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## STATE CONTROL OF SEDITION: THE SMITH ACT AS THE SUPREME LAW OF THE LAND

ALAN REEVE HUNT\*

### I

Steve Nelson, an admitted Communist Party leader in western Pennsylvania, was indicted by an Allegheny County grand jury on October 17, 1950.<sup>1</sup> The indictment contained twelve counts charging separate violations of the Pennsylvania statute which defines the crime of sedition and makes it a felony.<sup>2</sup> At the close of Nelson's trial a jury found him guilty as charged on all counts.<sup>3</sup> The defense filed motions in arrest of judgment and for a new trial. The Court of Quarter Sessions of Allegheny County in a written decision denied these motions and sustained the verdict of the jury.<sup>4</sup> It sentenced Nelson to the maximum penalties prescribed by the

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1. Transcript of Record, Vol. I, pp. 9-20, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). The N.Y. Times, Oct. 14, 1956, § E, p. 2, col. 6, carried the following brief biography:

"Stephen Mesarosh (better known as Steve Nelson) came to the United States in 1921 from Yugoslavia. A Communist of long standing, he made his 'pilgrimage' to Moscow in 1931 and later served with the Loyalist forces in Spain's Civil War. Upon his return to the United States, he became a party organizer in California and eventually was named leader of the Western Pennsylvania Communist Party."

For some time prior to his indictment Nelson operated openly from the Communist Party headquarters in Pittsburgh, and at his trial no attempt was made to deny his membership or position of leadership in the party.

Nelson was also indicted and convicted in federal court under the Smith Act. *United States v. Mesarosh*, 116 F. Supp. 345 (W.D. Pa. 1953), *aff'd*, 223 F.2d 449 (3d Cir. 1955), but the Supreme Court vacated this judgment per curiam with instructions to grant a new trial. 77 Sup. Ct. 8 (Oct. 10, 1956). Chief Justice Warren subsequently wrote an opinion stating the reasons for the Court's order. 77 Sup. Ct. 1 (Nov. 5, 1956). Certiorari had been granted, 350 U.S. 922 (1955), but these proceedings originated in a motion by the Solicitor General on September 27, 1956, seeking a remand of the case to the district court for a hearing as to the truthfulness of an important government witness at the trial. Reason to doubt the credibility of this witness had arisen since that time. A majority of the Court, over the dissents of Justices Harlan, Frankfurter and Burton, 77 Sup. Ct. 8 (Nov. 5, 1956), concluded that the interests of justice would be better served by a new trial than by the remand the federal government had requested. The retrial thus decreed for Nelson and others convicted of Smith Act violations has been scheduled for January 7, 1957, in the District Court for the Western District of Pennsylvania (Pittsburgh). *Legal Intell.* (Philadelphia), Nov. 28, 1956, p. 1, col. 3.

2. This was the Pennsylvania Sedition Act of 1919, later codified as Section 207 of the Pennsylvania Penal Code of 1939, Pa. Stat. Ann. tit. 18, § 4207 (Purdon 1945).

3. Transcript of Record, Vol. I, p. 22, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). The original trial of Nelson and others had been continued as to Nelson owing to his involvement in a serious automobile accident.

4. *Id.* at 28-49.

Pennsylvania law, ten thousand dollars fine, and twenty years imprisonment. An appeal was taken to the Superior Court of Pennsylvania, which affirmed the judgment of sentence per curiam and adopted the opinion of the trial court.<sup>5</sup> A further appeal to the Supreme Court of Pennsylvania resulted in a reversal, one judge dissenting, and an order that Nelson's indictment be dismissed.<sup>6</sup> The Commonwealth of Pennsylvania's petition for a reargument was refused.<sup>7</sup> Upon application by the Commonwealth to the United States Supreme Court for a writ of certiorari, that Court agreed to hear the case.<sup>8</sup> On April 2, 1956, the Supreme Court of the United States, in a 6-3 decision, affirmed the Supreme Court of Pennsylvania.<sup>9</sup> Petitions for a rehearing were denied.<sup>10</sup>

This sequence of events provided the framework for a series of searching judicial inquiries into the allocation between state and nation of the power and responsibility for the prosecution and punishment of sedition. The ultimate judicial answer to these inquiries was delivered in favor of the federal government, which was a reluctant recipient of this bounty.<sup>11</sup> The Supreme Court's decision thus crossed the politically sensitive question of sedition with the politically charged issue of states' rights, and not surprisingly produced a widely-publicized political controversy.<sup>12</sup> Those legislators and other political leaders who have been out of sympathy with the Supreme Court since its decision in the school segregation cases<sup>13</sup> seized upon the decision in *Nelson* as fresh evidence of the Court's willingness to intrude into forbidden areas.<sup>14</sup> From a legal stand-

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5. Commonwealth v. Nelson, 172 Pa. Super. 125, 92 A.2d 431 (1952).

6. Commonwealth v. Nelson, 377 Pa. 58, 104 A.2d 133 (1954)

7. 377 Pa. 58, 60, 104 A.2d 133 (1954).

8. 348 U.S. 814 (1954)

9. 350 U.S. 497 (1956).

10. 351 U.S. 934 (1956).

11. In the brief for United States as amicus curiae the Solicitor General took the position that the Pennsylvania Supreme Court's decision should be reversed.

12. The decision was described as "very bad" by Representative Howard W. Smith, of Virginia, author of the Smith Act. N.Y. Times, April 4, 1956, p. 16, col. 6. See also public statement by Smith and other Congressmen who had voted for the bill. *Ibid.* Former Supreme Court Justice, James F. Byrnes, severely criticized the decision in an article appearing in U.S. News and World Report, May 18, 1956, p. 50, reported also in N.Y. Times, May 15, 1956, p. 1, col. 3.

13. Brown v. Board of Education, 347 U.S. 483 (1954)

14. Criticism of the *Nelson* case was coupled with renewed attacks on the segregation decision. See Byrnes, *op. cit. supra* note 12, interpreting both as a judicial usurpation of state powers, and Krock, *Supreme Court Faces New Attack on Power*, N.Y. Times, May 20, 1956, § E, p. 3, col. 1-2. But see the defense of the Court's decisions in these cases by Representative Celler of New York in a letter to the N.Y. Times, June 17, 1956, § E, p. 8, col. 6, and the statement of more than one hundred leading lawyers from

point, the decision created serious doubt as to the validity of the sedition laws of forty-four states and of Alaska and Hawaii,<sup>15</sup> and it required the dismissal or reversal of indictments or convictions which had been obtained under several of these same statutes.<sup>16</sup> The number of briefs filed as *amici curiae* during all stages of the Supreme Court proceedings is an indication of the intense interest in the final decision shared by parties having a wide variety of reasons for their concern.<sup>17</sup> This interest and attention has now shifted to Congress, where legislation to reverse the result of the Pennsylvania Supreme Court's decision was introduced even before the United States Supreme Court had affirmed.<sup>18</sup> It is expected that similar bills intended to overturn both rulings and to vest or con-

thirty-one states and territories expressing grave concern over the "current wave of abuse" directed against the Court which was "doubtless precipitated by the school segregation decisions, though it has by no means been limited to them." *N.Y. Times*, Oct. 28, 1956, p. 63, col. 1-8.

15. *Fund for the Republic, Digest of the Public Record of Communism in the United States*, at 266-306 (1955), indicates that as of January, 1955, forty-four states had statutes which might be variously described as prohibiting sedition, criminal syndicalism, and criminal anarchy. See also Gellhorn, *The States and Subversion* (1952), and Note, 66 *Harv. L. Rev.* 327 (1952). These laws proscribe acts in terms sufficiently similar to the Pennsylvania law's definition of "sedition" so that the *Nelson* decision would probably control their validity. The present legal status of other and related state laws, for example those requiring the registration of Communists or making Communist Party membership unlawful, is not so clear. See *Albertson v. Millard*, 106 F. Supp. 635 (E.D. Mich. 1952), upholding registration provisions of the Michigan Communist Control Law against the contention that the Internal Security Act of 1950 had occupied the field. The Supreme Court reversed on other grounds, 345 U.S. 242 (1953).

16. *Commonwealth v. Gilbert*, 134 N.E.2d 13 (Mass. 1956), *Braden v. Commonwealth*, 291 S.W.2d 843 (Ky. 1956). A Massachusetts grand jury has also dropped long standing charges against Professor Dirk J. Struik of the Massachusetts Institute of Technology on the basis of the Supreme Court's decision. *N.Y. Times*, Oct. 6, 1956, p. 6, col. 3.

17. In support of the petition for a writ of certiorari to the Supreme Court of Pennsylvania, briefs of *amici curiae* were filed by the following: Commonwealth of Massachusetts, State of Texas, State of Illinois, and State of New Hampshire, the latter joined by the Attorneys General of twenty-four other states, including Massachusetts.

Subsequent to the grant of the writ by the Supreme Court on October 14, 1954, 348 U.S. 814, additional briefs *amici* were submitted by the following: United States, by its Solicitor General, American Civil Liberties Union, American Legion, Commonwealth of Massachusetts, Civil Liberties Committee of the Philadelphia Yearly Meeting of the Religious Society of Friends, and Frank J. Donner, attorney for individual *amici curiae*, all of whom had either been indicted or subjected to interrogation under the sedition laws of Massachusetts, New Hampshire, Kentucky, and Florida.

After the Supreme Court's decision on April 2, 1956, 350 U.S. 497, a petition for rehearing was filed by the District Attorney of Allegheny County, Pennsylvania, and Albert A. Fiok, an attorney of record appearing on the main brief for the Commonwealth of Pennsylvania. This petition was joined by the Attorneys General of thirty-four states and the territory of Alaska. A separate petition for rehearing was submitted by the Attorney General of the State of New York.

18. H.R. 8211, 83d Cong., 2d Sess. (1954), introduced by Representative Howard W. Smith on March 3, 1954. 100 Cong. Rec. 2614 (1954)

firm in the states greater power with respect to sedition and subversive activities will be placed before the 85th Congress.<sup>19</sup> If enacted into law, these bills may well have a more profound effect upon our federal system than the decisions which occasioned their introduction.

The primary purpose of this article is to examine the issues and precedents involved in the Supreme Court's consideration of the *Nelson* case, and on this basis to make an appraisal of the Court's decision. Secondary purposes include an estimate of the presently permissible limits of state control over seditious activity, and an account of the continuing congressional response which the *Nelson* decision evoked. Consideration of the last named will probably not be in proportion to its importance for the reason that the final product of this legislative aftermath has yet to emerge.

## II

At the outset it may be well to suggest a frame of reference into which the decision in the *Nelson* case may be placed. While judicial resolutions of supersedure questions in the general area of sedition and subversive activity have not been numerous,<sup>20</sup> the Supreme Court has been interpreting the meaning of the Constitution and the intent of Congress as they bear upon the distribution of power between state and nation virtually since the adoption of the Constitution. The commerce clause has provided the most frequent occasion for these determinations.<sup>21</sup>

19. The Committee Hearings disclosed relatively little opposition to H.R. 3 and S. 3617 as finally reported. See p. 329, *infra*.

20. The principal Supreme Court decisions which have considered federal supersedure in areas related to sedition and national security are the following: *Hines v. Davidowitz*, 312 U.S. 52 (1941) (registration of aliens), *Gilbert v. Minnesota*, 254 U.S. 325 (1920) (recruiting for the United States armed forces), *Halter v. Nebraska*, 205 U.S. 34 (1907) (state law prohibiting commercial use of United States Flag), *Presser v. Illinois*, 116 U.S. 252 (1886) (law creating state militia and regulating military organizations), *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820) (service in the federal militia). The leading state cases decided prior to the Supreme Court decision in *Nelson* are *Nelson v. Wyman*, 99 N.H. 33, 105 A.2d 756 (1954) (state investigation of subversive activities), *People v. Lloyd*, 304 Ill. 23, 136 N.E. 505 (1922) (sedition law), *State v. Tachin*, 92 N.J.L. 269, 106 Atl. 145 (1919) (sedition law), and *State v. Holm*, 139 Minn. 267, 166 N.W. 181 (1918) (recruiting for the United States armed forces). See also *Kahn v. Wyman*, 123 A.2d 166 (N.H. 1956) (legislative investigation of subversive activities).

21. See Braden, *Umpire to the Federal System*, 10 U. Chi. L. Rev. 27, 40 (1942), Note, 60 Harv. L. Rev. 262 (1946), Hunt, *Federal Supremacy and State Anti-Subversive Legislation*, 53 Mich. L. Rev. 407 (1955) (discusses commerce and labor relations cases). Portions of that article, which inspired the instant article, have necessarily been duplicated and expanded upon in this article.

