Preemption of Reconcilable State Regulation: Federal Benefit Schemes v. State Marital Property Law

James A. Riddle

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal
Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol34/iss3/6

This Comment is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
Preemption of Reconcilable State Regulation: Federal Benefit Schemes v. State Marital Property Law

Since Gibbons v. Ogden, the United States Supreme Court has extensively utilized the doctrine of federal preemption to determine the validity of state law in the face of arguably conflicting federal legislation. Federal preemption invalidates state regulation which conflicts or interferes with federal regulation. Given the requisite conflict, the principle of federal supremacy applies despite both the existence of important state interests in the preempted regulation and the failure of Congress to adequately assess the preemptive capability of the overriding federal regulation. The Court has consistently invoked federal preemption without undertaking the process of federalism balancing common to other areas of constitutional jurisprudence.

The failure to consider relative state and federal interests may be acceptable when applying orthodox preemption doctrine to state and federal regulation aimed at similar objectives. The same failure, however, may result in erroneous and unintended shifts in regulatory power when the federal and state laws in question are enacted in contemplation of unrelated objectives.

The problems inherent in applying orthodox preemption doctrine to unrelated federal and state regulation are evident in three recent Burger Court decisions invalidating state marital property laws. In Hisquierdo v. Hisquierdo, McCarty v. McCarty and Ridgway v. Ridgway, the Court invalidated state marital property laws as applied to the receipt of federal retirement and insurance benefits. Because these cases involved reconcilable federal and state regulation aimed at unrelated objectives, it can be argued that the Burger Court failed to apply suitable standards in determining that the state marital property laws

3. See infra text accompanying note 127.
4. See infra notes 75-77 & accompanying text.
5. For example, in dormant commerce clause cases “[t]he Court employs a balancing standard which weighs the state interest advanced by the challenged regulation against the national interest in open boundaries to commerce.” Wiggins, Federalism Balancing and the Burger Court: California’s Nuclear Law as a Preemption Case Study, 13 U.C.D. L. REV. 3, 12-13 (1979).
6. See infra notes 75-77 & accompanying text.
were preempted. Moreover, the arguments favoring adoption of a new preemption standard in state marital property law cases are equally applicable to preemption disputes involving many other types of state and federal regulation.

This Comment examines federal preemption of reconcilable state laws enacted to accomplish goals unrelated to the goals underlying federal law. The suitability of orthodox preemption doctrine in this context is examined with reference to the Burger Court's application of federal preemption to state marital property law. First, the Comment summarizes basic preemption principles ("orthodox preemption doctrine") developed by the Court since Gibbons. The Comment then examines the preemption standard applied by the Burger Court in Hisquierdo, McCarty and Ridgway and argues that it is not suited to resolve preemption disputes between reconcilable regulation aimed at differing objectives. Finally, the Comment suggests an alternative to the preemption standard presently applied to state regulation of marital property or other types of state regulation undertaken to achieve goals different from those underlying preempting federal regulation.

Orthodox Preemption Doctrine

The United States Constitution states the important principle of federal supremacy: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . ." The supremacy clause mandates preemption of state laws which conflict with the congressional exercise of an enumerated power.

When the requisite preemptive relationship exists, state regulation is invalidated without reference to the federal or state interests at stake. Although the policy considerations underlying arguably conflicting federal and state regulation may be entirely different in nature and importance, the Court has appeared unwilling to adopt a balancing approach in applying orthodox preemption doctrine. Thus, the validity of challenged state regulation traditionally has hinged solely on the existence of a perceived conflict with valid federal regulation.

Generally, preemption case law can be segregated into two relatively distinct classifications. First, congressional action may evidence

---

10. U.S. Const. art. VI, cl. 2.
11. See infra notes 163-68 & accompanying text.
12. See, e.g., Ridgway v. Ridgway, 454 U.S. 46, 54 (1981) (quoting Free v. Bland, 396 U.S. 663, 666 (1962)) ("[T]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law . . . .") However, in Farmer v. Carpenters, 430 U.S. 290 (1977), a strong state interest was the basis for upholding a state tort action which posed some risk of interfering with federal labor law. The Court stated that "in light of the discrete concerns of the federal scheme and the state tort law, [the] potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens." Id. at 304.
an intent to "occupy the field".\textsuperscript{13} When a field of regulation is deemed to be federally occupied, any state law attempting to operate within that field is necessarily preempted, whether or not it actually interferes with the operation of existing federal legislation. For example, extensive federal involvement in the field of aircraft regulation may be the basis for preempting local curfews on commercial flights despite the absence of federal legislation prohibiting curfews.\textsuperscript{14}

Second, state laws may "conflict" or "interfere" with the letter or spirit of valid federal enactments.\textsuperscript{15} For example, in one such preemption dispute the Court held that federal homestead legislation, specifying the terms under which certain designated individuals could succeed to the rights of the deceased homesteader, preempted a state community property claim to succession by the homesteader's daughter.\textsuperscript{16}

**Occupying The Field**

State laws may be invalidated merely because they are found to operate in an area "occupied" by federal regulation. Federal regulation will not be found to occupy a field "unless that was the clear and manifest purpose of Congress."\textsuperscript{17} This congressional mandate is recognized whenever enforcement of state law would impair "federal superintendence of the field."\textsuperscript{18}

Application of this test is difficult for a variety of reasons. Congress often gives no clear indication whether its enactments are intended to occupy a particular field.\textsuperscript{19} Further, evidence of congressional intent is normally discovered in the legislative history, an


\textsuperscript{14} City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973). See also, Pennsylvania v. Nelson, 350 U.S. 497 (1956) (federal anti-sedition legislation embodied in the Smith Act held so pervasive that Pennsylvania sedition statute apparently supplementing federal law was preempted); Hines v. Davidowitz, 312 U.S. 52 (1941) (Pennsylvania alien registration law requiring all aliens to carry state registration card held preempted by Federal Alien Registration Act which did not require aliens to carry registration cards).

\textsuperscript{15} Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977) ("Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict.").

\textsuperscript{16} McCune v. Essig, 199 U.S. 382 (1905).

\textsuperscript{17} Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).


\textsuperscript{19} "By framing the pre-emption question in terms of specific congressional intent the Supreme Court has manufactured difficulties for itself . . . . In the great majority of cases the pre-emptive implications of the federal statute must be derived without the aid of specific legislative guidance, and even when such guidance is offered, it does not represent the whole solution in many instances." Comment, Pre-emption as a Preferential Ground: A New Canon of Construction, 12 STAN. L. REV. 208, 209-10 (1959). See also, Hirsch, Toward a New View of Federal Preemption, 1972 U. ILL. L.F. 515, 542.
often misleading and unreliable source.20

Because of these difficulties, the Court occasionally looks to certain extrinsic factors to ascertain whether Congress intended to occupy a field.21 One or more extrinsic factors may be the basis for finding that Congress, by its regulation, intended to occupy the field to the exclusion of state law.22

Conflict or Interference

If a state law operates outside an occupied field, it will not be invalidated on the basis of the supremacy clause unless it is in conflict with existing valid federal regulation.

