. The answer to this problem is not to nationalize the standard but to properly educate family law attorneys and judges on the issue to allow the adversarial system to achieve a just result.

III. PROPOSAL

The realistic options for remedying the above problems are, unfortunately, quite limited. An adequately motivated litigant may attempt to raise a constitutional challenge in court, but the costs may greatly outweigh the benefits. Any lasting change must come from Congress if Congress feels sufficiently compelled to return power to divide military retired pay to the state courts where it belongs. In the alternative, this Section suggests that perhaps extending the Frozen Benefit Rule to all pension schemes might be proper.

135. *See supra* note 68 and accompanying text; *Military Spouses Enable Mission by Maintaining the Home Front*, U.S. DEP'T DEF. (May 7, 2021), https://www.defense.gov/News/News-Stories/Article/Article/2600076/military-spouses-enable-mission-by-maintaining-the-home-front/ [https://perma.cc/329M-2G3M]; Sullivan, *supra* note 8, at 24; KRISTY N. KAMARCK, BARBARA L. SCHWEMLE & SOFIA PLAGAKIS, CONG. RSCH. SERV., R46498, MILITARY SPOUSE EMPLOYMENT 1, 7, 9 (2020).

136. *See supra* note 74 and accompanying text.

A. A Judicial Challenge

A Tenth Amendment claim, although potentially viable, faces an uphill battle.[137] For decades, some experts all but proclaimed the death of Tenth Amendment claims in the federal court system.[138] Indeed, the Supreme Court had long viewed the Tenth Amendment as a mere "truism," a further assurance to the envious state representatives at the Constitutional Convention that states' rights would continue to be observed.[139] Quite recently, however, a different timbre from the Court described some resurgence in this field of jurisprudence.[140] Nonetheless, as discussed above, this theory rests on admittedly unstable ground because the federal government holds a powerful card—the power of the sword—which grants Congress considerable leeway.[141] Opponents of the Frozen Benefit Rule need an ideal case and strong advocacy to achieve their goal.

---

137. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the [s]tates, are reserved to the [s]tates respectively, or to the people." U.S. CONST. amend. X.

138. *See, e.g.*, Ronald D. Rotunda, *The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions*, 132 U. PA. L. REV. 289, 289 (1984) ("Before the middle of the 1970's, it appeared to be a settled principle of modern American constitutional law that the tenth amendment failed to limit Congress's power under the commerce clause."). *But see* Kathryn Abrams, Note, *On Reading and Using the Tenth Amendment*, 93 YALE L.J. 723, 723 (1984) ("Reports of the death of the Tenth Amendment have been greatly exaggerated. Though the doctrine of state sovereignty articulated in *National League of Cities v. Usery* has been radically narrowed, the return of the Amendment to its previous status as a truism is no more inevitable than it would be wise." (footnotes omitted) (internal quotation marks omitted)).

139. *See* United States v. Darby, 312 U.S. 100, 124 (1941) (declaring the Tenth Amendment to represent a mere "truism" and elaborating that "[t]here is nothing in the history of [the Tenth Amendment's] adoption to suggest that it was more than declaratory of the relationship between the national and state governments"); Hon. Vincent A. Cirillo & Jay W. Eisenhofer, *Reflections on the Congressional Commerce Power*, 60 TEMP. L.Q. 901, 919 (1987).

140. *See* Printz v. United States, 521 U.S. 898, 902, 924–25, 935 (1997) (holding that the Brady Handgun Violence Prevention Act Act improperly conscripted state law enforcement officers to regulate the purchase of firearms by exceeding Congress's enumerated powers under Article I); United States v. Lopez, 514 U.S. 549, 551, 565–68 (1995) (holding that Congress lacked the power to make it a federal crime to possess a firearm on school grounds under the Commerce Clause because it improperly infringed on state police power).

141. *See* Rostker v. Goldberg, 453 U.S. 57, 65–66 (1981) (stating that "perhaps in no other area has the Court accorded Congress greater deference" than "over national defense and military affairs").