The commerce clause cases which appear to have been considered particularly useful by the several courts involved and parties interested in the

The Constitution itself makes many fundamental allocations of authority within the federal system. Thus it is well-settled that in certain areas federal power is exclusive, and that in these areas the states are foreclosed from action even though Congress has not exercised its power and has not said that it wishes the matter left untouched by legislation.<sup>22</sup> These conclusions respecting exclusive federal power are thus reached by interpreting the text of the Constitution, not by divining congressional intent. Actual and outright conflict between federal and state laws relating to identical subject matter, moreover, can commonly be resolved by resort to Article VI, section 2, of the Constitution, generally referred to as the supremacy clause.<sup>23</sup> The clear dictate of this clause is that in such a case, the offending state law must fall. Of course, the supremacy of federal power there articulated is implicit in many judicial displacements of state power, even where the contrary nature of state legislation is not so apparent. Finally, while it may be true that the tenth amendment does little more than express an inference which would be drawn in any event from the limited nature of federal power, it is clear that the states possess an important residuum of reserved powers. Here judicial readiness to strike down state legislation must be carefully tempered by regard for the states' rights to police their own affairs.<sup>24</sup> Supersedure in such a case must gen-

*Nelson* case are *Garner v. Teamsters Union, AFL*, 346 U.S. 485 (1953) (Labor Management Relations Act); *California v. Zook*, 336 U.S. 725 (1949); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Hill v. Florida*, 325 U.S. 538 (1945) (Wagner Act), *Allen-Bradley Local 1111, United Electrical Workers v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942) (Wagner Act); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942).

22. Again the leading decisions arose under the commerce clause. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (principle implied), *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827) (principle followed).

23. "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

24. In *Kelly v. Washington*, 302 U.S. 1, 10 (1937), Chief Justice Hughes said:

"... The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'"

To similar effect are statements in *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952); *Jerome v. United States*, 318 U.S. 101, 104-05 (1943), *Allen-Bradley Local 1111, United Electrical Workers v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942); *Reid v. Colorado*, 187 U.S. 137, 148 (1902). The leading early decision, from which Justice Hughes was quoting in the *Kelly* case, is *Sinnott v. Davenport*, 63 U.S. (22 How.) 227, 243 (1859).

erally be grounded upon positive interference with federal purposes.

While the Constitution thus furnishes the broad outlines in accordance with which power is to be distributed, Congress may make its own choices within this framework, and may alter the framework itself in fundamental respects. Thus Congress may authorize state action even in areas of otherwise exclusive federal concern;<sup>25</sup> it may permit or deny to the states power to legislate in areas upon which neither has constitutional claims;<sup>26</sup> and at least where it has sufficient interest in so doing, it may drastically limit the reach of state power in areas of normally unquestioned state competence.<sup>27</sup> It is only when Congress has failed to speak clearly, and where the Constitution itself does not help, that courts have been obliged to work out an often conflicting and frequently unsatisfactory set of rules under which some answer as to congressional intent can be given. The matter of federal supersession becomes clearer, to some extent at least, if we regard these latter rules as the true "pre-emption doctrines" and if we realize that they are guides to the discovery of congressional intent which apply properly only in situations where neither Constitution nor Congress has expressly pointed the way. A frequent and troublesome initial ques-

25. *Whitfield v. Ohio*, 297 U.S. 431 (1936), *In re Rahrer*, 140 U.S. 545 (1891).

26. Statutes embodying express authorization or denial of state power are not likely to require clarifying interpretation. Litigation is typically produced by the question whether a congressional direction exists. Where it does, courts generally give it full effect. A recent example is *Railway Employees' Department, AFL v. Hanson*, 351 U.S. 225 (1956), involving § 2, Eleventh, of the Railway Labor Act, 48 Stat. 1186 (1934), as amended, 45 U.S.C. § 152 (1952), which expressly authorized "union shop" agreements notwithstanding the provisions of any state law. Suit was brought to enjoin the enforcement of such an agreement on the ground, *inter alia*, that it violated provisions of the Nebraska Constitution and implementing legislation prohibiting the union shop. The Supreme Court, recognizing the power of states to enact "right to work" laws in the absence of conflicting federal legislation, nevertheless had no difficulty in declaring simply that a union agreement made pursuant to the federal law "by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provisions of the laws of a State." 351 U.S. 225, 232 (1956). The Court noted that "the parallel provision in § 14(b) of the Taft-Hartley Act makes the union shop agreement give way before a state law prohibiting it." *Ibid.*, n. 5. See also *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 234-36 (1947), and the examples of express consent by Congress to share its powers with the states given in *California v. Zook*, 336 U.S. 725, 753-54 (1949) (dissenting opinion).

Adversaries in pre-emption cases can and do draw opposing inferences from the relative ease with which Congress can permit or prohibit concurrent state power. Had it been the congressional intent to allow (or forbid), runs the argument, Congress well knew an effective way of doing so.

27. A recent instance is *Ullmann v. United States*, 350 U.S. 422 (1956) holding that the Immunity Act of 1954 prohibits all state prosecutions based upon testimony compelled under the federal law and that Congress has the power to impose this drastic limitation upon state proceedings.

tion in the application of pre-emption doctrines is whether they should be used at all. On this analysis it may be understood why so many supersedure cases turn upon the multiple bases of Constitution, express congressional intent, and what we have called true pre-emption doctrines. In a single decision judges may believe that the case presents a question of exclusive federal power or state police power, of clear conflict between the provisions of the statutes concerned, of demonstrable congressional intent as disclosed in statute or legislative history, or finally of presumed congressional intent as determined under pre-emption rules. As Justice Black observed in *Hines v. Davidowitz*:

“There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation, curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.”<sup>28</sup>

The following is offered as a summary of the grounds upon which the Supreme Court has commonly discharged its duty to choose between the competing claims of state and federal government when these cannot be resolved by reference to some clear constitutional or congressional mandate.

(1) *Congressional Action in an Area of Supreme Federal Power and Interest.* Where federal legislation exists in an area of supreme, though not exclusive, federal interest, the Supreme Court has frequently been willing to displace state power on relatively slender evidence of congressional intent to preclude the states.<sup>29</sup> Nor has the existence of an actual conflict or repugnancy between state and federal law in such a case been required. Correspondingly, where the national interest is thought to be less dominant, courts have required a stronger inference or indication of congressional intent to dislodge state power. And in areas of long-recognized state interest, courts are inclined to assume that Congress wished to leave

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28. 312 U.S. 52, 67 (1941).

29. The Supreme Court has since viewed its decision in *Hines v. Davidowitz* as employing a presumption of congressional intent to pre-empt in areas of paramount national concern. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).



the states free to act.<sup>30</sup> There are, of course, no agreed-upon rules to be followed in weighing these interests, but the balance struck may be fundamental since it often dictates the further choice of the inferences or the evidences of intent which are to control the case. No judge, for example, could hand down a well-reasoned decision respecting state control over seditious activity without first making some assumptions as to the relative weights of state and national interests in suppressing such activity

(2) *Interference with or Obstruction of Congressional Purposes.* This is an important variant of the direct conflict or repugnancy test. While it retains an important element of the "conflict" idea, it does not depend upon the relatively objective textual comparisons of state and federal statutes which a strict repugnancy test involves. Rather it inquires more broadly into congressional purposes, and looks to see if the state law gives promise of thwarting these objectives.<sup>31</sup> It has, for example, been said that the additional penalties provided by a state law run contrary to the congressional purpose manifested in providing a single set of penalties.<sup>32</sup> This may be asserted even though the acts obviously do not collide in the sense that to comply with one is to disobey the other. Or again it may be argued that when a federal law contains certain deliberate safeguards for the protection of individual liberty which the state act omits, the effect of the congressional safeguards would be nullified if the state were allowed to proceed.<sup>33</sup> Congress, the argument would conclude, could not have intended such a result.

(3) *Occupation of the Field.* A strain of doctrine running strongly through a great many Supreme Court decisions involving the regulation of commerce and labor-management relations is the notion that where Congress has enacted a comprehensive body of legislation which pervades the field it is legitimate to infer that there

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30. See note 24 *supra*.

31. Thus it was stated in *Hines v. Davidowitz* that.

"Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. 52, 67 (1941).

32. *California v. Zook*, 336 U.S. 725, 738, 752 (1949) (dissenting opinions), *Jerome v. United States*, 318 U.S. 101, 105 (1943), *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 25 (1820). Despite the probable permissibility of double punishment from a constitutional standpoint, there are heavy overtones here of due process thinking stemming from the obvious harshness of dual or multiple sets of penalties.

33. *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941), *Albertson v. Millard*, 106 F. Supp. 635, 650 (D.Mich. 1952) (dissenting opinion)

is no room left for the states.<sup>34</sup> This reasoning is equally applicable either to federal laws or federal administrative regulation. For example, it has been applied where state law coincides with rules of the National Labor Relations Board.<sup>35</sup> This regulatory agency now ranges so widely over our economy that the field can in many instances very properly be described as federally occupied. And to recall another and closely related doctrine, the potential for conflict between federal and state objectives is closely correlated with the degree to which federal power embraces a field. Application of the doctrine frequently involves an initial problem of defining the field which is said to be occupied.

(4) *Double Punishment and Dual Sovereignty.* Double punishment should not be confused with double jeopardy. The latter is a constitutional limitation set forth in the fifth amendment which inhibits the federal government from placing persons twice in jeopardy for the same offense.<sup>36</sup> It has been contended, as it was in the *Nelson* case,<sup>37</sup> that double jeopardy in its constitutional sense is a reason for disallowing state action respecting sedition. The argument is that if the state were to prosecute first, the plea of prior jeopardy could then be urged in bar of a subsequent federal prosecution, and state action would thus frustrate the exercise of federal power. Precedents lend little support to the argument. First, the federal government is probably not estopped by prior *state* prosecution, even for the same offense.<sup>38</sup> Second, it is now well settled that state and federal governments may properly penalize the same acts when these constitute separate offenses against their respective

34. *Garner v. Teamsters Union, AFL*, 346 U.S. 485 (1953); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942); *Pennsylvania R.R. v. Public Service Comm'n*, 250 U.S. 566 (1919); and *McDermott v. Wisconsin*, 228 U.S. 115 (1913).

35. *Bethlehem Steel Co. v. New York Labor Relations Bd.*, 330 U.S. 767 (1947).

36. U.S. Const. amend. V: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

37. Brief for Respondent, pp. 49-52, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). The argument was not that the *instant* prosecution subjected Nelson to double jeopardy, since the Pennsylvania indictment preceded the federal prosecution under the Smith Act. See note 1 *supra*. Respondent's contention was rather that a plea of double jeopardy might bar the subsequent federal proceeding, and thus inhibit operation of the Smith Act. A motion by Nelson to dismiss the federal indictment on this ground, however, was rejected, 13 F.R.D. 180, 186 (W.D. Pa. 1952), and the point was not further considered by the federal courts.

38. This follows from the fact that the fifth amendment to the Constitution is a restriction upon the federal government alone. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1843). The double jeopardy provision has accordingly been interpreted as applying only to a second federal prosecution. *United States v. Lanza*, 260 U.S. 377, 382 (1922).

sovereignties.<sup>39</sup> These latter decisions, however, would not appear to rule out the objection that separate offenses are *not* involved when a state punishes criminal acts directed against the federal government. The only way this contention can be resolved is by answering further questions about the respective interests of the governments concerned. Against which one or more of the sovereigns involved were the offending acts really committed?

The argument based on double punishment can accept and ignore the fact that under the Constitution, state and nation may enjoy concurrent rights to punish offenders. For this is essentially pre-emption doctrine again—another way of discovering congressional intent by inference. The possibility of double punishment for the same acts can raise several such inferences. First, it can be said that Congress would not wish further and perhaps more stringent penalties to be imposed in addition to the ones it has already prescribed. Second, state prosecutions may obstruct congressional purposes by interfering in various practical ways with federal proceedings. Finally, double punishment has such an element of unfairness that Congress should not be presumed to have intended such a result. As Justice Washington early pointed out in *Houston v. Moore*, it is "something very much like oppression, if not worse."<sup>40</sup>

(5) *Imputed Congressional Intent*. Included here is the almost boundless range of arguments addressed to what Congress "knew" when it was legislating. Such arguments generally cut both ways. Thus it has been stated in decisions dealing with sedition that Congress knew of the existence of a great many state laws concerned with the same problem.<sup>41</sup> The legislative history of the Smith and Internal Security Acts bears this out.<sup>42</sup> But what is the inference?

39. *Jerome v. United States*, 318 U.S. 101 (1943), *Westfall v. United States*, 274 U.S. 256 (1927), *Hebert v. Louisiana*, 272 U.S. 312 (1926), *United States v. Lanza*, 260 U.S. 377 (1922), *Gilbert v. Minnesota*, 254 U.S. 325 (1920), *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852), *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850), *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847).

40. 18 U.S. (5 Wheat.) 1, 23 (1820).

41. Justice Bell, dissenting in *Commonwealth v. Nelson*, 377 Pa. 58, 84-85, 104 A.2d 133, 146 (1954). Cf. *Hines v. Davidowitz*, 312 U.S. 52, 79 (1941) (dissenting opinion), where Justice Stone made the same point with respect to state alien registration acts.

42. *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary*, 76th Cong., 1st Sess., ser. 3, at 7,69,83-85 (1939). There are numerous references here to state laws, and the Smith Act was largely patterned on the Criminal Anarchy Act of New York which had been upheld in *Gitlow v. New York*, 268 U.S. 652 (1925). Congress continued its awareness of the state laws, and at least one of its committees would appear to have approved of them. *Annual Report of the Committee on Un-American Activities for the Year 1949*, H.R. Rep. 1950, 81st Cong., 2d Sess. 25-46 (1950), and H.R. Rep. 2980, 81st Cong., 2d Sess. 2 (1950).