In Perez v. Campbell,23 the Court stated: "Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitu-

20. "Because of the propensity of many legislators to manufacture legislative history, the courts tend to discount statements made on the floor of Congress." Comment, supra note 19, at 215.

21. One extrinsic factor may be the importance of national uniformity in the regulated field. E.g., Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) (uniformity contemplated by Congress in enacting the Interstate Commerce Act as the basis for pre-empting state law action against carrier for abandonment of railroad branch line). Another extrinsic factor may be the pervasive character of federal regulation in the field. E.g., City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 633 (1973) ("It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption."). A third extrinsic factor may be the relation of this field to a dominant or uniquely federal interest. E.g., Hines v. Davidowitz, 312 U.S. 52 (1941) (state requirement that aliens carry state issued registration card impermissibly infringed upon federal superintendence of international relations). A fourth extrinsic factor may be the degree to which state law can be characterized as regulating a matter of traditional state concern. E.g., Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("Where, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States . . . 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' [citation omitted]"). Finally, the Court may be influenced by the degree to which the objectives of state and federal law differ. E.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973) (New York Stock Exchange compulsory arbitration requirement promulgated as a self-regulation measure held not to preempt state law remedies designed to protect wage earners from economic pressures affecting the employment relationship); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (municipal smoke abatement ordinance designed to protect health not preempted by federal inspection laws aimed at protecting against maritime navigation perils). But see Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) ("The test of whether both federal and state regulations may operate . . . is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.").

22. See cases cited supra note 21.

tional question whether they are in conflict.”

In the first stage of conflict/interference preemption analysis, the Court interprets the relevant state and federal laws in question. With respect to a federal law, the purposes, objectives and scope of the legislation must be ascertained. Next, the operation of the state law is determined. The groundwork is thus laid for deciding the constitutional issue whether the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

The purposes, objectives and scope of the federal legislation is determined in the same manner as occupation of a field—Congressional intent is the yardstick. What Congress intended, however, is seldom clear.

In the typical case the Court faces the construction problem with only its “own predilections regarding the proper relation between federal and state governments and [its] own notions on the proper method of statutory interpretation.” This subjectivity manifests itself in one important way: statutory construction determining the purposes, objectives and scope of federal legislation can be liberal or strict. The freedom to construe liberally or strictly is the freedom to create or avoid constitutional conflicts.

The significance of the interpretation process can be better appreciated by an examination of the majority and dissenting opinions in *Wissner v. Wissner.* In *Wissner,* a serviceman’s widow claimed one-half ownership of the proceeds of his National Service Life Insurance policy. Prior to his death, the serviceman had designated his parents as beneficiaries. Under California law, insurance proceeds are considered community property if the policy is purchased with community property. The California court of appeal found that the policy

24. *Id.* at 644.
27. *See supra* notes 19-20 & accompanying text.
29. *See infra* text accompanying notes 30-49.
31. *Id.* at 657.
32. *Id.*
33. Community property law “proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution’. . . . Community property includes the property earned by either spouse during the union, as well as that given to both during the marriage. . . . In community property States, ownership turns on the method and timing of acquisition, while the traditional view in common-law States is that ownership depends on title.” Hisquierdo v. Hisquierdo, 439 U.S. 572, 577-78 (1979) (quoting Meyer v. Kinzer, 12 Cal. 247, 251 (1859)) (footnotes omitted).
34. *Wissner,* 338 U.S. at 657-58. Although under California law the wife’s right to a
was purchased with community property, and allowed the widow's claim.

In a 5-3 decision, the Supreme Court held that the provisions of the National Service Life Insurance Act of 1940 preempted the widow's state law claim. Under the Act, each insured has "the right to designate the beneficiary" of the policy, and payments therefrom are "exempt from the claims of creditors" and not subject to "attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." Thus, the majority concluded that "Congress [had] spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." The three dissenting Justices, disagreeing with the majority's interpretation of the relevant federal statutes, wrote that "the right to designate [the] beneficiary" did not foreclose the former wife's claim as part owner of the policy because "the wife [made] no claim to rights as a beneficiary." The dissent further concluded that the provision exempting the proceeds from the claims of creditors did not preempt the wife's state claim. "Creditor," as used in the federal statute, meant one who attempted to reach the fund on an independent claim. The dissenters reasoned that the federal statute presupposed that the beneficiary was the undisputed owner of the insurance proceeds. Thus, the wife's claim as a part owner did not conflict with the federal statute so as to warrant preemption.

portion of the insurance proceeds necessarily followed from a finding that the serviceman's policy was purchased with community property funds, the Court found it "unnecessary to decide whether California is entitled to call army pay community property." Id. at 657 n.2. See generally Davis, The Case of the Missing Community Property, 5 Sw. L.J. 1 (1951).

35. The policy had been purchased with the husband's military pay while he was married. Wissner, 338 U.S. at 657. See supra note 33.
38. 338 U.S. at 658-61.
41. Justice Clark joined by Chief Justice Vinson and Justices Reed, Black and Burton.
42. 338 U.S. at 658.
43. Justice Minton joined by Justices Frankfurter and Jackson.
44. 338 U.S. at 662-63 (Minton, J., dissenting).
45. Id. at 663.
46. Id. at 663-64.
47. Id. at 662.
48. Id.
49. Id. at 662-63.
[Wissner] demonstrates the Court’s traditional willingness to apply preemption doctrine to reconcilable state regulation. The dissenting Justices found preemption inapplicable because they narrowly construed the scope of the federal legislation. Conversely, the majority’s liberal statutory interpretation precluded an otherwise valid application of state community property law from dividing a federally related marital asset.

The process of statutory construction illustrated in [Wissner] is only the first step in the Court’s conflict/interference preemption analysis. The Court must also determine whether the relationship between the federal and state statutes warrants invoking the supremacy clause.50

The requisite preemptive relationship can take two forms. First, federal and state law can “conflict” so as to be “irreconcilable.”51 Such a relationship would exist, for example, where state law mandates conduct which federal law proscribes.52 State law in this case would stand as a complete “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”53

State and federal laws, however, are rarely irreconcilable. Thus, much depends on statutory construction in the first instance. The reasoning of the dissenters in [Wissner], for example, illustrates the process of statutory reconciliation at work. True conflict preemption disputes are seldom encountered.54 Instead, the Court encounters preemptive relationships spanning the continuum from irreconcilability to irrelevance. Many cases lie somewhere in between. These are the so-called “interference” cases.55 They involve state laws which inhibit rather

50. See supra notes 23-25 & accompanying text.

51. There is little agreement among commentators as to which labels most accurately describe the preemptive relationship. One commentator divides the nomenclature of conflict/interference case law as follows: 1) conflict, irreconcilability, contrary to, violation; and 2) interference, difference, inconsistency, curtailment. Hirsch, supra note 19, at 526. Another commentator divides conflict/interference preemption into two different classifications: 1) inconsistency conflicts; and 2) obstacle conflicts. Wiggins, supra note 5, at 42-44. The term “irreconcilable” is utilized in this Comment to describe conflict/interference preemption disputes in which the only reasonable interpretation of the relevant state and federal laws leads to the conclusion that the primary purpose of the federal law is completely defeated by the existence of the state law.

52. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143 (1963) (“That would be the situation here if, for example, the federal orders forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the State any avocado measuring less than 8% oil content.”).

53. See supra note 29 & accompanying text.

54. “[C]ases of explicit conflict are rare. Far more frequently, the Court must imply a conflict . . . .” Wiggins, supra note 5, at 43.

55. The term “interference” is utilized in this Comment to describe conflict/interference preemption disputes in which a reasonable interpretation of the relevant state and federal laws may leave the primary objective of the federal law substantially unhindered by the continued existence of the state law. See supra note 51.
than prevent "the accomplishment and execution of the full purposes and objectives of Congress." Typically, orthodox preemption analysis must be used to determine the validity of state laws which are merely "inconsistent" as opposed to "irreconcilable" with federal legislation.57

*Free v. Bland*58 exemplifies the use of orthodox preemption analysis to invalidate a state marital property law which "interferes" with the purposes and objectives of federal law. *Free* illustrates that while the preemptive relationship may be characterized as "interference", as opposed to "irreconcilable", the obligation to invoke federal supremacy does not vary under orthodox preemption doctrine.

In *Free*, the husband purchased United States Savings Bonds issued to "Mr. or Mrs. Free."59 Treasury regulations governing bonds issued in that form provide that a surviving co-owner will be "recognized as the sole and absolute owner."60 After the death of Mrs. Free, her son claimed part ownership in the bonds pursuant to Texas community property law.61 The Texas courts ultimately awarded full title to the bonds to Mr. Free but ordered that he reimburse the son for one-half the value of the bonds.62

A unanimous Supreme Court concluded that application of Texas community property law frustrated the purpose and objective of the federal borrowing scheme.63 First, the Court found that the Treasury regulations in question were promulgated under the federal borrowing power and were therefore valid.64 Second, the Court held that the legislative history clearly indicated that the purpose of the regulations was "to establish the right of survivorship regardless of local state law."65 Because Congress had sought to regulate the right of survivorship, the state court's reimbursement order could not be saved by the award of full title to Mr. Free.66 The Treasury chose the survivorship provision as an inducement to attract bond purchasers.67 The reimbursement
order would have had the practical effect of eliminating this inducement. Thus, "the State [had] interfered directly with a legitimate exercise of the power of the Federal Government to borrow money." Free demonstrates that the distinction between "irreconcilability" and "interference" may not be significant for purposes of invoking pre-emption. There may be, however, some significance in the nature of the "conflict" itself. The Court appears unwilling to invoke preemption on a showing that interference is merely possible. Just as statutory construction in an orthodox preemption analysis can be liberal or strict, the requisite conflict or interference can be actual or potential. Moreover, just as strict construction may prevent preemption, so too may an actual conflict requirement render resort to federal supremacy unnecessary.

Wissner and Free demonstrate the use of orthodox preemption analysis to determine the validity of state marital property laws in the face of related federal legislation. They showcase the Court's conflict preemption methodology: 1) the liberal or strict construction of the objectives and scope of federal law along with a corresponding determination as to the operation of state law; and 2) the determination

68. Id.
69. Id. An important exception to federal preemption of state marital property law is acknowledged in Free. "[R]elief would be available in a case where the circumstances manifest fraud or a breach of trust tantamount thereto on the part of a husband while acting in his capacity as manager of the general community property." Id. at 670.
70. In Free, the state court attempted to avoid the rigors of supremacy clause scrutiny by complying with the express provisions of federal law. Indeed, the state court's award of full title to the co-owner, on its face, satisfied Treasury regulations providing that a designated "co-owner . . . be recognized as the sole and absolute owner" of the bonds. See supra notes 59-60 & accompanying text. The state court's reimbursement order, however, interfered with the federal objective of inducing the purchase of savings bonds. See supra notes 67-70 & accompanying text. This interference was enough, under orthodox preemption analysis, to invoke the supremacy clause. See supra notes 54-57 & accompanying text.
71. In Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978), a preemption challenge was brought against a Maryland statute which required producers or refiners to extend "voluntary allowances" to all retail service stations they supplied in the state. "Voluntary allowances" were temporary price reductions granted by the suppliers to dealers facing local competitive price reductions by competing retailers. The oil companies contended that the state requirement should be preempted because it potentially conflicted with federal law prohibiting price discrimination. The Supreme Court rejected this contention stating that "hypothetical conflict is not sufficient to warrant pre-emption." Id. at 131.
72. Compare Savage v. Jones, 225 U.S. 501, 533 (1912) ("intent [to preempt] is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State") with San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959) ("to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes").
73. "With a bit of imagination, most lawyers and judges can create a hypothetical set of facts under which any two regulations touching the same general subject matter would conflict. . . . As the degree of unavoidable conflict required by the Court increases, it becomes more likely that state regulation will be tolerated." Wiggins, supra note 5, at 44.
whether state law actually or potentially prevents or hinders attainment of the objectives attributable to valid congressional action.

Wissner, Free, and three more recent Supreme Court decisions also demonstrate that orthodox preemption standards may be inappropriate where the challenged state law has been enacted to accomplish goals different from federal law. Where the objectives of the state law are unrelated to the objectives of federal law, as with state marital property law and regulation of federal benefits, it may be more likely that Congress has failed to assess the preemptive effect of the federal legislation in question. Thus, use of orthodox preemption doctrine in the preceding context may result in unintended, unnecessary, and undesirable shifts in the balance of federal and state regulatory power.

Contemporary Standards For Preemption of Reconcilable State Law

In Hisquierdo v. Hisquierdo the Court began to formulate a specific preemption standard to resolve disputes involving the effect of state marital property laws on federal benefit programs. Hisquierdo and its progeny demonstrate that it may be undesirable in many instances to invoke federal supremacy where the challenged state regulation has been undertaken to accomplish goals unrelated to those underlying particular federal laws.

The preemption issue in Hisquierdo arose after the California Supreme Court held that Railroad Retirement Act (Act) benefits were community property and thus divisible in a marriage dissolution proceeding. The Supreme Court, in a 7-2 decision, concluded that federal law prevailed over state law on the issue of ownership of pension benefits paid under the Act.

76. In contrast to orthodox preemption doctrine, the Court has recognized that a presumption favoring the validity of state law may be desirable in certain cases to avoid unintended and unnecessary disturbances in the balance of federal and state regulatory power. See infra note 109 & accompanying text.
77. Shifts in regulatory power may be undesirable where they further questionable federal interests at the expense of important state interests. See infra text accompanying notes 162-68.
82. 439 U.S. at 590.
The *Hisquierdo* Court began its preemption analysis with two observations. First, the Court noted:

On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted. . . . A mere conflict in words is not sufficient.\(^83\)

Second, the Court stated that "[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden."\(^84\) The Court then proceeded to frame a two-tier test for preemption in terms of 1) "whether the right as asserted conflicts with the express terms of federal law . . ." and 2) "whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition."\(^85\)

In applying the first tier of the *Hisquierdo* test the Court found several express conflicts between federal legislation governing pension benefits and applicable state community property law.\(^86\) One such conflict involved a federal anti-attachment provision common to many federal benefit schemes.\(^87\) The Court concluded that this anti-attachment provision was designed to ensure that pension benefits "actually reach the beneficiary."\(^88\) Thus, the pensioner's wife's marital property claim to a portion of the pensioner's retirement benefits conflicted with the express terms of federal law.