What does the ideal case look like? Begin with a divorce after fifteen years of marriage in, say, Nebraska.[142] The husband, John Doe, works as a city carrier for the U.S. Postal Service in Omaha, and the wife, Jane, has a pay grade of O-4 in the Air Force stationed at Offutt Air Force Base.[143] The Does are in their mid-thirties at the time of divorce, and neither intends to retire from their current job in the near future. Assume, for simplicity, that the judge in this case divides all marital assets directly down the middle according to the parties' settlement agreement. The parties further agree to equal division of the marital portion of both John's Federal Employees Retirement System benefits and Jane's military retired pay. Neither the parties' attorney nor the judge has sufficient experience with military matters to recognize that the Frozen Benefit Rule will prevent division of Jane's pension according to the Time Rule. Regardless, the judge issues the court orders in their proper form, and the attorneys submit certified copies of the same to the proper federal agencies.

Both John and Jane remain in their current careers for the next ten years, at which point they both seek employment in the private sector. During this time, both parties received regular pay increases, and Jane was promoted to O-5 with sufficient active-duty service to begin receiving military retired pay immediately upon retirement.

142. Nebraska, like 90% of states, is an ideal setting for this hypothetical, as it divided military pensions pursuant to the Time Rule prior to 2016. NEB. REV. STAT. ANN. § 42-366 (West 2022); *see supra* notes 65–74 and accompanying text.

143. In this instance, Jane will earn significantly more than John at the time of divorce. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-140, U.S. POSTAL SERVICE: ADDITIONAL GUIDANCE NEEDED TO ASSESS EFFECT OF CHANGES TO EMPLOYEE COMPENSATION 39 tbl.6 (2020) (listing the average hourly compensation for city carriers in fiscal year 2018 at $29.58); U.S. DEP'T OF DEF., VOLUME 7A, CHAPTER 1: "BASIC PAY": SUMMARY OF MAJOR CHANGES 1-51 tbl.1-7 (2021) https://comptroller.defense.gov/Portals/45/documents/fmr/current/07a/07a_01.pdf [https://perma.cc/83WG-FETQ] (listing basic monthly pay for an O-4 with over fourteen years of experience at $8,332.50).

1. Appeals

The first, and most obvious, route to overturn the Frozen Benefit Rule runs through the appeals process. If John realizes that the marital assets were not divided to account for the disparity caused by the Frozen Benefit Rule, he may file a timely appeal with the Nebraska Court of Appeals or the Nebraska Supreme Court.[144] Unfortunately for John, no state court in Nebraska (or in any state) has the power to ultimately declare an act of Congress repugnant to the federal Constitution.[145] This process, at best, ends in Washington. At this juncture, however, the standard appellant is not likely to pine for a lengthy appeals process that may end with oral arguments before the U.S. Supreme Court in an attempt to overturn the very statute that divested him of a greater share of his wife's military retired pay. Such action is arduous, costly, and inherently risky. John wants to take his money and go home.

Moreover, an appeal of the division of marital property in a divorce case carries the "abuse of discretion" standard.[146] Under this standard, the appellate court may only disturb the ruling below if it finds the trial judge's decision is "untenable and unfairly deprives a litigant of a substantial right or a just result."[147] Not only is this a difficult standard of proof in most cases,[148] but this hypothetical case features a

144. *See* NEB. REV. STAT. ANN. § 24-1106 (West 2022) (authorizing direct review by the Nebraska Supreme Court when the constitutionality of a statute is in question).

145. *See generally* Marbury v. Madison, 5 U.S. 137 (1803) (establishing judicial review, which gives federal courts the exclusive power to declare legislative actions unconstitutional). *See* McCulloch v. Maryland, 17 U.S. 316, 326–27 (1819). State courts can, however, petition the Supreme Court to review cases involving a question not yet decided by the Supreme Court. *See* SUP. CT. R. 10(c).

146. *See* Plog v. Plog, 824 N.W.2d 749, 759 (Neb. Ct. App. 2012); Malin v. Loynachan, 736 N.W.2d 390, 394 (Neb. Ct. App. 2007); Nygren v. Nygren, 704 N.W.2d 257, 266 (Neb. Ct. App. 2005).

147. *See* cases cited *supra* note 146.