That had Congress wished these state laws to fall it would have said so? Or that had Congress wished the state law to stand it would have said so? Again it has been said that Congress was aware of the federal government's inadequacies in combatting internal subversion.<sup>43</sup> Assuming that Congress did in fact believe that federal efforts in this direction had been unsatisfactory, was the inadequacy to be remedied by more federal legislation, or by giving the states free rein? What is the effect to be given congressional declarations as to the international scope and nature of the Communist conspiracy?<sup>44</sup> It has been argued, in dissent, that these statements evidence a congressional design to treat the problem as one of nationwide concern to the exclusion of the states.<sup>45</sup>

(6) *Belief as to Unwisdom or Unconstitutionality of State Laws.* Any honest analysis of the decisions must take into account the fact that federal supersedure is a likelier result where a court disapproves of state laws on other grounds.<sup>46</sup> Some judges have been willing to disclose this disapproval and their reasons for it. Others may be less candid, though perhaps it is not unfair to say that on occasion a judge is really expressing his own doubts respecting such laws when he attributes them to Congress.<sup>47</sup>

A few further observations with special reference to the pre-emption issues raised by sedition laws may be offered. From a constitutional standpoint, despite the express duty laid upon Congress

43. Justice Bell, dissenting in *Commonwealth v. Nelson*, 377 Pa. 58, 87, 104 A.2d 133, 147 (1954). Justice Bell went even further, stating that Congress knew that the federal government needed the active cooperation of the states, as well as the "enthusiastic help of every patriotic American citizen." This view is difficult to reconcile with facts such as those stated in note 107 *infra*.

44. In the Internal Security Act, 64 Stat. 987 (1950), 50 U.S.C. § 781 (1952), Congress found that: "There exists a world Communist movement which, in its origins, its development, and its present practice, is a worldwide revolutionary movement." Findings of a similar nature are contained in the Communist Control Act, 68 Stat. 775 (1954), 50 U.S.C. § 841 (Supp. III, 1956).

45. *Albertson v. Millard*, 106 F. Supp. 635, 648 (D.Mich. 1952) (dissenting opinion).

46. There can be little doubt as to the attitude of the judges toward the state laws involved in *Hines v. Davidowitz* and *Commonwealth v. Nelson*. See also the dissenting opinion of Justice Brandeis in *Gilbert v. Minnesota*, 254 U.S. 325, 334 (1920), and the dissent in *Albertson v. Millard*, 106 F. Supp. 635, 647-53 (D.Mich. 1952). The dissenting judges in the latter two cases did not believe that the state laws in question met the due process standards prescribed by the fourteenth amendment. In the commerce field, see *Southern Pac. Ry. v. Arizona*, 325 U.S. 761 (1945).

47. Cf. Powell, *Supreme Court Decisions on the Commerce Clause and State Police Power*, 22 Colum. L. Rev. 28, 48 (1922) "Seldom does Congress explicitly negative the further application of State laws. While this issue is referred to the intention of Congress, it is apparent that as a rule it is the court that is doing the intending."

to provide for the common defense,<sup>48</sup> there is relatively little tendency to decide supersedure questions on the basis that federal power over sedition and subversion is exclusive, in the sense that it has been allotted by the Constitution to Congress unless and until the latter expressly elects to share it.<sup>49</sup> There is, however, an additional provision of the Constitution to which reference has seemed appropriate where sedition laws are involved. This is Article IV, section 4, which states that

"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion, and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Congressional authority to enact anti-subversive legislation has been expressly grounded upon this clause.<sup>50</sup> And it has been urged that the section goes far in establishing the predominant interest and responsibility of the federal government in guarding against the dangers of forcible overthrow or violent change.<sup>51</sup> An inference looking toward the opposite conclusion has been drawn from the same section. The congressional duty, it is contended, extends to the protection of the states against invasion from without.<sup>52</sup> Whatever duties it may have respecting domestic violence are limited by the requirement that the state must actively solicit federal assistance.<sup>53</sup> Finally, state and federal laws directed against seditious and subversive activity inevitably raise important civil liberties questions

48. U.S. Const. art I, § 8, cl. 1.

49. The proposition that the Constitution itself places sedition against the United States beyond the power of the states to punish unless Congress affirmatively permits it was unsuccessfully advanced by the respondent before the Supreme Court in the *Nelson* case. Brief for Respondent, p. 22 *et. seq.*, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). This position, however reasonable as a matter of policy, enjoys scant support in the decided cases. Even in *Hines v. Davidowitz*, affirming the supremacy of federal power in the regulation of aliens, the Supreme Court did not categorize this power as exclusive, despite its intimate relation to the exclusive federal power over foreign affairs.

50. Internal Security Act, 64 Stat. 989 (1950), 50 U.S.C. § 781 (1952) wherein it is stated that. "The Communist organization in the United States and the nature and control of the world Communist movement itself make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation."

51. *Commonwealth v. Nelson*, 377 Pa. 58, 69, 104 A.2d 133, 139 (1954)

52. Brief for Petitioner, pp. 30-31, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956)

53. It was suggested, in answer to this argument, that the states initiative under the constitutional provision is restricted to cases of actual domestic violence, not seditious utterance. Brief of Frank J. Donner, as Amicus Curiae, p. 49, *Commonwealth v. Nelson*, 350 U.S. 497 (1956)

which seldom intrude so forcibly in other areas. As Justice Black noted for the Court in *Hines v. Davidowitz*, "it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans."<sup>54</sup> The presence of these questions may have an important effect upon a court's approach to a pre-emption question, its reasoning, and its ultimate conclusion.

### III

To return now to the *Nelson* case, the initial contention that federal legislation had ousted the states of jurisdiction to prosecute seditious activity was advanced by the defendant Nelson in a motion to quash his indictment.<sup>55</sup> He pursued the argument again in connection with motions requesting the Court of Quarter Sessions to arrest judgment and to grant a new trial. These latter motions provided the occasion for the first judicial resolution of the pre-emption issue raised by Pennsylvania's statute. Nelson urged that the Smith Act and the McCarran Act taken together impliedly superseded state legislation directed against sedition. Judge Montgomery wrote an opinion for the trial court in which he rejected this and other of the defendant's grounds for objection to the Pennsylvania law. With respect to pre-emption, Judge Montgomery conceded that in some areas the Constitution grants exclusive powers to the federal government, and that in other areas federal jurisdiction is supreme, with the result that the states may not act when the federal government expressly or by necessary implication has evidenced its intent that state power shall be superseded. No such intent, expressed or implied, was considered to inhere in either the Smith or the McCarran Acts. In fact, Judge Montgomery found in the latter statute an expression of intent that state power was *not* to be displaced.<sup>56</sup> Finally, he characterized the instant prosecution as one of concurrent jurisdiction by dual sovereigns, state and nation, each of which might punish offenses against its own peace and dignity. The Superior Court of Pennsylvania affirmed

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54. 312 U.S. 52, 68 (1941).

55. Transcript of Record, Vol. I, p. 25, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

56. This was the provision of the Internal Security (McCarran) Act, 64 Stat. 987 (1950), 50 U.S.C. § 796 (1952), which states: "The foregoing provisions of this subchapter shall be construed as being in addition to and not in modification of existing criminal statutes." There is no clear indication as to whether or not this reference includes state laws.

Nelson's conviction on the opinion written by Judge Montgomery<sup>57</sup>

On appeal to the Pennsylvania Supreme Court, Nelson secured a reversal of his conviction by a 4-1 decision. Justice Jones for the court recognized, but found it unnecessary to reach, a number of serious constitutional objections, both substantive and procedural, which had been urged against the statute, the indictment, and the conduct of Nelson's trial.<sup>58</sup> The majority based its reversal squarely upon the proposition that the Smith Act precluded Pennsylvania from prosecuting sedition against the United States. Although the indictment had clearly charged Nelson with offenses against the state of Pennsylvania,<sup>59</sup> Justice Jones declared that he had searched the record in vain for evidence of a single seditious act or utterance directed against the Commonwealth. Moreover, in his words, "it is difficult to conceive of an act of sedition against a State in our federated system that is not at once an act of sedition against the Government of the United States,—the Union of the forty-eight component States."<sup>60</sup> Justice Jones concluded that "it is only alleged

57 172 Pa. Super. 125, 92 A.2d 431 (1952)

58. *Commonwealth v. Nelson*, 377 Pa. 58, 63, 104 A.2d 133, 136 (1954). The circumstances of Nelson's indictment and trial are so remarkable that it may be of interest to set out Nelson's arguments on this point as summarized by the Pennsylvania Supreme Court:

"Thus, the appellant charges that he was refused a reasonable postponement of the trial, which he sought in order to pursue his effort to obtain counsel, and was thereby denied due process of law, citing *Powell v. Alabama*, 287 U.S. 45, that the trial judge, who was an incorporator, officer and member of the executive committee of a local nonprofit corporation, known as "Americans Battling Communism", which had publicly demanded the defendant's indictment, deprived him of due process by refusing to disqualify himself, citing *Timney v. Ohio*, 273 U.S. 510, 534, and *Snyder's Case*, 301 Pa. 276, 290, 152 A. 33, that the prosecutor in the information upon which the indictment was founded and chief witness against the defendant at the trial was a member of the same court in which the indictment was returned and the trial had, and that the district attorney indulged in improper, prejudicial and inflammatory remarks throughout the trial and, particularly, in his address to the jury."

377 Pa. 58, 63, 104 A.2d 133, 136 (1954) Justice Musmanno of the Pennsylvania Supreme Court, who was personally responsible for Nelson's indictment (being at that time a judge both of the Court of Common Pleas and the Court of Quarter Sessions in Allegheny County) and had been a leading prosecution witness at the trial, (see Transcript of Record, Vols. I, II, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (*passim*)) took no part in the supreme court's decision.

59. Eight of the twelve counts in the indictment alleged acts of sedition directed specifically against the government of Pennsylvania or its officers. Transcript of Record, Vol. I, pp. 9-25, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956)

60. 377 Pa. 58, 69, 104 A.2d 133, 139 (1954) The Solicitor General was later to contend that the converse was equally true, *i.e.*, that an act of sedition against the United States was necessarily also an act of sedition against the state in which it is committed. Brief for United States as Amicus Curiae, p. 13, n. 3, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956)

sedition against the United States with which the instant case is concerned."<sup>61</sup>

In holding that the Smith Act precluded enforcement of the Pennsylvania statute, Justice Jones rested his decision on two principal grounds. First, he declared that where both state and federal governments have legislated in a field of paramount importance to the latter, the federal legislation must be taken to supersede the state's, and that the federal government could have no more dominant interest than the maintenance of its own existence. The full stature of the federal concern, he said, was recognized and provided for in the duty which the Constitution lays upon the United States to guarantee to every state in the union a republican form of government. Congress undertook to fulfill this duty by enactment of legislation which prohibited the attempted overthrow of "the government of the United States or the government of any State, Territory, District or Possession thereof. . . ."<sup>62</sup> Justice Jones stated that "Federal pre-emption could hardly be more clearly indicated."<sup>63</sup> Second, a majority of the Pennsylvania court thought that the law under which Nelson was prosecuted gave promise of obstructing or hindering congressional purposes.<sup>64</sup> Potential interference was found in the disparity of sentences prescribed by federal and Pennsylvania law for the same offense, since this disparity "could not help but confuse and hinder the attack on sedition, which calls for uniform action on a national basis."<sup>65</sup>

Justice Jones further expressed strong disapproval of the provisions of the Pennsylvania law permitting indictment upon information of a private individual.<sup>66</sup> Pointing to the opportunities thus afforded for the venting of personal spite, he stated that defense of the nation should be a public and not a private undertaking, and that were the task accomplished by the central administration of the federal government, the right of the individual to freely criticize the government might better be maintained. In a brief concurring opinion Chief Justice Stern, joined by Justices Stearne and Chidsey, after expressing full agreement with what Justice Jones had written, added that :

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61. *Ibid.*

62. The Smith Act as revised in 1948. 54 Stat. 670, as amended, 18 U.S.C. § 2385 (1952).

63. 377 Pa. 58, 70, 104 A.2d 133, 139 (1954).

64. This was referred to as the "primary" test in *Hines v. Davidowitz*. See note 31 *supra*.

65. 377 Pa. 58, 70, 104 A.2d 133, 139 (1954).