\(^83\) *Id.* at 581.

\(^84\) *Id.* (quoting United States v. Yazell, 382 U.S. 341, 352 (1966)). It should be recognized that *Yazell* did not involve either a conflict or occupation preemption challenge to state law. In *Yazell*, Mr. and Mrs. Yazell obtained disaster loans from the Small Business Administration. Upon default, the government attempted to execute a deficiency judgment against Mrs. Yazell's separate property. Texas law at the time of the loan provided that wives could not bind their separate property by contract unless the disability to contract had been removed by court decree. The disability had not been removed when Mr. and Mrs. Yazell signed for the loan. The issue before the Court, then, was "whether in connection with an individualized, negotiated contract, the Federal Government may obtain a preferred right which is not provided by statute or specific agency regulation, which was not a part of the bargain, and which requires overriding a state law dealing with the intensely local interests of family property and the protection (whether or not it is up-to-date or even welcome) of married women." 382 U.S. at 349 (emphasis added). The Court held that the federal interest in collecting the deficiency did not, in itself, override state law.

\(^85\) 439 U.S. at 583.

\(^86\) *Id.* at 583, 586-89.

\(^87\) 45 U.S.C. § 231m provides in part: "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever nor shall the payment thereof be anticipated . . . ."

\(^88\) 439 U.S. at 584.
The dissent more narrowly construed the relevant statutory language and concluded that state law should not be preempted. Referring to the anti-attachment provision, the dissent did not perceive an express conflict between federal law and the wife's community property claim. Federal law provided that "no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." Because the wife claimed to be a part owner in her husband's pension there could be no "garnishment" or "attachment" inconsistent with federal law as those terms govern remedies, not ownership rights. Similarly, "[a] determination that a particular asset [was] community property [was] clearly not an 'assignment' of that property from one spouse to another." Furthermore, the prohibition against "anticipation" was also reconcilable with a division of the pension as a community asset. A divorce decree ordering the transfer of other community assets to the wife as an offset for the value of her community property interest in the husband's pension has no impact upon the timing of such payments. An award of this nature is "not at all incompatible with the distribution system established by Congress."

Having determined the existence of an "express conflict", the Court examined whether the state law "sufficiently" injured the purposes and objectives of the federal legislation. "Sufficient injury", presumably, requires "major damage" to "clear and substantial" federal interests.

The Court was able to find the requisite injury using the second tier of its preemption test. The purposes of the Act were clear: 1) to provide older employees with an inducement to retire and 2) to assure rapid advancement for younger employees. It followed that "any automatic diminution" of pension benefits by assertion of a community property claim "discourag[ed] the divorced employee from retiring." California community property law provided the potential retiree with an additional incentive to remain employed "because the former spouse has no community property claim to salary earned after the

89. Id. at 591-603 (Justice Stewart joined by Justice Rehnquist).
90. Id. at 598-603.
92. 439 U.S. at 599 (Stewart, J., dissenting).
93. Id.
94. Id. at 600.
95. Id. at 600-03.
96. Id. at 601-03.
97. Id. at 602.
98. Id. at 581; see supra note 84.
100. Id. at 585.
marital community is dissolved.”

Hisquierdo established an unprecedented standard for preemption disputes involving state marital property law. In deciding to apply a different test, the Court may have been convinced that orthodox preemption standards alone were unsuitable to determine the validity of state regulation of marital property.

The first tier of the Hisquierdo preemption test involves a determination of “whether the right as asserted conflicts with the express terms of federal law.” State domestic property law will not be preempted unless Congress has “positively required by direct enactment” that state law be invalidated. This first tier effectively requires application of an orthodox “conflict” preemption methodology in determining whether state law stands as a full or partial obstacle to the accomplishment of federal objectives.

Whereas the first tier of the Hisquierdo test appears to be a mere restatement of orthodox preemption doctrine, the test’s second tier injury requirement is clearly original. Why is “major damage” to “clear and substantial” federal interests required? Would not a finding of “conflict”, “express” or otherwise, in the first tier of the test, automatically invoke the principle of federal supremacy as in the case of orthodox preemption analysis? Apparently, a small degree of “interference”, established in the first tier of the test, is not considered “sufficient” to preempt state marital property law. Thus, it follows that state marital property law causing only minimal interference with federal objectives should be tolerated.

The Hisquierdo Court did not clarify its reasons for establishing a new preemption test for disputes involving state marital property law. Although the “sufficient injury” requirement does not originate from preemption case law, the creation of a new test to avoid preemption is defensible on three grounds. First, the Court has rarely invoked preemption to invalidate state marital property law. Second, the Court in prior decisions has recognized a presumption against preemption

101. Id.
102. See infra notes 106-10 & accompanying text.
103. 439 U.S. at 583.
104. Id. at 581.
105. The “major damage” to a “clear and substantial” federal interest requirement is not recognized in any of the four preemption decisions prior to Hisquierdo involving state marital property law. See Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962); Wissner v. Wissner, 338 U.S. 655 (1950); McCune v. Essig, 199 U.S. 382 (1905).
106. See supra note 84.
when the state law regulates a matter of traditional state concern.\textsuperscript{108} This presumption, overcome only by an express congressional intent to preempt, "assur[es] that 'the federal-state balance' . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts."\textsuperscript{109} Finally, the Court may have been aware of the problems inherent in applying orthodox preemption principles in determining the validity of reconcilable state law, such as marital property law, enacted to accomplish goals unrelated to those underlying federal law. These problems are examined more closely later in this Comment.\textsuperscript{110}

The Hisquierdo Court, however, did not apply its new preemption test in a manner which supported the presumptive validity of state marital property law. In finding that state law was preempted, the Court did not signal a significant departure from orthodox preemption doctrine in state marital property law cases. For example, the Hisquierdo Justices disagreed concerning whether the federal anti-attachment provision conflicted with a community property division of federal pension benefits.\textsuperscript{111} A similar disagreement as to the proper method of statutory construction occurred in Wissner,\textsuperscript{112} where, in accordance with orthodox preemption doctrine, "conflict" was in the eye of the beholder. Moreover, as discussed below, the Hisquierdo Court loosely defined the meaning of "major damage" to "clear and substantial" federal interests in applying the unique "sufficient injury" component of the test.