148. *See* Carlson v. Carlson, 909 N.W.2d 351, 363 (Neb. 2018) (holding that a property settlement agreement properly incorporated into the divorce decree by a court of competent jurisdiction "will not thereafter be vacated or modified in the absence of fraud or gross inequity"); *Appeals Process*, CAL. CTS., https://www.courts.ca.gov/12431.htm?rdeLocaleAttr=en [https://perma.cc/WA2C-NL3X] ("Abuse of discretion occurs when the trial court judge makes a ruling that is arbitrary or absurd. This does not happen very often.").

settlement agreement and ineffective advice of counsel. Here, John's chances of success at the immediate appellate level are vanishingly slim, and his investment in appeal to the Supreme Court is probably not worth the reward.

2. Injunction

John's more reasonable remedy may well rest in the U.S. District Court for the District of Nebraska. First, a lay litigant is unlikely to recognize the harm until DFAS begins issuing payments and the window for appeals has long been closed.[149] A full ten years after the divorce, John will realize that his half of the marital portion—30% of the total—of Jane's military retired pay represents far less than he expected to receive.[150] Thus, John must look again to the court system for a modification.

Second, the Frozen Benefit Rule undoubtedly presents a federal question. Any district court would enjoy original jurisdiction to review whether the Frozen Benefit Rule violates the Tenth Amendment,[151] and any district court could issue a ruling declaring the provision unconstitutional on those grounds. Such a ruling by a district court alone would present profound difficulties, as detailed below in Part B.

The third part of this imaginary suit, however, introduces the most difficult wrinkle: Who can John sue? Although Jane receives the actual dollars that John contends are his marital property, she is not the government official charged with enforcing the Frozen Benefit Rule; Jane passively receives her paychecks. John may name the trial judge as a defendant, but the judge signed the order at least ten years before

149. *See* NEB. REV. STAT ANN. § 25-2729 (West 2022) (providing an appeal must be perfected within thirty days of the final judgment).

150. According to 2021 numbers, an O-5 with over twenty-four years of service earns a monthly salary of $10,111.20, as opposed to an O-4 with over fourteen years of service who earns $8,332.50. U.S. DEP'T OF DEF., *supra* note 143. Assuming these salary numbers represent Jane's "high-3," John would be entitled to $1,895.85 per month under the Time Rule compared to $937.41 under the Frozen Benefit Rule. *See supra* note 66 and accompanying text.

151. *See* 28 U.S.C § 1331.

the subsequent suit, and the judge is shielded by absolute judicial immunity.[152] Thus, John, perhaps along with a class of similarly situated former spouses, would be compelled to name DFAS, the agency charged with making direct payments under the USFSPA.[153]

If John, or someone like John, manages to bring a valid claim, the Tenth Amendment argument stands a decent chance to succeed at the district level. Even if the claim fails initially, a favorable ruling from the Supreme Court would invalidate the Frozen Benefit Rule at the federal level. On the other hand, of course, failure forever divests state courts of the power to properly manage military divorces. But judicial review can only do so much. If Congress truly wishes to impose the Frozen Benefit Rule at a national level, its power to regulate the armed forces is but one of many tools in its belt.

B. Change Must Come From Congress

Yes, the unsatisfying answer to this perplexing issue is: "Write to your representative." To be painfully frank, the genie simply cannot be shoved back into its bottle. If the Frozen Benefit Rule is the will of the people, as its passage through both houses of Congress and the President's signature deem it to be, then the Supreme Court cannot and should not stand opposed. Sure, five honorable Justices may, with the stroke of a pen, invalidate the current provision of § 1408, but this

152. Scott A. Keller, *Qualified and Abosulte Immunity at Common Law*, 73 STAN. L. REV. 1337, 1357, 1378 (2021) (explaining that at common law, "judges' exercise of judicial power entailed absolute immunity" and that "[t]he Court proceeds 'on the assumption that common law principles of . . . immunity were incorporated into our judicial system'" (quoting Pierson v. Ray, 386 U.S. 547, 554–55 (1967))).