66. This feature of the Pennsylvania law had, in fact, been utilized in the *Nelson* case. See note 58 *supra*.



"Sedition against the United States is not a *local* offense. It is a crime against the *Nation*. As such, it should be prosecuted and punished in the Federal courts where this defendant has in fact been prosecuted and convicted and is now under sentence. It is not only important but vital that such prosecution should be exclusively within the control of the Federal Government."<sup>67</sup>

Justice Bell entered a lengthy and vigorous dissent. He contended that since the power of the federal government to punish sedition is concededly not exclusive, supersedure can occur only when there is a direct and positive conflict between state and federal acts. Having established his criterion, Justice Bell argued that there was no conflict between the two acts, and that neither the text of the federal statute nor the circumstances of its enactment gave the slightest indication that Congress in passing the Smith Act intended to take full control of the field. He cited that section of Title 18 of the United States Code which provides "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof,"<sup>68</sup> and he introduced into his opinion a portion of a letter written by the author of the Smith Act to the Attorney General of Pennsylvania, in which the writer stated that Congress had never at any time intended to oust the states' concurrent jurisdiction to prosecute subversive activities.<sup>69</sup>

Justice Bell's dissent also stressed the decisions upholding the concurrent jurisdiction of states and the federal government to punish for offenses against their respective sovereignties.<sup>70</sup> These decisions were offered to show that double jeopardy is not created where the same acts constitute separate offenses against separate sovereigns, and that accordingly there is no basis for concluding that state action might hinder the operation of federal law by making a constitutional plea of double jeopardy available in bar of a second prosecution. If it is assumed that two sovereigns are properly involved, this proposition respecting double jeopardy appears

67. 377 Pa. 58, 76, 104 A.2d 133, 142 (1954).

68. 18 U.S.C. § 3231 (1952).

69. The letter had been submitted to the Court by the Attorney General of Pennsylvania as a ground for reargument after the majority rendered its decision. Its use as bearing upon congressional intent prior to passage of the act would appear to be of dubious propriety, see Sutherland, *Statutes and Statutory Construction*, 504 (3d ed. 1943), although the Solicitor General, in the amicus brief he submitted to the United States Supreme Court argued, citing cases, that this was not merely an *ex post facto* interpretation, but rather the author's present recollection of the facts at the time of the bill's enactment. Brief for the United States as Amicus Curiae, p. 27, n. 17 *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

70. Including, *inter alia*, the decisions cited at note 39 *supra*.

to be amply supported in the decisions. In the view of Justice Jones, however, sedition against the United States is not an offense against the state, and separate offenses are not committed in such a case. Hence the "concurrent jurisdiction cases" are not in point. The opinion for the majority, moreover, quite clearly did not allude to double jeopardy in any constitutional sense. Justice Jones had been concerned rather with the possibility of double punishment and its attendant inferences respecting congressional intent.

#### IV

The Pennsylvania Supreme Court's decision attracted widespread attention, particularly from state law officers charged with the enforcement of legislation similar to the Pennsylvania Act.<sup>71</sup> Their interest was further heightened when the United States Supreme Court agreed to review the decision, although in the interim the Supreme Court of New Hampshire had expressly declined to follow the Pennsylvania Court.<sup>72</sup> Mr. Louis C. Wyman, Attorney General of the State of New Hampshire, served as the leader and spokesman for this group of state officers. He filed a brief *amicus curiae* joined by the attorneys general of twenty-four states, and he presented an oral argument to the Court. The Solicitor-General of the United States, at the Court's invitation,<sup>73</sup> set forth the view of the federal government in a brief and in oral argument. He contended that the Pennsylvania law should be upheld. Several other briefs of *amici curiae* were filed, both in connection with the Supreme Court's decision to grant certiorari and with respect to the merits of Pennsylvania's appeal.<sup>74</sup> And finally briefs were submitted and arguments made on behalf of the Commonwealth of Penn-

71. The National Association of Attorneys General, an association which includes the attorneys general of all the states and territories, made the *Nelson* decision a major topic of discussion at its 1954 and 1955 conferences. N.Y. Times, Dec. 10, 1954, p. 16, col. 4-6; N.Y. Times, Sept. 13, 1955, p. 25, col. 1. At the second of these conferences United States Attorney General Brownell stated on behalf of the federal government that: "We believe that state sedition laws should be enforced and that a full measure of Federal state cooperation will be in the public interest." N.Y. Times, Sept. 15, 1955, p. 19, col. 1-2. More recent opinion among state law enforcement officers has not, however, been unanimous. At the 1956 conference of the Association there was considerable support for the Supreme Court's decision. N.Y. Times, May 23, 1956, p. 12, col. 3.

72. *Nelson v. Wyman*, 99 N.H. 33, 49, 105 A.2d 756, 769 (1954). Although the decision was concerned primarily with a legislative resolution authorizing an investigation into violations of the state anti-subversive law, the New Hampshire court stated that the Smith Act did not preclude state legislation "on the same subject matter." *Ibid.*

73. The invitation was extended in the Court's grant of certiorari, 348 U.S. 814 (1954).

74. These briefs are listed in note 17 *supra*.

sylvania and of Steve Nelson. Thus the Supreme Court approached the case fully advised as to the wide range of important issues involved and with an appreciation of the really significant impact on governmental and private interests which its decision could be expected to have. Before examining the opinions which emerged from this mass of opposing contentions, it may be useful to summarize the arguments of counsel for the petitioner and for the respondent.

Pennsylvania's first question for the Court was

"Does a state have the power to enact a sedition law making criminal acts committed within its territory which advocate overthrowing of the government of the State or the United States by force or violence?"<sup>75</sup>

The petitioner thus invited a decision as to the power of Pennsylvania respecting acts of sedition directed against the government of the state, as well as acts directed against the United States. While this statement of the question was apparently grounded on the fact that the Pennsylvania law made it a crime to advocate the overthrow of the government of Pennsylvania, and that Nelson was actually indicted for such acts, the Pennsylvania Supreme Court had expressly found that no evidence of sedition against the Commonwealth appeared in the record, and had accordingly concerned itself only with the charges relating to sedition against the United States. The United States Supreme Court did not accept the petitioner's formulation of the issue.

In its argument petitioner contended first that Pennsylvania had the power, as a part of its inherent right of self-preservation, to make it a crime to advocate within its territory the overthrow of the government of the United States by force or violence. Though nominally directed against the United States, such acts in Pennsylvania would necessarily result in the death of Pennsylvania citizens and the destruction of Pennsylvania property. Moreover, under the police power Pennsylvania has the right to move against the dangers of violent overthrow before plans looking to this end are actually carried out,<sup>76</sup> and Pennsylvania alone has a local police organization adequate to cope with these dangers.

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75. Brief for Petitioner, p. 5, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

76. Citing and relying particularly upon *Gitlow v. New York*, 268 U.S. 652 (1925), which upheld New York's Criminal Anarchy Statute against constitutional attack, the Court declaring that a state "cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction." *Id.* at 669.

Petitioner interpreted Article IV, section 4, of the Constitution to mean that the federal government may intervene in cases of domestic violence only on application of the state. Nor, in petitioner's view, did Congress intend that the Smith Act should supersede the Pennsylvania law. First, nothing in the Smith Act indicates such an intent. Had Congress wished to preclude the enforcement of state laws, it would have unequivocally so stated. Second, no conflict exists between the federal and state legislation, and the Court has held that a state may be prohibited from exercising its police power only where a direct and positive conflict with a federal law is shown to exist. Third, the decisions of the Court in which supersedeure has been found involve regulatory statutes. The Smith Act is not a law of this type. Rather, the laws here involved are criminal statutes which are traditionally the prerogative of states, there being no provision in the Constitution for a general federal criminal code, and no federal common law of crimes. Finally, section 3231 of Title 18, United States Code, expressly provides that nothing in that title shall be held to impair the jurisdiction of state courts under state laws.

Petitioner placed particular reliance on the Supreme Court's decision in *Gilbert v. Minnesota*,<sup>77</sup> which held that the Federal Espionage Act of 1917 did not suspend the operation of a Minnesota law which made it a misdemeanor to publicly advocate that men should not enlist in the military forces of the United States or Minnesota. The federal law provided for the punishment, *inter alia*, of persons willfully obstructing the recruiting or enlistment service of the United States. Petitioner stressed the applicability of the following language from the decision to the question of sedition ·

“ . . . The United States is composed of the States, the States are constituted of the citizens of the United States, who also are citizens of the States, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the States as well as the United States are intimately concerned . . . this country is one composed of many and must on occasions be animated as one and that the constituted and constituting sovereignties must have power of cooperation against the enemies of all ”<sup>78</sup>

The same decision was cited for the principle that federal and state governments have concurrent power to punish the same acts when they constitute separate offenses against each sovereign. Nor in petitioner's view could double jeopardy be urged as an objection

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77. 254 U.S. 325 (1920).

78. *Id.* at 329.

to prosecution under Pennsylvania's law, since a crime under federal law and a crime under state law are not the "same offense" within the meaning of the fifth amendment, and that amendment is a restriction upon the federal government alone.

Counsel for Steve Nelson, understandably wishing not to become embroiled in a controversy as to whether states could enforce their laws against attempts to overthrow state and local governments, stated the issue for resolution by the Supreme Court more narrowly than had the petitioner. As framed by the respondent, the issue was, "whether the state can enact or enforce a law making sedition 'against the United States' a crime in the face of an identical federal law on that same subject."<sup>79</sup> This statement of the issue appears to be the more accurate reflection of the Pennsylvania Supreme Court's view as to what it was deciding in the *Nelson* case.

Respondent began his argument by stating that the constitutional bases of federal power to prohibit sedition,<sup>80</sup> and the nature and source of sedition itself, combine to produce a paramount federal interest, and at the same time clearly indicate that the problem is not suited to handling on a local basis. Moreover, the legislative history of the Smith Act and the congressional findings preceding the Internal Security and Communist Control Acts show that the problem of sedition raises questions of foreign policy peculiarly within federal competence to resolve. It was urged, on Nelson's behalf, that the same considerations supported a conclusion that Pennsylvania's law should not be judged as a local police measure of the type traditionally within the scope of state authority. State sovereignty exists, the argument continued, with respect to matters affecting the citizens of a single state alone, and not matters which affect citizens of the nation as a whole.<sup>81</sup> Sedition against the United States does not concern the citizens of Pennsylvania alone.

Since in his view federal power was here exercised in an area of dominant federal interest where the states do not enjoy reserved

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79. Brief for Respondent, p. 9, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

80. With respect to the power "to provide for the common defense", respondent noted that this was one of the few federal powers appearing also in the Constitution's preamble, and that it is a power so fundamental that it would necessarily be implied had it never been expressly granted. *Id.* at 23.

81. Citing Thomas Jefferson, who wrote that "My own general idea was, that the States should severally preserve their sovereignty in whatever concerns them alone, and that whatever may concern another State, or any foreign nation, should be made a part of federal sovereignty." (2 *Memoir, Correspondence and Miscellanies from the Papers of Thomas Jefferson*, p. 230, letter to Mr. Wythe (1829)), Brief for Respondent, p. 27, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

powers, the respondent contended that the tests for supersession employed in areas of concurrent federal and state power were not applicable. Here there is rather a presumption that state laws are superseded unless Congress has expressly consented to share its powers, and since Congress has given no indication of such consent, the existence of the federal law precludes the enforcement of the Pennsylvania statute. In addition to a presumption of supersedure, respondent contended that several further factors indicated pre-emption: (1) Congress through the enactment of three major laws had occupied the field; (2) The state law conflicted with the federal, both as to procedure and as to penalties; (3) The state act was a potential obstacle to the accomplishment of federal purposes; (4) Double or multiple punishment would be inflicted for the identical acts if state and federal laws were permitted to co-exist, and Congress cannot be presumed to have intended so harsh a consequence. Moreover, a plea of double jeopardy based on a state prosecution might actually operate to bar a federal Smith Act proceeding.<sup>82</sup>

In response to the argument that acts of sedition against the United States are ipso facto acts of sedition against the state, the respondent asserted that the federal system presupposes dual sovereignties, each operating within its own constitutional sphere, and each possessing different capacities and responsibilities. Thus true sedition against a state consists in an attempt to overthrow the government of the state, not the government of the nation. A state's undoubted interest in having sedition against the United States suppressed does not confer upon it the power to act outside its proper sphere. The respondent distinguished the case of dual sovereignties penalizing the same acts when these constitute an offense within the competence of each to punish. Here Pennsylvania, in the view of the respondent, was improperly attempting to occupy the same plane of control as the federal government.