Undoubtedly there were railroad employees whose post-divorce financial status would preclude them from retiring when first eligible. Whether this group of eligible retirees would have a "major" impact on personnel management goals is unclear.\textsuperscript{113} Furthermore, while the federal interest at stake may have been "clear", its "substantiality" was never documented.\textsuperscript{114} To conclude, without more, that a "substantial" federal interest exists in inducing railroad employees to retire is to con-


\textsuperscript{109} Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); see also Kesler v. Department of Public Safety, 369 U.S. 153 (1962) (strictly construing the purposes of discharge provisions of federal bankruptcy law to avoid preemption of State's exercise of policy power requiring the suspension of a judgment debtor's driver's license until any outstanding automobile tort judgment was satisfied). But see Perez v. Campbell, 402 U.S. 637 (1971) (constitutional requirement of uniformity in the authorization to Congress to enact bankruptcy legislation required construction of the purposes of federal bankruptcy law such that preemption was found on facts similar to Kesler). See infra note 148 & accompanying text.

\textsuperscript{110} See infra notes 162-68 & accompanying text.

\textsuperscript{111} See supra notes 86-97 & accompanying text.

\textsuperscript{112} See supra notes 30-49 & accompanying text.

\textsuperscript{113} See infra note 115.

\textsuperscript{114} The Court in Hisquierdo does not cite any empirical evidence regarding the costs or benefits which would inure to the federal government as a result of the prompt retirement of railroad employees.
cede that virtually any federal interest is substantial. 115

Hisquierdo, then, illustrates that the subjective element inherent in orthodox preemption analysis 116 remains. The dissent apparently construed the new preemption requirements as mandating both strict construction in dealing with the relevant statutes and a showing of reasonable injury to "demonstrable federal policies." 117 The majority's interpretation of the new requirements, however, does not signal a shift from orthodox preemption analysis.

Two years after Hisquierdo, in McCarty v. McCarty, 118 the Court held that the supremacy clause precluded application of California community property law to divide military pension benefits in a marriage dissolution proceeding. The Court first concluded that several provisions of federal law, identical to some analyzed in Hisquierdo, "conflicted" with state marital property law. 119 The Court then found that federal interests in certain personnel management goals were "sufficiently injured" by application of California community property principles to the federal military retirement scheme. 120 Thus, the Court

115. Without any empirical evidence as to 1) the numbers of eligible retirees who might defer retirement as a result of a community property division of their pension or 2) the potential federal cost/benefit resulting from prompt, as opposed to delayed, retirement, any determination as to the "substantiality" of the federal interest implicated in Hisquierdo was purely conjecture. In the absence of a required showing of "substantiality," based on empirical or related evidence, any reasonably identifiable federal interest may be transformed into a "substantial" federal interest. In fact, the Court casts considerable doubt on whether there could be "major damage" to "clear and substantial" federal interests on the facts in Hisquierdo. As a result of the rapidly decreasing number of individuals employed in the railroad industry and the ever increasing number of pension beneficiaries, it is questionable whether a substantial federal interest in encouraging retirement to create job opportunities still exists if indeed it existed at the time Hisquierdo was decided. See 439 U.S. at 585 n.18.
116. See supra text accompanying notes 28-49.
117. 439 U.S. at 595 (Stewart, J., dissenting).
119. The Court found several instances in which state law conflicted with the express terms of federal law. Under 10 U.S.C. § 2771 (1976), for example, a serviceman has the right to direct, upon death, receipt of unpaid arrearages in retirement pay. The majority concluded that this unfettered right to dispose of arrearages conflicted with a spouse's community property interest in the member spouse's retirement benefits. 453 U.S. at 225-26. The dissent argued that such conflict established only that unpaid arrearages could not be considered community property, noting that "[a] provision permitting a serviceman to tell the Government where to mail his last paycheck after his death hardly supports the inference of a congressional intent to pre-empt state law governing disposition of military retired pay in general." Id. at 244 (Rehnquist, J., dissenting).
As it had done two years earlier in Hisquierdo, the Court found a federal anti-attachment provision inconsistent with a community property division of pension benefits. Id. at 228-30. The dissent once again refused to deviate from the plain language of the federal law. Since the service member's spouse was not seeking to "attach" her husband's retirement benefits, any "negative implication" of preemption from the anti-attachment provision was not directly relevant. Id. at 246 (Rehnquist, J., dissenting).
120. In applying the second tier of the Hisquierdo test, the majority examined the twin
found that preemption was mandated through application of the *Hisquierdo* test.

Though *Hisquierdo* did not radically depart from orthodox preemption analysis, its preemption requirements of "express conflict" and "sufficient injury" potentially restricted the extension of federal supremacy in the area of state marital property law. *McCarty*, however, interpreted the two *Hisquierdo* preemption requirements very liberally. In determining the existence of an "express conflict", the Court relied almost entirely on implied inconsistencies between state marital property law and federal legislation. Moreover, the Court based its holding on a doubtful showing of injury to federal objectives. By speculating as to the nature and extent of injury to federal objectives, the Court virtually eliminated the one aspect of the *Hisquierdo* preemption test that potentially distinguished it from orthodox preemption doctrine.

goals of the military retirement program and concluded that "the community property division of retired pay has the potential to frustrate each of [them]." *Id.* at 233 (emphasis added).

First, "Congress had enacted a military retirement system . . . to provide for the retired service member." *Id.* at 232. Division of retired pay would injure federal objectives by diminishing congressionally determined benefit levels. *Id.* at 233.

Second, the military retirement system was aimed at providing inducements for enlistment and reenlistment while simultaneously encouraging older members to retire. *Id.* at 235. A community property division of retirement benefits injured the federal objective of encouraging enlistment and reenlistment because potential recruits, faced with the possibility of being involuntarily stationéd in a community property state, presumably would hesitate to enlist or reenlist. *Id.* at 234-35. Furthermore, a community property division of retirement benefits injured the federal objective of encouraging older servicemen to retire. Because marital assets earned after separation under state law are deemed a spouse's separate property, a serviceman would have an incentive to continue active service whenever his retirement pay had been subjected to division pursuant to state community property law. *Id.* at 235.

121. The dissenting Justices in *McCarty* were not convinced that state marital property law and federal legislation were irreconcilable. See supra note 119.

122. As previously stated, military pension benefits, in addition to providing retirement income, were designed to encourage enlistments while simultaneously providing older servicemen with an incentive to retire. See supra note 120. It is certainly arguable, however, whether a significant number of servicemen and potential enlistees consider, in advance, the possibility of divorce and the effects which various states' laws might have on their military pensions. The absence of a sizable number of similarly knowledgeable servicemen would commensurately reduce the disincentive to enlist and reenlist resulting from the continued application of state marital property law.

More importantly, it is unclear whether the military retirement scheme's personnel management goals constitute "substantial federal interests" in the first instance. According to the *McCarty* Court, Congress was aware that the retirement scheme had been ineffective in accomplishing personnel management goals. 453 U.S. at 234 n.26. Consequently, if important goals require effective measures for their attainment, then the personnel management objectives were admittedly insignificant.
In *Ridgway v. Ridgway*, the Court exhibited a willingness to retreat even further from the unique *Hisquierdo* preemption standard. In fact, the results reached in *Ridgway* illustrate that the *Hisquierdo* standard can now be used to uphold unsubstantiated, and possibly insignificant, federal objectives at the expense of important state interests.