153. Under the USFSPA, John would not be authorized to sue any of the officers or secretaries responsible for making payments to former spouses. 10 U.S.C. § 1408(f). Precedent reveals, however, that John may seek a writ of mandamus from DFAS itself. *See* Jordan v. Def. Fin. & Acct. Serv., 744 F. App'x 692, 697 (11th Cir. 2018) (holding that the district court acted within its discretion in denying appellant's writ of mandamus). The Supreme Court has unanimously held that individuals have standing to bring claims asserting that Congress has infringed upon state sovereignty in violation of the Tenth Amendment where the individual is a "party to an otherwise justiciable case or controversy." Bond v. United States, 564 U.S. 211, 225–26 (2011).

move could only temporarily deter a Congress determined to implement the rule.

First, a motivated Congress may incentivize states to implement the Frozen Benefit Rule for military retired pay themselves.[154] The Supreme Court has long held that Congress can twist the arms of state legislatures into adopting uniform laws that further Congress's aims but that might be contrary to state interests.[155] The federal government has instituted such measures time and again to circumvent the Tenth Amendment and impose its will upon the states.

Second, Congress can make receiving sufficient pay under the Time Rule prohibitively difficult for former spouses. Rather than directly governing state courts, Congress may direct DFAS to refrain from making direct payments to former spouses in excess of what they would have received under the Frozen Benefit Rule.[156] In this scenario, DFAS would reject every state court division order that does not track the Frozen Benefit Rule. Thus, the state court would either follow the Frozen Benefit Rule or order the service member to indemnify the former spouse for the balance of pay due under the Time Rule.[157] One

154. *See* Daniel S. Cohen, *A Gun to Whose Head? Federalism, Localism, and the Spending Clause*, 123 DICK. L. REV. 421, 436 (2019) ("At its heart, the conditional spending power allows Congress to incentivize state governments to adopt Congress's policy preferences, but only in a manner that preserves federalism.").

155. *See* South Dakota v. Dole, 483 U.S. 203, 210–11 (1987); New York v. United States, 505 U.S. 144, 153–54, 159, 173–74, 177, 188 (1992) (affirming economic incentives while declaring a "take title" provision of the same law relating to disposal of radioactive waste unconstitutional because the former did not directly infringe upon state action); Madison v. Virginia, 474 F.3d 118, 122, 130 (4th Cir. 2006) (finding that Congress's decision to condition receipt of federal prison funds on waiver of Eleventh Amendment protections was a valid exercise of the power of the purse). *But see* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577–78 (2012) ("Congress may use its spending power to create incentives for [s]tates to act in accordance with federal policies. But when 'pressure turns into compulsion,' the legislation runs countrary to our system of federalism." (quoting Charles C. Steward Mach. Co v. Davis, 301 U.S. 548, 590 (1937))).

156. *See* 10 U.S.C. § 1408(d) (directing DFAS to take certain actions and refrain from taking others pursuant to court orders).

157. Indemnification under this scenario could certainly invoke the arguments raised in *Howell*; however, because the Court relied on the veteran's waiver of a share of military retirement pay to receive VA disability, this precedent would not be controlling. Howell v. Howell, 581 U.S. 214, 216, 222 (2017); *see supra* notes 121–24 and accompanying text.

can imagine how frequently such an order would be blatantly violated, leading to a surge in litigation and a strong incentive for state courts to abandon the Time Rule altogether for military retired pay.

Third, and most drastically, Congress can take its ball and go home. The Supreme Court has already held that Congress enjoys the power to dictate whether a particular benefit is a "personal entitlement" or may be subject to equitable division incident to divorce.[158] If former spouses like John Doe start stirring the pot and second-guessing Congress, what is to stop congressional leaders from repealing the USFSPA altogether and returning to *McCarty*? Congress may, at any time, employ the rallying cry, "support our troops," to forever vest military retired pay in service members alone and leave former spouses out in the cold.

For these reasons, the answer for opponents to the Frozen Benefit Rule must be: "Write to your representative." Unfortunately, the only parties interested in this change are divorce attorneys and former spouses for whom a prospective change with no retroactive effect would make no difference. Even among experts in this field, reasonable minds differ.[159] Thus, change may never come to this niche issue, and courts should seek alternatives in the division of marital property to account for losses to the former spouse's share of military retired pay.[160] Before concluding, however, one final question bears repeating.