Throughout the brief, counsel for Nelson drew heavily upon the prior Supreme Court resolutions of supersedure questions in *Hines v. Davidowitz* and *Houston v. Moore*. The *Hines* case grew out of an Alien Registration Act adopted by Pennsylvania in 1939. A year later Congress enacted a comprehensive Federal Registration Act which also placed aliens under a duty to register, though

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82. The dubious merits of this contention were discussed in notes 37 and 38 *supra*.

there were important differences between the two statutes.<sup>83</sup> Justice Black for a majority of the Court in that case held that Congress had foreclosed the possibility of state action respecting the registration of aliens. Respondent viewed the decision as widely applicable to Pennsylvania's sedition law, stating that

Here, as in *Hines*, we have a subject 'intimately blended and intertwined with responsibilities of the national government', here, as in *Hines*, various aspects of civil liberties are involved, here, as in *Hines*, the subject is a national one, requiring legislation on a national scale, and here, as in *Hines*, the field is one in which there is no traditional state power to act.<sup>84</sup>

In the *Houston* case the validity of still another Pennsylvania law had been called into question. A federal law subjected to penalties persons failing to respond to the President's call for service in the federal militia. These penalties were to be imposed by a court-martial convened under federal law. Pennsylvania had provided that a court-martial called under state law might prescribe the same penalties for the same offense, though such acts were not made a crime against the state. The Supreme Court through Justice Washington, Justice Story dissenting, upheld the Pennsylvania law as a proper effort to assist in the enforcement of the federal statute. It was respondent's contention that both majority and dissenting opinions agreed that Pennsylvania could not have made the identical offense illegal under state law. Quotations such as the following were offered from the lengthy dictum of Justice Washington

"If, in a specified case, the people have thought proper to bestow certain powers on Congress as the safest depository of them, and Congress has legislated within the scope of them, the

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83. The distinctions to which the Court attached primary significance were the absence from the federal law of any requirement that the alien carry and be able to produce a card, and the absence from the state law of willfulness as an element of the punishable offense. It was clear that in general, the state law imposed the more onerous restrictions. In the view of Justice Black these restrictions ran counter to the congressional purpose, which was to "protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance." 312 U.S. 58, 74 (1941). Concern for the liberties of the alien as a basis for this decision is often overlooked by those who have sought subsequently to distinguish it. Justice Stone, with the concurrence of Chief Justice Hughes and Justice McReynolds, dissented. He would have required a showing of direct conflict between state and federal laws, and he would not assume that Congress was unaware of existing state laws touching the same subject when it enacted the federal statute. Dual burdens upon the alien were held to be the necessary result of dual sovereignty.

84. Brief for Respondent, p. 38, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956)

people have reason to complain that the same powers should be exercised at the same time by the State legislature. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other. If they correspond in every respect, then the latter is idle and inoperative, if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment for a certain offense, the presumption is, that this was deemed sufficient, and, under all circumstances the only proper one. If the other legislature imposes a different punishment, in kind or degree, I am at a loss to conceive how they can both consist harmoniously together.<sup>785</sup>

Respondent distinguished *Gilbert v. Minnesota* as upholding a statute construed to have for its purpose the prevention of breaches of the peace, and actually applied to Gilbert in a situation of that nature. The Pennsylvania Supreme Court placed no such construction on Pennsylvania's sedition law, even had the express language and penalties of the act permitted it. Nor was mention made in that case of the decision in *Houston v. Moore*.

The respondent urged that various practical considerations further supported his belief that Congress had pre-empted the field. First, a decision voiding the Pennsylvania law would not affect the right of states to outlaw acts of sedition directed at their own governments and to cooperate in the enforcement of federal statutes. Second, the record of prosecutions under the Smith Act indicated that federal action against subversion would be vigorous and effective.<sup>86</sup> Third, the work of combatting the Communist conspiracy demanded the attention of competent professionals at the federal

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85. 18 U.S. (5 Wheat.) 1, 23 (1820). Cited in Brief for Respondent, pp. 30-31, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). Petitioner devoted a substantial portion of its reply brief to the *Houston* case, pointing to other and more favorable language in the various opinions and distinguishing the case altogether with the argument that there Pennsylvania sought to aid the President in the enforcement of a *federal* law, while in the instant case Pennsylvania was enforcing its *own* statute. Reply Brief for Petitioner, p. 4, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

86. As of June 30, 1955, the Justice Department had obtained the arrest of 131 persons on Smith Act charges, and had secured the conviction of 90 of these. Department of Justice Press Release, July 18, 1955, cited in Brief for United States as Amicus Curiae, p. 31, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).



level.<sup>87</sup> Finally, enforcement of any sedition laws impinged so closely upon important civil liberties that a dual system of enforcement of such laws might be inconsistent with the maintenance of personal freedoms. As a significant addendum to this last point, respondent stated that "the record in this very case so indicates."

In a second portion of his brief, not to be further considered here, the respondent asked the Court to consider serious constitutional objections to the indictment and to provisions of the Pennsylvania law, on the basis that the Court might properly affirm an opinion below on grounds other than those which had controlled the prior decision.

## V

Chief Justice Warren wrote the opinion of the Court, which affirmed the decision below that the Smith Act rendered Pennsylvania's law unenforceable. He was careful to limit this approval to the precise question decided by the Pennsylvania Supreme Court. And he further circumscribed the Court's holding with the declaration that

" The decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct. Nor does it limit the jurisdiction of the States where the Constitution and Congress have specifically given them concurrent jurisdiction, as was done under the Eighteenth Amendment and the Volstead Act. *United States v. Lanza*, 260 U.S. 377 Neither does it limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds. Nor does it prevent the State from prosecuting where the same act constitutes both a federal offense and a state offense under the police power, as was done in *Gilbert v. Minnesota*, 254 U.S. 325, relied upon by petitioner as authority herein."<sup>88</sup>

After thus limiting the effect of what the Court was about to say, Chief Justice Warren proceeded in orderly fashion to prepare the way for the pre-emption doctrines that were to rule the case. He did this by observing both that Congress had not expressly declared

87 Respondent cited a 1954 public interview with J. Edgar Hoover, in which the FBI Director stated. "Investigating subversives is a highly professional job in World War II, I was approached by groups who wanted to help investigate. They wanted badges and authority to make investigations of their own. I flatly refused. I knew the work had to be handled by professionals I told them to turn their information over to the F.B.I.—not to investigate, themselves." Brief for Respondent, p. 66, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

88. 350 U.S. 497, 500 (1956).

any intentions respecting state laws, and that no constitutional prohibitions upon the power of the states to act were involved. Absent these factors, he continued, the Court has employed varying criteria in its decisions. Categorizing these as "tests of supersession," he selected three as requiring a rejection of Pennsylvania's efforts to prosecute Steve Nelson.

(1) *The Pervasive Character of Federal Regulation in the Field of Sedition and Subversion Makes Reasonable the Inference that Congress Left No Room for the States to Act.* Reliance for this proposition was placed upon a case involving the exercise of federal power under the commerce clause.<sup>89</sup> Chief Justice Warren established its applicability in the case under consideration by summarizing major provisions of the three principal federal statutes aimed at subversion—the Smith Act of 1940, the Internal Security Act of 1950, and the Communist Control Act of 1954. Taking these acts as a whole, he concluded that they "evinced a Congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law"<sup>90</sup>

(2) *The Federal Interest in Resisting and Protecting Against Internal Subversion is so Dominant that Federal Legislation Must be Presumed to Preclude the Enforcement of State Laws Touching the Same Subject.* Chief Justice Warren demonstrated this supremacy of federal interest by referring both to what Congress had done and what it had said. The congressional program for meeting totalitarian aggression was viewed in its entirety as including the strengthening of our external defenses, the guarding of freedom throughout the world, and the furnishing of protection against internal subversion. As part of this plan, the FBI and the CIA were given the "responsibility for intelligence concerning Communist seditious activities against our Government." Further, Congress had clearly regarded such activities as part of a world conspiracy<sup>91</sup> And in proscribing sedition against local, state and national governments it grounded its action upon the federal duty "to provide

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89. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

90. 350 U.S. 497, 504 (1956). Chief Justice Warren here used the oft-cited language of Justice Holmes in *Charleston R.R. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

91. See note 44 *supra*.

for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government. <sup>92</sup> Chief Justice Warren concluded that since Congress had treated seditious conduct as a matter of vital national concern, it was not in any sense a local enforcement problem.

(3) "*Enforcement of State Sediton Acts Presents a Serious Danger of Conflict with the Administration of the Federal Program.*" Chief Justice Warren stated that since 1939, the federal government had urged the states not to intervene in the action it was taking against subversion, but to turn over all relevant information to federal authorities.<sup>93</sup> The Pennsylvania law was held to present a further and peculiar danger of interference with the federal program in that indictments may be had upon informations brought by private persons. Here Chief Justice Warren adopted the views of Justice Jones of the Pennsylvania Supreme Court, including his statement that "defense of the Nation by law, no less than by arms, should be a public and not a private undertaking."<sup>94</sup> Speaking more broadly of state anti-sedition statutes, Chief Justice Warren noted particularly their lack of uniformity, the absence of successful prosecutions under these laws for attempts to destroy local or state governments, and the omission from some acts of important safeguards for the protection of fundamental rights. He indicated that statutes of this latter type do not comport with the congressional purpose "to protect freedom from those who would destroy it, without infringing upon the freedom of all our people." In a like situation in the field of labor-management relations, he added, Justice Jackson had written

"A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."<sup>95</sup>

And here, Chief Justice Warren observed that different criteria for judging substantive offenses still further increases the potentiality or likelihood of conflict with federal enforcement.

With the decision thus resting upon his three conclusions respecting occupation of the field, dominant interest of the federal government, and conflict between the enforcement of state acts and

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92. See note 50 *supra*.

93. Excerpts from statements by President Franklin D. Roosevelt and J. Edgar Hoover, dated respectively 1939 and 1940, were set out in the Court's opinion. 350 U.S. 497, 506-07 (1956).

94. 377 Pa. 58, 74-75, 104 A.2d 133, 141 (1954).

95. *Garner v. Teamsters Union, AFL*, 346 U.S. 485, 490-91 (1953)

the federal plan, the Chief Justice declined to venture any opinion as to the constitutionality of double punishment for the same acts directed against the United States. But "without compelling indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment."<sup>96</sup>

From this decision Justice Reed, with whom Justices Burton and Minton joined, dissented. Their opinion takes up each of the three grounds for the majority decision, and concludes that none of them offers a proper basis for denying to Pennsylvania power to enforce its sedition act.

(1) The doctrine that comprehensive federal action spells out congressional occupation of the field, said Justice Reed, is one developed in decisions concerning legislation under the commerce clause and was intended "to prevent partitioning of this country by locally erected trade barriers." This doctrine and the decisions from which it springs can have no application to anti-sedition laws, he stated, since the federal laws are "distinct criminal statutes" which do not create or require administrative regulation. Consequently questions of conflict with a general congressional regulatory scheme do not arise. State penal laws, moreover, are particularly entitled to judicial respect, and it should not lightly be presumed that Congress wished to void them. Justice Reed concluded that as Congress has since 1940 been aware of the existence and continued growth in the number of state anti-subversive laws, the states should not be precluded from enforcing their acts without a clear mandate to that effect from Congress itself.

(2) In the view of the dissenters, the assumption that the federal interest in suppressing sedition is so dominant as to oust state power proceeds from a mistaken reliance upon the decision in *Hines v. Davidowitz*. Justice Reed read that case as meaning only that a nationwide integrated system of alien registration bore so directly on foreign relations that Congress must clearly have intended only the one uniform system.<sup>97</sup> The decision thus involved

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96. 350 U.S. 497, 509-10 (1956), citing *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 31 (1820), and *Jerome v. United States*, 318 U.S. 101, 105 (1943).

97. Judge Montgomery in the trial court opinion had declared that *Hines* involved the protection of aliens enjoying rights under treaties which were the exclusive concern of the federal government, *Commonwealth v. Nelson*, 172 Pa. Super. 125, 128, 92 A. 2d 431, 434 (1952). Justice Bell in his dissent from the decision by the Pennsylvania Supreme Court had stated: "A reading of the majority opinion makes it clear that the basis for the decision was the Court's conviction that a State Alien Registration Act would likely involve us in grave international controversies and might even lead

the elements of a regulatory apparatus and an intimate relation to foreign policy with which the Court was not confronted in *Nelson*. With respect to the problem of internal subversion, Justice Reed asserted, "there is no 'dominant interest' " The enactment by state and federal government of criminal statutes in fulfillment of their respective responsibilities rather presents the situation treated by the Court in *Gilbert v. Minnesota*. Justice Reed pointed to language in that decision indicating that the Minnesota law had been specifically upheld against the contention that power to punish interference with enlistments in the United States military forces was an exclusive congressional prerogative.<sup>98</sup> Only alternatively, declared Justice Reed, did the Supreme Court sustain the Minnesota statute as a simple exercise of the police power.

(3) With respect to the asserted conflict between the administration of Pennsylvania's law and the enforcement of the federal act, Justice Reed found the statements of the executive department quoted in the majority opinion insufficient to establish any desire on the part of the federal enforcement officers to have the field to themselves. On the contrary, Justice Reed contended, the Department of Justice's brief *amicus curiae* in the present proceeding states most unequivocally

"The administration of the various state laws has not, in the course of the fifteen years that the federal and state sedition laws have existed side by side, in fact interfered with, embarrassed, or impeded the enforcement of the Smith Act."<sup>99</sup>

The fear of possible conflict, Justice Reed concluded, is not a valid reason for nullifying state power.

With the three pre-emption theories of the majority thus dis-

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to war. No such result could possibly ensue from State treason or Sedition laws, and the case is clearly distinguishable on its facts." *Commonwealth v. Nelson*, 377 Pa. 58, 101, 104 A.2d 133, 154 (1954). The reference in the *Hines* case to a single uniform system of legislation recalls a judicial test which has been used in commerce clause cases since the decision in *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851). The concept which the Court there developed was that where the subject of regulation demands a uniform national system, state regulation is precluded in the absence of congressional assent. While there would appear to be a place for this idea in the area of anti-subversive legislation, it does not appear in any of the decided cases as a distinct ground of decision.