In *Ridgway* a serviceman, pursuant to a divorce settlement, agreed to maintain his children as the beneficiaries of his Servicemen’s Group Life Insurance policy. The settlement was incorporated in the final divorce decree by the state court. Four months later, the serviceman remarried and changed the policy so that the proceeds would be paid to his new wife. Nine months later the serviceman died.

In a suit between the serviceman’s widow and his children, the state court imposed a constructive trust on the proceeds of the policy for the benefit of the children. The state court concluded that the federal statute did “not reflect any federal interest in permitting a serviceman to evade the responsibility to provide for his minor children imposed both by virtue of his voluntary agreement and by the express provision of a valid state court decree.” The Supreme Court, however, in a 5-3 decision, held that the provisions of the Servicemen’s Group Life Insurance Act preempted the imposition of the constructive trust and the state court decree on which it was based.

Significantly, Justice Blackmun, writing for the majority, did not preface his analysis of the supremacy issue by restating the two-tier *Hisquierdo* standard. Instead, he began by stating that “[w]hile state family and family-property law must do ‘major damage’ to ‘clear and substantial’ federal interests before . . . state law be overridden . . . the relative importance to the State of its own law is not material when there is a conflict with a valid federal law . . . .” This statement may have signaled a total retreat from the two-tier *Hisquierdo* standard in favor of an orthodox preemption standard.

*Hisquierdo* had established two separate preemption requirements recognizing the presumptive validity of state laws which regulate an area of traditional state concern, such as marital property. *Ridgway*, however, did not explicitly acknowledge the two separate *Hisquierdo* preemption requirements. Instead, the Court simply stated that the existence of perceived “conflict” will warrant preemption. This approach is identical to the orthodox approach taken by the Court earlier.

---

124. *Id.* at 48-49.
125. *Id.* at 50.
126. *Id.* at 53-54.
127. *Id.* at 54 (quoting *Hisquierdo*, 439 U.S. at 581, and *Free v. Bland*, 369 U.S. 663, 669 (1962)).
128. *Id.* at 55.
in resolving state marital property preemption disputes.\textsuperscript{129}

The \textit{Ridgeway} Court did not explicitly disapprove the \textit{Hisquierdo} approach. Rather, the Court cited the "sufficient injury" \textit{Hisquierdo} requirement,\textsuperscript{130} and then proceeded to resolve the preemption issues as if it were utilizing the two-tier \textit{Hisquierdo} standard. An examination of the process by which the Court purportedly satisfied both \textit{Hisquierdo} requirements, however, illustrates that the Burger Court is now willing to invoke federal preemption on the basis of orthodox preemption doctrine alone.\textsuperscript{131} As will be discussed later in this Comment, orthodox preemption analysis may be inappropriate to resolve preemption disputes involving state marital property law.

The Serviceman's Group Life Insurance Act of 1965 (SGLIA)\textsuperscript{132} at issue in \textit{Ridgway} was the Vietnam era successor to the National Service Life Insurance Act of 1940 (NSLIA).\textsuperscript{133} Previously, the \textit{Wissner} Court had utilized orthodox preemption methodology to find that the NSLIA preempted state community property law on the issue of ownership of insurance proceeds.\textsuperscript{134} It is not surprising then that the Court in \textit{Ridgway} looked to \textit{Wissner} for guidance in resolving the supremacy issue.\textsuperscript{135}

First, \textit{Ridgway}, like \textit{Wissner}, involved a federal statute granting the insured the right to designate and change the beneficiary of insurance proceeds.\textsuperscript{136} It followed that "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other."\textsuperscript{137} Thus, the state court's treatment of the insurance

\textsuperscript{129} The Court in \textit{Ridgway} cited \textit{Free v. Bland}, 369 U.S. 663, 666 (1962) for the statement that the existence of "conflict" invokes preemption despite the presence of important state interests in the challenged regulation. 454 U.S. at 54-55. In \textit{Free}, the Court applied orthodox preemption doctrine to resolve the preemption dispute presented in that case. \textit{See supra} text accompanying notes 58-73.

\textsuperscript{130} 454 U.S. at 54.

\textsuperscript{131} \textit{See infra} text accompanying notes 132-45.


\textsuperscript{134} \textit{See supra} text accompanying notes 30-49.

\textsuperscript{135} 454 U.S. at 55 ("The present case, we feel, is controlled by \textit{Wissner.").

\textsuperscript{136} \textit{Id.} at 55-56. The two statutes, however, are by no means identical. The statute at issue in \textit{Ridgway} reads as follows: "Any amount of insurance . . . in force on any member . . . on the date of his death shall be paid . . . to the beneficiary or beneficiaries as the member . . . may have designated . . . " 38 U.S.C. § 770(a) (1976). Contrast § 770(a) with the provision at issue in \textit{Wissner} which reads as follows: "The insured shall have the right to designate the beneficiary or beneficiaries of the insurance . . . within [certain specified] classes of individuals . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries of such insurance without [their] consent . . . " National Service Life Insurance Act of 1940, ch. 757, § 601(g), 54 Stat. 1008, 1010 (1940) (current version at 38 U.S.C. § 717(a) (1976)). Section 601(g) is clearly a stronger statement of a serviceman's right to designate the beneficiary of insurance proceeds than is § 770(a).

\textsuperscript{137} 454 U.S. at 56 (quoting \textit{Wissner v. Wissner}, 338 U.S. 655, 658 (1950)).
proceeds was "inconsistent" with this congressional directive.

Second, both cases involved "identical" anti-attachment clauses.\textsuperscript{138} Because federal law prohibited "attachment, levy or seizure" of insurance payments, "[a]ny diversion of the proceeds . . . by means of a court-imposed constructive trust would therefore operate as a forbidden 'seizure' of those proceeds."\textsuperscript{139}

These apparent similarities make the Court's use of \textit{Wissner} in meeting the "express conflict" component of the \textit{Hisquierdo} standard defensible. The "express conflict" preemption requirement had been satisfied in \textit{Hisquierdo} and \textit{McCarty} by a process resembling orthodox preemption analysis.\textsuperscript{140} Because \textit{Wissner} had been decided primarily on orthodox "conflict" preemption grounds,\textsuperscript{141} the Court's reliance on \textit{Wissner} to determine the existence of "express conflict" in \textit{Ridgeway} was at least consistent with the approaches taken in \textit{Hisquierdo} and \textit{McCarty}.