158. *Howell*, 581 U.S. at 217, 222; Mansell v. Mansell, 490 U.S. 581, 588–89 (1989).

159. *Compare* Sullivan, *supra* note 8, at 21–22 (arguing against the Frozen Benefit Rule), *with* Bradley, *supra* note 24, at 103 (pointing to arguments supporting the Time Rule and proposing a new method to divide military retired pay).

160. Such alternative solutions, under an equitable distribution doctrine, might include offsetting the former spouse's decreased interest in the member's military retired pay by an award of spousal support, interest in real property, or application of the Frozen Benefit Rule to the member's interest in the former spouse's pension. *See infra* Section III.C.; GA. JURISPRUDENCE: FAMILY LAW, *supra* note 38.

C. What Makes Military Retired Pay So Special?

Assume Representative Russell was right. Assume that it is unfair for one spouse to enjoy the benefits of increased pay and tenure of the other spouse after the final judgment and decree of divorce.[161] Why stop at military retired pay? Sure, the foundation theory has sound support, and this Note repeatedly sings its praises. But perhaps its proponents are wrong; perhaps the Frozen Benefit Rule most justly rewards the hard work of a divorcee and properly accounts for the contribution of the former spouse.

Today, most state courts divide pensions of all kinds according to the Time Rule.[162] If Congress has the power to dictate the manner of division, what is to stop it from extending the Frozen Benefit Rule to all federal pensions? If it can bully states into doing so, why should Congress not use the power of the purse to incentivize state adoption of the Frozen Benefit Rule for *all* pensions, public and private?

Without taking anything away from the wonderful benefits afforded to our uniformed service members, this author submits that *nothing* makes military retired pay special. It is often argued that military retired pay acts as a powerful recruiting tool for the armed forces, but the same argument can be made for any pension plan, public or private.[163] Value, too, is often lauded as distinguishing military retired pay among federal pensions.[164] Although one would be loath to find a more lucrative public retirement plan, some in the private sector continue to offer high-quality, traditional pensions.[165] Even so, value

161. *See supra* note 8 and accompanying text.

162. *See supra* Section I.C.1.

163. *See* BETH J. ASCH, SETTING MILITARY COMPENSATION TO SUPPORT RECRUITMENT, RETENTION, AND PERFORMANCE 29 (2019).

164. *See Preliminary Review of Military Retirement Systems: Hearings Before the Mil. Comp. Subcomm. of the H. Comm. on Armed Servs*, 95th Cong. 115 (1978) (statement of Charles J. Zwick, Chairperson).

165. *See* EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LAB., PRIVATE PENSION PLAN BULLETIN: ABSTRACT OF 2019 FORM 5500 ANNUAL REPORTS 1–2 (2021). Admittedly, the overwhelming trend since the passage of ERISA has been a move toward defined contribution plans (like a 401(k)) as opposed to a defined benefit plan, but the latter is still available in the private sector. *Id.* at 1.

alone does not dictate the manner of division; a higher value only means that the service member and the former spouse have larger slices of a larger pie.

All this is to say that if we, as a society, deem the Frozen Benefit Rule to address a so-called "windfall" to former spouses more equitably, then we should not discriminate. If the rule applies to one, it ought to apply to all. The above example featuring John and Jane Doe should make the reasoning for this point abundantly clear. One should not enjoy the fruits of another's labor while hoarding one's own apples.

CONCLUSION

As a matter of law, policy, and federalist principle, the division of marital property is best left to the discretion of the state trial court. As the finder of fact closest to the parties, the trial court has the greatest ability to account for all circumstances surrounding the divorce and make an equitable division. The greatest opponent of judicial discretion, the aggrieved service member, will claim that his or her spouse did not deserve so large a portion of the member's military retired pay because the spouse did not adequately contribute to the member's career. Of course, this is a feature of many a marriage, but this factor is for the fact finder—not for the service member—to determine.

The U.S. ought never to have the power to paint with so broad a brush as it did in implementing the Frozen Benefit Rule. Such a solution, while equitable in some cases, fails to adequately reward former spouses for their contributions in others. The solution seeks a problem that never existed. If you want a better outcome, hire a better lawyer.