98. Thus in speaking of Minnesota's effort to prohibit interference with federal military enlistments, the Court had stated that "to do so is not to usurp a National power, it is only to render a service to its people." 254 U.S. 325, 331 (1920).

99. Brief for United States as *Amicus Curiae*, p. 30, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). Moreover, Justice Reed quite clearly has the better of the argument when he characterizes the statements offered by the Court as essentially a call for state aid in the collection of useful information, rather than a declaration that the states had no business in the field.

cussed and disposed of, Justice Reed turned to what he believed to be an independently decisive ground upon which to reverse the Pennsylvania Supreme Court. This was section 3231 of Title 18 of the United States Code.<sup>100</sup> Justice Reed declared that the section is clear authorization by Congress to the states to proceed in any constitutionally permissible areas in the absence of express congressional prohibition. In his view, the section "recognizes the fact that maintenance of order and fairness rests primarily with the States." Justice Reed's dissent concludes with the observation that state and nation had here legislated within constitutional limits against sedition, and that, referring to these legislative judgments, "Courts should not interfere."

## VI

Since the Court's decision in the *Nelson* case represents its conclusions respecting congressional intent, and since it does so on the basis of doctrines laid down in prior decisions and considered applicable in testing the Pennsylvania law, an appraisal of the decision should address itself to two questions: (1) Did the Court make proper use of pre-emption doctrines? (2) Was the Court successful in finding the real intent of Congress?

The initial problem is the application of commerce clause precedent in concluding that Congress had occupied the field. The doctrine depends upon the existence of a pervasive congressional regulatory scheme. Even assuming that multiple federal statutes not requiring administration by a federal agency would not meet this test, it is clear that when the Smith Act is taken together with the Internal Security and Communist Control Acts, an occupation of the field has occurred within the meaning of the Court's prior decisions. The Internal Security Act is an elaborate registration statute demanding the services of a special administrative body, and the Communist Control Act extended this regulatory approach.<sup>101</sup>

100. This is reproduced in the text at note 68 *supra*.

101. Act of Sept. 23, 1950 c. 1024, 64 Stat. 987 (1950) (codified, as amended, in scattered sections of 8, 18, 22 U.S.C.); Act of Aug. 24, 1954, Pub. L. No. 637, 68 Stat. 775 (codified in scattered sections of 50 U.S.C.). Broadly speaking, these acts penalize the failure on the part of certain organizations therein defined to register and file detailed annual reports with the Attorney General. In some cases individuals as well as groups must register. The initial determination as to whether an organization falls within the statutory categories is made by the Subversive Activities Control Board—a specialized administrative body created by the Internal Security Act. In 1954 Congress eliminated one step in this procedure by declaring that the Communist Party was a "Communist-action organization" within the meaning of the earlier law. Despite strong pressure to do so, however, it did not radically depart from the basic notion of registration, and even created a new statutory concept—the "Communist-infiltrated" organization. See Note, *Federal Anti-*

The fact that federal power over commerce among the states enjoys greater constitutional stature than federal power over sedition does not destroy the usefulness of commerce cases as precedent, since in both instances the occupancy test is employed to discover congressional intent, and the validity of the inference drawn from an elaborate legislative plan does not depend upon the constitutional source or strength of federal power. While decisions holding federal power under the commerce clause to be exclusive or supreme were doubtless intended, as a minority of the Supreme Court asserts, to forestall the erection of local barriers to a national commerce, a national approach to the problem of sedition could be Balkanized by the states with equally unfortunate effect. The Court had already used the notion of occupancy in the *Hines* case, moreover, where the subject of legislation was not unrelated to the problem of sedition, and where the Court's own decision makes it clear that *exclusive federal power was not involved*. Granting that the Smith Act alone did not create the extensive system of regulation set up in the Alien Registration Act, it would be utterly unrealistic to omit the Internal Security and Communist Control Acts from consideration in determining the scope of the congressional plan. Communists are prosecuted under the Smith Act, they will be prosecuted for a failure to register under the Internal Security Act if the Subversive Activities Control Board completes the necessary findings, and they are directed to register and are placed under certain other disabilities in the Communist Control Act. The mischief sought to be remedied in each of these statutes is essentially the same, the threat posed by domestic Communism.

The rightness of the Court's second conclusion, respecting the dominance of the federal interest in combatting sedition, is also difficult to dispute. The Solicitor General of the United States, arguing for Pennsylvania as *amicus curiae*, conceded as much in no uncertain terms.<sup>102</sup> The Constitution itself creates this dominance

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*Subversive Legislation of 1954*, 55 Colum. L. Rev. 631 (1955). And for a notion of the difficulties which have arisen in the administration of the Internal Security Act, see *Communist Party v. Subversive Activities Control Bd.*, 351 U.S. 115 (1956), reversing a decision which upheld an order of the Board directing the Communist Party to register under the Act, 223 F.2d 531 (D.C. Cir. 1954). The Supreme Court remanded to the Board for findings respecting the allegedly tainted testimony of three witnesses who had appeared before it at the Communist Party hearings. Subsequently the Board expunged the offending testimony and reissued its order. *N.Y. Times*, Dec. 19, 1956, p. 23, col. 3.

102. See Brief for the United States as *Amicus Curiae*, p. 9, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). "There can be no real question as to the paramount interest of the federal government in the prevention of sedition." The Solicitor General took the further position, however, that the paramount nature of the federal interest did not make it exclusive.

by the very fact of a federal union, and Congress has accorded it express legislative recognition.<sup>103</sup> The nature of the Communist conspiracy, moreover, adds very substantially to the weight of federal interest. This is no loose group of isolated domestic agitators parading under a common name, but a highly centralized organization controlled from a nation to which the United States is currently and grimly opposed on a global basis. Domestic policy respecting the Communist Party in the United States should at least ideally be carefully coordinated with foreign policy respecting its Soviet master.<sup>104</sup> The federal government alone is in a position to wage the "cold war" with unity of purpose and action. The argument that state and local governments would fall with the federal government were an internal conspiracy to succeed confuses concern with responsibility. Foreign invasion would produce the same result, but few would suggest that each state should raise its own army even if the Constitution were to permit it.

If this view of the present problem of sedition is correct, the Supreme Court seems fully justified in following the conclusions as to federal dominance and resulting supersedure which were reached in the *Hines* case. Only a very superficial analysis can assign that decision to a separate and sacrosanct category labelled "aliens and foreign relations." The concern there was plainly with alien registration acts, but the applicability of Justice Black's reasoning to the Pennsylvania statute in the current context might, if anything, have been more firmly pressed in the majority opinion. And the same reasoning can be used with equal effect to distinguish the earlier decision in *Gilbert v. Minnesota*. In his analysis of that decision as merely upholding a state police measure, Chief Justice Warren was obliged to focus upon Minnesota's law as it happened to have been applied to Gilbert, and he was also obliged to ignore some important language in the Supreme Court's opinion.<sup>105</sup> Justice Reed quite properly called attention to this omission. But Gilbert does not appear to have belonged to a cohesive and nationwide organiza-

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103. See note 50 *supra*.

104. In *United States v. Pink*, the Supreme Court said. "If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power." 315 U.S. 203, 232 (1942). The close connection between the conspiratorial activities of Communists in this country and our relations with nations having similar ideologies was stressed in *Dennis v. United States*, 341 U.S. 494, 510-11 (1951). To the same effect are statements in *American Communications Ass'n v. Douds*, 339 U.S. 382, 427 (1950), where in a concurring opinion Justice Jackson wrote: "The [American] Communist Party alone among American parties past or present is dominated and controlled by a foreign government."

105. See note 98 *supra*; text, *supra*, p. 314.



tion serving the interests of a foreign and unfriendly state.<sup>100</sup> A distinction on this basis would have made the Court's treatment of the *Gilbert* case far more satisfying.

In its findings respecting conflict between state and federal action against internal subversion, the Court appears to have relied upon some very dubious evidence and to have ignored the most accurate source of current and concrete information. The statements of the executive branch of the federal government introduced into the Court's opinion are now badly dated. The contrary conclusions of the United States Solicitor General, on the other hand, were based upon fifteen years of experience with co-existing federal and state sedition laws, including the recent era of really vigorous prosecution under the Smith Act.<sup>107</sup> It is true that the Court has not always insisted upon direct evidence of existing conflict in the administration of state and federal statutes.<sup>108</sup> But if potentialities for conflict remain despite the statement by the Department of Justice, the Court was unwilling or unable to describe them. Judged

106. *Gilbert* was in fact an officer of the Non-Partisan League. It is of record that he denounced America's participation in World War I, but there is nothing to indicate that he favored the enemy.

107. In a memorandum released October 7, 1956, Attorney General Brownell presented the most recent figures on Smith Act proceedings. He stated that convictions of 108 Communist leaders had been obtained under that law in eighteen separate trials, and that "fourteen of these eighteen successful trials have either been initiated or carried to completion since January, 1953." N.Y. Times, Oct. 8, 1956, p. 15, col. 1-4.

Brownell's summary of recent Department of Justice activity directed primarily against Communists is particularly instructive in revealing the breadth of the federal program. In addition to the Smith Act proceedings, he listed the following achievements:

"We have also prosecuted the agents of the international Communist movement under several other statutes.

"Twenty Communists have been convicted for making false statements or affidavits.

"Five Communists have been convicted for perjury.

"Four Communists have been convicted for harboring fugitives from Smith Act prosecutions.

"Nine individual defendants are awaiting trial for violation of the Foreign Agents Registration Act.

"One hundred and sixty nine aliens with subversive backgrounds have been deported and seventy suits have been filed to cancel the citizenship of Communists.

"Twenty-one petitions have been filed with the Subversive Activities Control Board against Communist fronts and two petitions have been filed against Communist-infiltrated unions.

"Two persons have been convicted for espionage on behalf of the Soviet Union." *Ibid.*

The Attorney General concluded with a reference to eight changes or additions to existing statutes relating to subversion which had been recommended by the Department of Justice since 1952. He also stated that in 1954, a separate Internal Security Division was established within the Department.

108. See *Cloverleaf Butter Co. v. Patterson* 315 U.S. 148, 156-57 (1942), *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

by anything which appears in its opinion, the Court's conclusion as to interference and conflict is far from convincing.

Justice Reed, in dissent, was of the opinion that the general saving clause included in the federal criminal code<sup>109</sup> was in itself sufficient indication of congressional intent to require a reversal of the Pennsylvania Supreme Court. Judicial reaction to the clause, first enacted in 1825<sup>110</sup> and made a part of successive code revisions, has varied widely. While Justice Reed regarded it as independently dispositive, Chief Justice Warren declared, in a footnote addressed to what he denominated a "subsidiary argument," that "there was no intention to resolve particular supersession questions by the Section." This view is quite clearly the correct one. It is the jurisdiction of the state courts under valid state statutes that is saved by the clause, not the states' power to enact such statutes. The respondent put the matter well in his brief with the assertion that:

" . . . Reliance on that provision of law actually begs the entire question before the Court on this writ. No one questions the jurisdiction of the state courts to enforce valid and operable criminal statutes, despite any provision of the Code. But the very issue here is whether the Supreme Court of Pennsylvania was right when it held that its own state law was *not* valid and operable. . ."<sup>111</sup>

While this approach to the clause is easily the more persuasive, it should be recognized that the Supreme Court in *Sexton v. California*<sup>112</sup> did in fact use the identical language as the basis for a decision permitting California to punish activity also penalized in the federal code of crimes.

Turning now to the more fundamental question, can it be said that in striking down Pennsylvania's law the Court was carrying out the actual intent of Congress when that body passed the Smith Act?<sup>113</sup> The thesis offered here is that while at least two of the Court's major grounds for decision represented a proper application of precedent, they were in this context highly unrealistic guides, and their mistaken acceptance as controlling produced a misreading of the congressional will. The term "will" may in this instance be

109. 18 U.S.C. § 3231 (1952).

110. 4 Stat. 115 (1825).

111. Brief for Respondent, p. 17, n. 9, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

112. 189 U.S. 319 (1903).

113. This judgment has the benefit of hindsight, but the Supreme Court also had the benefit of the strong congressional reaction to the Pennsylvania Supreme Court's decision, and in any case this reaction tells little which is legally relevant to a determination of the congressional intent when the Smith Act was passed.

more appropriate than "intent", since there is reason to believe that Congress never consciously turned its attention to the problem posed by the co-existence of state laws.<sup>114</sup> In situations of this sort a court's decision is necessarily one step farther removed from reality, since it must make its judgment on the basis of a wholly hypothetical intent.