The Court, however, also relied on \textit{Wissner} to satisfy the "sufficient injury" component of the \textit{Hisquierdo} standard.\textsuperscript{142} This reliance was much less defensible. The \textit{Wissner} Court, in holding that federal legislation preempted state marital property law, applied an orthodox preemption standard.\textsuperscript{143} In contrast, the "sufficient injury" requirement was first introduced in \textit{Hisquierdo} some 29 years after \textit{Wissner}.\textsuperscript{144} \textit{Hisquierdo}, in requiring "major damage" to "clear and substantial" federal interests, apparently modified orthodox preemption doctrine to reflect the presumptive validity of state regulation of marital property.\textsuperscript{145}

Further, while \textit{McCarty} may have modified the standard to require only "potential damage" to "identifiable federal objectives," the Court there still had treated the "injury" requirement as meriting independent analysis.\textsuperscript{146} \textit{Wissner}, however, neither acknowledged nor decided the issue of whether state marital property law caused "major

\begin{footnotes}
\item 138. \textit{Id.} at 60.
\item 139. \textit{Id.}
\item 140. \textit{See supra} notes 111-17, 119-22 & accompanying text.
\item 141. The \textit{Ridgway} Court stated that \textit{Wissner} invoked the anti-attachment clause "as an independent ground for the result reached in that case." 454 U.S. at 60. This "independent ground," however, was simply an additional basis for finding "interference" such that state marital property law could be invalidated under orthodox preemption analysis. \textit{See supra} text accompanying notes 37-50.
\item 142. "Because the Court in \textit{Wissner} . . . relied on similar provisions of the National Service Life Insurance Act of 1940, 54 Stat. 1008, in rejecting a claim to insurance proceeds paid under that statute, the Court today concludes that \textit{Wissner} is controlling and that it must reach a similar result." 454 U.S. at 72 (Stevens, J., dissenting).
\item 143. \textit{See supra} note 141 & accompanying text.
\item 144. \textit{See supra} notes 105-06 & accompanying text.
\item 145. \textit{See supra} notes 106-10 & accompanying text.
\item 146. \textit{See supra} note 120 & accompanying text.
\end{footnotes}
"damage" to "clear and substantial" federal interests. Wissner applied only orthodox preemption analysis to determine the validity of state law. Thus, the Court's summary reliance on Wissner to satisfy the "sufficient injury" requirement in Ridgway indicated its willingness to substitute orthodox preemption doctrine for the two-tier Hisquierdo preemption standard.

There is reason, however, to question the Burger Court's retreat to orthodox preemption standards in the area of state marital property law. The use of orthodox preemption doctrine to resolve preemption disputes involving state marital property law can result in unintended shifts in state and federal regulatory power. This potential for misapplication of federal supremacy is evidenced by recent congressional action reversing the holding in McCarty. Apparently, Congress never intended that the federal military retirement scheme preempt state marital property laws.

Hisquierdo can be interpreted as the Court's attempt to avoid unintended preemption by devising an approach favoring the validity of state marital property law in the face of reasonably reconcilable federal legislation. If state law caused "major damage" to "clear and substantial" federal interests then it would be much more likely that Congress, by its action, intended to displace arguably conflicting state law.

Mistaken interpretation of congressional intent, however, is merely symptomatic of the problem of applying orthodox preemption doctrine to determine the validity of reconcilable state regulation enacted to accomplish objectives different from those underlying federal law. When applying orthodox preemption analysis, "the relative importance to the State of its own law is not material when there is a conflict with a valid federal law." It is this refusal to balance state and federal interests which makes orthodox preemption doctrine unsuitable to resolve preemption disputes between reconcilable state law, such as state marital property law, and federal law aimed at different objectives.

The importance of maintaining the presumptive validity of state marital property law, either through a "sufficient injury" requirement or by balancing state and federal interests, is made evident in Justice Stevens' dissenting opinion in Ridgway. Justice Stevens separately identified the precise federal interests involved in both Wissner and Ridgway. He concluded that neither the "interest in protecting feder-

147. See supra text accompanying notes 30-50.
149. See supra text accompanying note 109.
150. Ridgway v. Ridgway, 454 U.S. at 54 (citing Free v. Bland, 369 U.S. at 666). Free employs orthodox preemption analysis. See supra text accompanying notes 58-76. Therefore, the Court's express reluctance to acknowledge the important state interests at stake in Ridgway was nothing more than a reiteration of orthodox preemption ideology.
ally supported benefits from claims of the recipient's commercial creditors" nor the "interest . . . in permitting a federal serviceman to designate the beneficiary of his insurance policy" was sufficiently "compromised" by the state court's ruling.\textsuperscript{151}

Justice Stevens further noted that the "federal interest incorporated within exemption statutes is an interest in preventing federally supported benefits from satisfying claims of commercial creditors."\textsuperscript{152} \textit{Wissner}, however, did no more than place community property claims "in the business category."\textsuperscript{153} \textit{Ridgway} involved a claim based on a "familial obligation" which may have been "precisely the type of claim for which the federal benefit was intended."\textsuperscript{154} Relying on the "family" versus "business" distinction, Justice Stevens was unconvinced "that Congress intended . . . to bar a minor child's claim for support."\textsuperscript{155}

Justice Stevens also questioned whether there was a significant federal interest in permitting servicemen to designate insurance beneficiaries. The Court in \textit{Wissner} had "speculated" that this right to direct insurance proceeds was designed to "enhance the morale of the serviceman."\textsuperscript{156} Surely military "morale" did not hinge on the serviceman's ability to evade freely negotiated support settlements.\textsuperscript{157} Most importantly, however, a serious potential for inequity lurked beneath the majority's rationale:

[A] loan shark, a camp follower, or a total stranger designated as beneficiary would have priority over claims of dependent family members, even though those claims were incorporated in a voluntary settlement agreement and an express judicial decree . . . . No federal interest justifies such an absolute and unqualified priority for the designated beneficiary.\textsuperscript{158}

This conclusion on the part of Justice Stevens exposes the inequity resulting from the use of orthodox preemption analysis to determine the validity of reconcilable state regulation undertaken to accomplish objectives different from those underlying federal law. Conflicting federal legislation can be enacted without any consideration of its preemptive capabilities. Congress may not be cognizant that largely unrelated state law may be completely invalidated by the routine enactment of federal legislation.\textsuperscript{159} The "all-or-nothing" nature of orthodox pre-

\textsuperscript{151} 454 U.S. at 72-73 (Stevens, J., dissenting).
\textsuperscript{152} \textit{Id.} at 78-79.
\textsuperscript{153} \textit{Id.} at 77.
\textsuperscript{154} \textit{Id.} at 79.
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.} at 80 (quoting \textit{Wissner v. Wissner}, 388 U.S. 655, 660 (1950)).
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.} at 81.
\textsuperscript{159} This apparently occurred with respect to the federal legislation at issue in \textit{McCarty}. 
emption doctrine can, therefore, result in unintended shifts in the balance of regulatory power within our federal system.\textsuperscript{160}

The \textit{Hisquierdo} test, with its “sufficient injury” requirement, provides some assurance that congressional intent will not be misread.\textsuperscript{161} \textit{Ridgway}, however, demonstrates that the Court is unwilling to apply the “sufficient injury” requirement in a manner supporting the validity of state law. Unfortunately, the problems created by the Burger Court’s shift to orthodox preemption standards as a basis for determining the validity of state marital property law remain. Consequently, the following discussion examines an alternative standard designed to meet the problems inherent in resolving preemption disputes between state and unrelated federal legislation.