The actual legislative history of the Smith Act is inconclusive, but what little of relevance there is supports a result opposite to that reached by the Court.<sup>115</sup> More important, however, the Court's decision appears to have ignored the relatively familiar political realities involved in the passage of this legislation. While the public hue and cry over the problem of Communists in our midst has doubtless grown during the years since 1940, it is nevertheless difficult to believe that the popularly elected legislators who originated and passed the Smith Act, itself much criticized as infringing constitutional rights, were really so solicitous of individual liberties, so sensitive to repercussions in foreign affairs, and so concerned with the possibilities of jurisdictional conflict, that they consciously selected a single federal measure as the exclusive means of achieving their ends. If this statement be an indictment of congressional leadership, a number of legislators have since pleaded guilty.<sup>116</sup>

Although it would probably have been improper and unwise for the Supreme Court to decide the *Nelson* case on the basis of a candid look at these political facts of life, the Court might nevertheless have selected accepted judicial grounds for a decision in favor of Pennsylvania. It might, for instance, have drawn the one really persuasive inference from the fact that Congress knew all about state anti-sedition laws. Had Congress believed that state laws were an obstacle to achievement of the purposes embodied in the Smith Act (and in later and related federal statutes) it seems far more likely than not that it would have expressed this belief in unequivocal statutory language. It has done so on other occasions, and knows that such an expression is entitled to judicial respect.<sup>117</sup> The congressional silence on the point might have been explained satisfactorily on the ground that supersedure was an eventuality which simply did not occur to it, or occurred only to be dismissed as too

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114. In the debates preceding passage of the Smith Act, Representative Smith was asked whether there was any conflict between the federally-prescribed penalty and those fixed under state laws. He answered by saying that "this has nothing to do with state laws." 84 Cong. Rec. 10452 (1939)

115. See note 42 *supra*.

116. See protest of congressmen over the Supreme Court's decision, note 12 *supra*.

117. Instances are given in note 26 *supra*.

unlikely a possibility to suggest any affirmative action. Or the Court might have chosen to observe the distinction, so strenuously urged before it, between local penal laws and state statutes interfering with the free flow of goods in commerce. However the Court itself might categorize state sedition laws, it might properly have assumed that Congress would be especially solicitous of what *Congress* would likely regard as state efforts at self-preservation. Viewed from the legislative standpoint as proper police laws, the Court might then have insisted upon evidence of a direct and positive conflict, as it has done in prior cases.<sup>118</sup> These suggested grounds for decision involve inferences and assumptions, but they lie closer to the political arena in which statutes are enacted than do the pre-emption doctrines applied by the Court.

The presumptions respecting legislative intent which have from time to time been used by the Supreme Court to produce a finding of pre-emption contain a substantial element of enlightened political judgment. As a policy matter, the view that the federal interest in combatting Communist subversion is so dominant that states should not undertake to duplicate the federal program, particularly when Congress has blanketed the field with comprehensive regulations, seems both sound and wise. But judgments of this sort lie outside the realm of judicial competence, and courts should avoid making them, even in the name of uncovering congressional intent. The use of pre-emption doctrines did not serve the Supreme Court well in the *Nelson* case, and the tension generated by the decision between Congress and the Court may prove to have had unfortunate consequences for the nation. If the thesis is correct that the Court here reached a wrong result by the application of doctrines which nevertheless had considerable support in reason and precedent, perhaps a partial answer lies in a far more sparing use by the Court of these necessarily artificial assumptions where any indications of the actual legislative will can be detected. Or perhaps the doctrines should be wholly abandoned, at least if something better can be found. But if the Court is to be defended on the ground that it delivered a judgment by congressional default,<sup>119</sup> the ultimate and best answer would appear to lie in the careful legislative resolution of supersession questions before the answer must be supplied by

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118. Many of the principal cases are cited at note 24 *supra*.

119. Congressional default would appear particularly evident in this case. In enacting the Communist Control Act of 1954, Congress passed over what seems an obvious opportunity to have expressed itself respecting the decision rendered in the *Nelson* case earlier that year by the Pennsylvania Supreme Court.

litigation. It is now for Congress to decide whether this resolution is best reached by a general declaration of intent or by the insertion of appropriate language in individual statutes.

## VII

While there is reason to believe that the Supreme Court's decision does not threaten state security so much as it affronts state dignity,<sup>120</sup> it did produce widespread confusion and concern over the extent to which the states are now restricted in prosecuting seditious acts against their own governments. A measure of uncertainty shows through such statements as the following, taken from the petition to the Supreme Court for a rehearing, filed by the Attorney General of New York on behalf of that state

"This petitioner reads the *Nelson* decision as not intended to inhibit a state in prosecutions for sedition against the state as such. It is respectfully submitted that an exact statement by the Court on this point could serve to quell doubts which have been voiced as to the precise import of the decision in relation to state penal sedition laws."<sup>121</sup>

Although it is not unlikely that Congress will make the question academic, the extent of presently admissible state power over sedition is a matter of no small importance to prosecutor and prisoner who must depend upon existing law. To reach a reasoned estimate as to the remaining powers of the state, it is necessary to re-examine the Pennsylvania and United States Supreme Court decisions, and to consider the opinions of state courts which have since passed on the question.

Steve Nelson was indicted for numerous acts of sedition committed against the Commonwealth of Pennsylvania. A jury verdict of guilty on all counts of the indictment was sustained by two Pennsylvania courts. But the Pennsylvania Supreme Court put these charges aside and concerned itself only with "alleged sedition against the United States." Justice Jones for that court stated that the record contained no evidence of seditious acts directed against the Commonwealth. He did not, however, expressly quash portions of the indictment which alleged such offenses on the ground of a lack of evidence. Instead he went on to observe that it would be

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120. To take Pennsylvania as an example, there are laws penalizing the following: riots and unlawful assemblies, riotous destruction of property; disturbing public assemblies, carrying deadly weapons, and carrying bombs and explosives. Pa. Stat. Ann. tit. 18, §§ 4401, 4402, 4405, 4416, 4417 (Purdon, 1945).

121. Petition of Attorney General of the State of New York for Rehearing of Decision of April 2, 1956, p. 3, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956)

difficult to conceive of an act of sedition against a state which was not at the same time an act of sedition against the United States. Thus it is unclear whether his opinion as to offenses against the Commonwealth rests on the state of the record or on a belief that these offenses necessarily merged into the crime of advocating the overthrow of the federal government. Clearly, under one interpretation Pennsylvania might be free in a given instance to prosecute under its sedition law for activity directed against itself; on the other interpretation it could never enjoy this power so long as federal legislation respecting sedition remains in effect. Additional language in Justice Jones' opinion appears very strongly to support this latter interpretation;<sup>122</sup> the brief concurring opinion by three other justices could be argued as supporting the former.<sup>123</sup> The Supreme Court of the United States declined Pennsylvania's invitation to pass upon the full range of state power, and expressly affirmed only the precise holding of the Pennsylvania court. Was this an affirmance also of the view that pure sedition against a state was something difficult to conceive of? Chief Justice Warren did not refer to this language in the opinion below. Rather, he set out that portion of the court's decision which pointed to the lack of testimony relating to seditious acts or utterances against Pennsylvania. Is there a substantial basis here for reading the Supreme Court's approval as restricted by the record?

An analysis of the United States Supreme Court's decision with a view to ascertaining its outer edges likewise fails to produce a definite answer. The holding in the case is clear: The Smith Act precludes Pennsylvania from punishing Steve Nelson for acts of sedition against the United States. It is possible to read the *Nelson* case as standing for no more than that. But Chief Justice Warren's own statement as to what the Court was not deciding offers relatively little comfort for the states. In this self-imposed list of limitations, the Court did not say that the states were free to outlaw sedition against local and state government, though it expressly

122. In his decision Justice Jones wrote:

"Nor is a State stripped of its means of self-defense by the suspension of its sedition statute through the entry of the Federal Government upon the field. There are many valid laws on Pennsylvania's statute books adequate for coping effectively with actual or threatened internal civil disturbances. As to the nationwide threat to all citizens, imbedded in the type of conduct interdicted by a sedition act, we are—all of us—protected by the Smith Act and in a manner more efficient and more consistent with the service of our national welfare in all respects." 377 Pa. 58, 70, 104 A.2d 133, 139 (1954).

123. This opinion, set out virtually in its entirety in the text at note 67 *supra*, spoke only of sedition against the United States.

conceded the state's continued power to protect itself "against sabotage or attempted violence of all kinds."<sup>124</sup> And the declaration that state power remained unimpaired "at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct" leaves little if any room for state action. This is very different from saying that states have power where the federal government has not occupied the field.

Turning from the limitations to the grounds for decision, the reliance upon federal legislation other than the Smith Act further supports the view that any and all prosecution of Communist subversion by the states has been effectively pre-empted. These laws, in the words of Chief Justice Warren, made inescapable his conclusion that "Congress has intended to occupy the field of sedition." Presumably the "field of sedition" is not to be subdivided into areas for state and federal cognizance, with federal occupation of only a single sphere, the decisional language is unqualified. In demonstrating the dominance of the federal interest, Chief Justice Warren looked again at the broad outlines of the congressional plan, and referring to Congress he said

" It has charged the Federal Bureau of Investigation and the Central Intelligence Agency with responsibility for intelligence concerning Communist seditious activities against our Government, and has denominated such activities as part of a world conspiracy. It accordingly proscribed sedition against all government in the nation—national, state and local. Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem."<sup>125</sup>

Finally in his discussion of the danger of conflict between the enforcement of state and federal laws, the Chief Justice spoke with little admiration of state anti-sedition laws in general, calling attention particularly to the loose way in which some of them had been drafted, and their lack of safeguards for the protection of fundamental rights.

The Supreme Court's reasoning, making repeated use of the degree to which federal legislation fills the field, and the broad language used throughout the opinion, tend strongly to support the view that the decision has an applicability well beyond the precise question it decides. The supreme courts of two states have in

124. Here Chief Justice Warren set forth that portion of Justice Jones's opinion reproduced at note 122 *supra*. 350 U.S. 497, 500, n. 8 (1956)

125. 350 U.S. 497, 505 (1956)

fact now adopted this larger interpretation of the *Nelson* case. In *Commonwealth v. Gilbert*,<sup>126</sup> the Supreme Judicial Court of Massachusetts had postponed its decision until it could proceed with the benefit of a final determination as to the validity of Pennsylvania's law. The defendant, Margaret Gilbert, had been indicted for conspiracy to advocate the overthrow, by force and violence, of both the Commonwealth of Massachusetts and the United States. With respect to alleged offenses against the latter, the Massachusetts court needed only a brief paragraph in which to declare that the *Nelson* case was clearly controlling, but its conclusion respecting sedition against the Commonwealth required an analysis of Chief Justice Warren's opinion in some detail. Chief Justice Qua looked beyond the narrower question which the Pennsylvania Supreme Court's decision had presented for review. He stated that

" . . . The reasoning of the opinion, however, seems to us to carry implication beyond the case of a State prosecuting for sedition against the United States and in substance to decide that the Smith Act . . . taken in connection with the general conspiracy provisions of 18 U.S.C. § 371, the Internal Security Act of 1950 . . . and the Communist Control Act of 1954 . . . indicates an intent on the part of Congress to occupy exclusively the field of sedition at least where the offense charged is a Federal crime of the type of that charged in that case, even though alleged as a conspiracy against the State. . . ."<sup>127</sup>

After summarizing the three principal grounds upon which the Supreme Court had based its decision, Chief Justice Qua observed that the Supreme Court would find the same grounds for decision present in Margaret Gilbert's indictment under Massachusetts law, whether the alleged offenses be considered statutory violations or common law crimes.<sup>128</sup> He then reviewed the record, including detailed specifications of what it would seek to prove which had been drawn by the Commonwealth. These included membership in the Communist Party and attendance at secret cell meetings held both to study Marxist literature and to learn the techniques to be used in the violent revolution which was to precede the establishment of proletarian dictatorship. In language strongly suggestive of that used by Justice Jones in the Pennsylvania case, Chief Justice Qua

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126. 134 N.E.2d 13 (Mass. 1956). See also *Commonwealth v. Hood*, 134 N.E.2d 12 (Mass. 1956), where in a brief opinion the *Nelson* case was similarly held to require a dismissal of existing indictments.

127. *Id.* at 15.

128. This observation seems particularly significant in view of the generally accepted notion that nonstatutory criminal offenses are peculiarly the province of state administration, there being no federal common law of crimes. See *Jerome v. United States*, 318 U.S. 101, 104-05 (1943).



concluded that the specifications constituted only the "familiar paraphernalia of Communist agitation for the overthrow of government in general, and cannot be directed separately and exclusively against the government of the Commonwealth." The Massachusetts court granted motions to quash the indictment in its entirety, but qualified its decision with the following.