**Balancing State and Federal Interests To Determine Whether Reconcilable State Law is Preempted By Unrelated Federal Law**

As previously discussed, sound reasons exist for doubting the Court’s wisdom with respect to the treatment of alleged conflicts between congressional action and state regulation of marital property. Such disputes involve laws aimed at largely unrelated objectives.\textsuperscript{162} When the aims of two regulatory schemes are different it can be expected that the policy considerations underlying each scheme will also be different. Ascertaining congressional intent with respect to preemption can be very imprecise in cases where it is likely that Congress failed to consider the policy considerations supporting state law. Invalidating unrelated state law on the basis of orthodox preemption doctrine, with its sole focus on the existence of possible interference with federal objectives, gives rise to the possibility that important policy considerations underlying state law will be entirely ignored.

\textit{Ridgway} illustrates the type of policy considerations which may go unweighed by an application of orthodox preemption doctrine to resolve preemption disputes involving state marital property law. For instance, the majority in \textit{Ridgway} interpreted federal law as “directing that the proceeds [of military insurance] belong to the named beneficiary and no other.”\textsuperscript{163} The federal objective in establishing a service-

\begin{footnotes}
\item[160.] See supra notes 75-77, 148 & accompanying text. See also Hirsch, supra note 19, at 542-48.
\item[161.] See supra note 120 & accompanying text.
\item[162.] For example, in \textit{Ridgway}, the Court found that the federal law was designed to “enhance the morale of servicemen.” See supra text accompanying notes 156-58. State marital property laws are designed to effectuate an equitable property division upon divorce. See infra note 166.
\item[163.] \textit{Ridgway} v. \textit{Ridgway}, 454 U.S. at 56 (quoting \textit{Wissner v. Wissner}, 338 U.S. 655, 658 (1950)).
\end{footnotes}
man's right to designate insurance beneficiaries apparently was to "enhance the morale of the serviceman." If the purpose of particular congressional action is to devise methods which will enhance the morale of servicemen, then presumably Congress has weighed certain policy considerations in deciding that the creation of a right to designate freely the recipient of insurance proceeds is the most desirable method by which to achieve its goal. With respect to the federal law at issue in Ridgway, an important policy consideration was to solve existing flaws in the military benefits program which failed to allow a serviceman to compensate persons to whom he may have felt he owed some survivorship protection. This is typical of a policy consideration which would be weighed against other policy considerations, such as the cost of administering the program, when deciding whether to establish a right to designate insurance beneficiaries for the purpose of enhancing military morale.

In contrast, the state regulation at issue in Ridgway involved completely different policy considerations. Most importantly, state laws designed to enforce marital support obligations presumably take into account the ability of the parties to earn income, the standard of living to which the parties are accustomed, and the ability of the state to provide the necessary income in lieu of support from other sources. It is doubtful whether Congress considered any of these policy considerations when passing legislation designed to enhance the morale of servicemen. Under orthodox preemption doctrine, a state marital property law which "conflicts" with Congress' attempt to enhance the morale of servicemen would be invalidated without either the Court or Congress having first considered the policy considerations underlying the state regulation.

In contrast to the orthodox preemption approach utilized in Ridgway, the Court, in determining whether a state marital property law should be preempted, could balance the relevant state and federal interests involved whenever the state law is reasonably reconcilable with federal law. Specifically, the Court could balance the state's interest in regulating the subject matter at issue with the federal interest in re-

164. Id. at 80 (Stevens, J., dissenting).
166. "[T]he policy of community property was to establish equality between husband and wife in the area of property rights in marital property acquisitions, in recognition of and to give effect to the fundamental equality between the spouses based on the separate identity of each spouse and the actual contribution that each made to the success of the marriage." W. DE Funiak & M. Vaughn, Principles of Community Property 24 (2nd ed. 1971).
maining free from the potential interference posed by the particular state regulation. Again, using *Ridgway* as an example, it can be seen that this balancing approach can overcome the problems which result from the application of orthodox preemption doctrine to resolve disputes involving state marital property law.

In determining the weight to be given the state’s interest in imposing a constructive trust on the insurance proceeds for the benefit of the serviceman’s children, the Court in *Ridgway* could have taken into account such policy considerations as the ability of similarly situated parties to earn a living and the ability of the state to provide essential income should the need arise. If the state’s interests, based on these and other similar considerations, did not outweigh the federal interest in the improvement of military morale through the establishment of absolute beneficiary designation rights, the Court should have concluded that state law was preempted. If, however, the state interest did outweigh the federal interest, the Court could have reasonably concluded that Congress did not intend that state law be preempted. The Court could have then adopted the reasonable interpretation of federal law which resulted in reconciliation between the state and federal statutory schemes. Under this approach, where state and federal laws are enacted with unrelated objectives in mind, there would be adequate assurances that important policy considerations have been weighed before state law is preempted.

It should be noted that the preemption standard developed by the Court in *Hisquierdo*, and subsequently applied in *McCarty* and *Ridgway*, cannot adequately assure that important policy considerations will be examined when state marital property law is preempted. The Court’s failure to require “major damage” to “clear and substantial” federal interests before state law is overridden has removed the mechanism by which policy considerations may be assessed under the *Hisquierdo* standard. As was demonstrated in the examination of the respective positions of the majority and dissenting Justices in *Hisquierdo*, *McCarty* and *Ridgway*, preemption of state marital property law by largely unrelated federal law rests solely on a process of statutory interpretation. Though the state and federal laws at issue in those cases were reconcilable, the Court was compelled to invoke the supremacy clause under the mandate of orthodox preemption doctrine. Thus, until the Court undertakes to balance the state’s interest in regulating the subject matter at issue with the federal interest in remaining free from the potential interference posed by reasonably reconcilable state regulation, important policy considerations will go unweighed in the determination of whether state regulation should be invalidated.

169. *See supra* text accompanying note 149.
Conclusion

There can be no doubt that state law which is completely irreconcilable with valid federal legislation is preempted pursuant to the supremacy clause. Preemption disputes involving state marital property law, however, fall, for the most part, outside the area of irreconcilability.

The issue before the Court, then, is whether the process of statutory reconciliation should be undertaken. The Court, however, appears unwilling to recognize a presumption favoring the validity of reconcilable state law such as state marital property law. Instead, under orthodox preemption doctrine, preemption will be mandated whenever state law conflicts with the implied terms of federal law or potentially inhibits the attainment of some identifiable statutory goal.

Unfortunately, the application of orthodox preemption doctrine to resolve preemption disputes between federal law and unrelated yet reconcilable state law may lead to unintended shifts in the balance of federal and state regulatory power. Moreover, the application of orthodox preemption doctrine to these disputes gives rise to the possibility that important policy considerations will be overlooked in deciding whether state marital property law should be invalidated.

Fortunately, the Court need not utilize orthodox preemption analysis, or its effective equivalent, the two-tier *Hisquierdo* standard, in deciding whether reasonably reconcilable state marital property law is preempted by largely unrelated federal legislation. An appropriate solution would be to balance the state’s interest in regulating the common subject matter with the federal interest in remaining free from the potential interference which upholding state marital property law would entail. Until such an approach is adopted, however, the Court will continue to make important decisions regarding the relative spheres of state and federal regulation without adequate assurances that important policy considerations have been weighed in the line-drawing process.

*James A. Riddle*

170. *See supra* text accompanying notes 140-47.
171. *See supra* notes 121-27 & accompanying text.

* Member, Third Year Class.