"We do not wish to be understood as saying that there can never be any instance of any kind of sedition directed so exclusively against the State as to fall outside the sweep of Commonwealth of Pennsylvania v Nelson. If it is to be said that there can never be such an instance, it must be said elsewhere."<sup>129</sup>

When the Kentucky Court of Appeals, in *Braden v. Commonwealth*,<sup>130</sup> faced a situation similar in substantial respects to that involved in the *Gilbert* case, it dismissed the indictment on the same reasoning the Massachusetts court had employed and stated its "full accord" with that decision. This accord included the qualification that "this opinion does not foreclose the possibility of a prosecution by the Commonwealth of the crime of sedition directed exclusively against the Commonwealth of Kentucky."<sup>131</sup>

The most plausible estimate of the extent to which state laws can presently be brought to bear upon acts of sedition against the states themselves would appear to require a distinction between Communist conspirators and those advocates of forcible overthrow whose organization and purposes are confined within the bounds of a particular locality or state. The judicial premise, evident particularly in *Gilbert v. Commonwealth*, seems to be that the source and nature of the Communist conspiracy effectively foreclose the possibility of Communist-inspired acts of sedition against an individual state as such. Whatever acts might be committed against a state would in this view be inextricably bound up with a far larger pattern of the planned overthrow of the federal government. Moreover, the real thrust of the federal laws which have produced supersedure is directed at the Communist Party and its adherents in the United States.<sup>132</sup> An indictment brought against a party member is very likely to allege acts similar to those charged under

129. 134 N.E.2d 13, 16 (Mass. 1956).

130. 291 S.W.2d 843 (Ky. 1956).

131. *Id.* at 844. And see *Kahn v. Wyman*, 123 A.2d 166 (N.H. 1956), holding that the *Nelson* case does not preclude legislative investigations pursuant to a state subversive activities law, as distinguished from criminal prosecutions.

132. These laws were for the most part so intended, and have unquestionably been so used. See the summary of Department of Justice activity in note 107 *supra*.

the sedition laws of Pennsylvania, Massachusetts, and Kentucky, and for the reasons set forth in those cases, it would appear equally likely that such an indictment would now be dismissed.

At the same time state laws may, in theory at least, continue to have validity when applied to the isolated zealot or fanatical group which seeks Utopia through the seizure of local government, and advocates forcible means to this end. But such an area is clearly so narrow as to be of dubious value to the states, since the private putsch, the planned assassination of state officers, the direct incitement to violence or riot, are all so obviously punishable under other provisions of state law that sedition acts would appear superfluous. What the states have wished to do is to join with the federal government in the prosecution of Communists under their own laws. Absent legislative change, the best estimate today is that they cannot do so.

### VIII

The decision of the Pennsylvania Supreme Court holding that by the passage of the Smith Act Congress intended to pre-empt the field of sedition against the United States produced an immediate and disapproving reaction on the part of the author of that federal law. Writing to the Attorney General of Pennsylvania in protest against the decision, Congressman Howard W. Smith stated that:

“ . . . As I am the author of the Federal act in question, known as the Smith Act, I am deeply disturbed by the implications of this decision. May I say that when I read this opinion, it was the first intimation I have ever had, either in the preparation of the act, in the hearings before the Judiciary Committee, in the debates in the House, or in any subsequent development, that Congress ever had the faintest notion of nullifying the concurrent jurisdiction of the respective sovereign states to pursue also their own prosecutions for subversive activities. . . The whole tenor and purpose of the Smith Act was to eliminate subversive activities, and not to assist them, which latter might well be the effect of the decision in the *Commonwealth v. Nelson* case.”<sup>133</sup>

Congressman Smith promptly moved to repair, by legislation, the damage which in his view had been wrought by the Pennsylvania Supreme Court. He prepared a bill specifically intended to reverse the result that court had reached. In its original form the bill, later known as H.R. 3, was drawn so as to apply very broadly to all areas of legislative concern. The decision to go beyond mere

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133. *Commonwealth v. Nelson*, 377 Pa. 52, '89-90, 104 A.2d 133, 148-49 (1954) (introduced into the dissenting opinion).

amendment of the Smith Act, and beyond a bill which would apply only to sedition and subversive activities, was taken because Representative Smith believed that the Pennsylvania decision was "merely a symptom of a dangerous disease that threatened to destroy completely the sovereignty of the states. I decided to offer a separate bill to seek a cure of the whole malady"<sup>134</sup>

H.R. 3 was first introduced into the House at the second session of the Eighty-Third Congress (as H.R. 8211)<sup>135</sup> and was re-introduced at the beginning of the first session of the Eighty-Fourth.<sup>136</sup> Shortly thereafter, Senator Jenner introduced the companion bill, S. 373, into the Senate.<sup>137</sup> These bills provided

"That no Act of Congress shall be construed as indicating an intent on the part of Congress to occupy the field in which such Act operates, to the exclusion of all State laws on the same subject matter, unless such Act contains an express provision to that effect. No Act of Congress shall be construed as invalidating a provision of State law which would be valid in the absence of such Act unless there is a direct and positive conflict between an express provision of such Act and such provision of State law so that the two cannot be reconciled or consistently stand together."

Broadly speaking, this legislation was designed to strengthen the position of Congress, and correspondingly to reduce that of the Supreme Court, as arbiter of the federal system within the wide area where the Constitution permits power to be exercised concurrently by state and federal governments. It was also frankly intended to halt what Congressman Smith regarded as the increasing and unwarranted usurpation by the federal government of powers rightfully belonging to the states, and to eliminate uncertainties in the interpretation of Congressional intent.<sup>138</sup> Its sponsors recognized, however, that Congress could not vest in the states

134. Extension of Remarks in the House of Representatives, 101 Cong. Rec. 123 (1955).

135. 100 Cong. Rec. 2614 (1954)

136. 101 Cong. Rec. 31 (1955)

137. 101 Cong. Rec. 333 (1955)

138. In a brief filed with the subcommittee which was conducting hearings on H.R. 3, Representative Smith stated the purposes of the bill as follows:

"It would return to Congress, rather than the courts, the authority to prescribe the extent to which Federal enactments would supersede State laws on the same subject matter. It would also obviate much of the unpredictability that both the Federal and State government labor under in attempting to ascertain the proper scope of their respective powers. At the same time, it would establish a reliable safeguard against the continued diminution of State power."

*Hearings before Subcommittee No. 1 of the House Committee on the Judiciary*, 84th Cong., 1st Sess., ser. 9, pt. 1, at 44 (1955).

powers which the Constitution assigns exclusively to the federal government, and they expressly disavowed any purpose to do so. An effort was made also to avoid infringing upon the Constitution's supremacy clause, it being correctly viewed as a constitutional necessity to provide that federal law should have precedence in cases of "direct and positive conflict."<sup>139</sup> The bills were directed rather at Supreme Court pre-emption doctrine, frequently referred to in the congressional hearings as "supersession by implication." Consequently while some doubts as to constitutionality were expressed, there is little reason to suppose that the Constitution would prevent Congress from setting out a general rule of statutory interpretation applicable in those areas where it can normally exclude or include state power by express provision in particular statutes.

The bills introduced by Congressman Smith were referred to a Subcommittee of the House Committee on the Judiciary, Eighty-Fourth Congress, which held hearings during both legislative sessions, first in 1955 and again in April of 1956, a few days after the United States Supreme Court affirmed in the *Nelson* case.<sup>140</sup> These hearings disclosed widespread and enthusiastic support for the proposed legislation on the part of state law enforcement officers,<sup>141</sup> the American Farm Bureau Federation, the National Association of Manufacturers, and individual congressmen. But opposition was expressed on behalf of the AFL-CIO, the Railway Labor Executives' Association, the National Association for the Advancement of Colored People, the Department of Justice, and the Interstate Commerce Commission. The arguments of this latter group were directly chiefly against H.R. 3's broad applicability, there being relatively little objection to confirming, in the states, concurrent power with respect to sedition alone. And it became increasingly obvious that the bills as introduced raised fundamental political issues, specifically the sensitive question of whose law is to govern labor-management relations and of course the broad problem of states' rights in general. Supporters of the legislation tended strongly to be those who favor a realignment of powers in favor of the states, especially in the fields of commerce and labor-man-

139. The phraseology was consciously adapted from the leading early case of *Sinnot v. Davenport*, 63 U.S. (22 How.) 227 (1859).

140. *Hearings, supra* note 138; *Hearings before Subcommittee No. 1 of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 9, pt. 2 (1956).

141. The vote at the 1956 meeting of the National Association of Attorneys General in support of the bills was 31 to 10. *N.Y. Times*, June 1, 1956, p. 48, col. 4.

agement relations, while opponents typically represented groups which have found the exercise of federal power more congenial than control by state legislatures. Federal agencies were perhaps less politically motivated, but equally concerned with the impact which H.R. 3 might be expected to have upon vast areas of federal regulatory activity. It was uncertainty as to the nature of this impact which provided the principal argument against H.R. 3, and the point was pressed effectively by spokesmen for economic interest groups and by federal officials. The Department of Justice foresaw enormous problems both in the drafting of future legislation and in redetermining the extent of state power in areas presently under federal regulation. It recommended that

“ it would be more effective to amend each such law specifically to eliminate the possibility of conflict with State statu[t]es rather than by the enactment of blanket legislation, to throw into doubt operations in many areas to an extent presently unpredictable.”<sup>142</sup>

The strength and persuasiveness of the opposition to the original H.R. 3 soon produced several substitute bills which were in terms limited to sedition and subversive activity.<sup>143</sup> Among these was H.R. 11341, which adopted the very different approach of amending Title 18 of the United States Code to authorize the enforcement of state statutes dealing with sedition against the state or the United States. This bill did not purport to be a legislative guide to the interpretation of statutes, although in its limited area it manifested congressional intent clearly enough. The Judiciary Committee put the new bill into the form of an amendment to H.R. 3, and as thus amended, well beyond any recognition, H.R. 3 was reported favorably out of the Committee on July 3, 1956. As submitted to the House it stated

“Except to the extent specifically provided by any statute hereafter enacted by the Congress, the enactment of (a) any provision of law contained in this chapter or in chapter 37, 67, or 105 of this title, (b) the Subversive Activities Control Act of 1950, (c) the Communist Control Act of 1954, or (d) any other Act of Congress heretofore or hereafter enacted which prescribes any criminal penalty for any act of subversion or sedition against the Government of the United States or any

142. Letter from William P. Rogers, Deputy Attorney General, to Emanuel Celler, Chairman of the House Committee on the Judiciary, June 27, 1955, in *Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 9, pt. 2, at 141 (1956).

143. H.R. 10335 and H.R. 10344, 84th Cong., 2d Sess. (1956). These are described by their sponsors in 1956 *Hearings*, *supra* note 140 at 98-100, 109-12.

State of the United States, shall not prevent the enforcement in the courts of any State of any statute of such State prescribing any criminal penalty for any act, attempt, or conspiracy to commit sedition against such State or the United States, or to overthrow the Government of such State or the Government of the United States. . . ."<sup>144</sup>

The original objections of the Department of Justice were withdrawn, and the Department favored enactment of the legislation, on the basis that "in the fields of sedition and subversion, the Federal and State Governments can work together easily and well. . . ."<sup>145</sup>

This view accords with the position the Department had taken in the amicus brief it submitted to the Supreme Court in the *Nelson* case. A companion Senate bill, S. 3617, was reported out of the Senate Judiciary Committee on June 5, 1956.<sup>146</sup>

With the wisdom of a policy allowing the states to proceed in these areas we are not here concerned.<sup>147</sup> A minority report opposing passage of H.R. 3 was signed by Congressman Celler, and the

144. H.R. Rep. No. 2576, 84th Cong., 2d Sess. (1956).

145. Letter from William P. Rogers, Deputy Attorney General, to Emanuel Celler, Chairman of the House Committee on the Judiciary, May 25, 1956, in *id.* at 5.

146. S. Rep. No. 2117, 84th Cong., 2d Sess. (1956). This bill was identical to H.R. 3 with the important exception that it omitted H.R. 3's opening clause, "Except to the extent specifically provided by any statute hereafter enacted by the Congress. . . ." The purpose of such omission would appear to have been to make it more difficult for a future Congress to exclude state power, since it would probably be necessary not only to negate state power by express provision but also to amend this new section of Title 18. While a Congress willing to take the first step would presumably agree also as to the second, this sort of restriction upon the freedom of future legislative action does not seem well-advised.

147. The record in the *Nelson* case indicates, however, that state power to ferret out and to prosecute Communists and other persons deemed to be subversive is susceptible of very serious abuse. As both the Pennsylvania and United States Supreme Courts explicitly recognized, Nelson's indictment and trial raised a number of grave constitutional questions, both as to procedure and as to substance. Chief Justice Warren further commented generally on the absence from some state sedition laws of accepted constitutional safeguards. 350 U.S. 497, 508 (1956). A succeeding Attorney General of Pennsylvania, moreover, while not necessarily endorsing these constitutional doubts, has since expressed himself as opposing prosecutions by the states under their own sedition laws. Evening Bulletin (Philadelphia), July 21, 1956, p. 2, col. 8. Even more broadly instructive in this regard is the brief filed by Frank J. Donner on behalf of individuals who had been either indicted or interrogated under the sedition laws of Massachusetts, New Hampshire, Kentucky and Florida. See note 17 *supra*. The deeply disturbing facts recited in that brief amply support the writer's conclusions that the proceedings in the four states therein described were largely motivated by personal and partisan considerations, and that all were marked by repeated invasions of procedural due process and a parallel disregard for freedoms of expression. Brief of Frank J. Donner for individual Amici Curiae, pp. 34-35, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). If state power in the area of sedition and subversion is to be given congressional sanction, it should not be on the basis of the record which certain of the states have thus far made for themselves.

outlines of a convincing case against concurrent state power over sedition are suggested there.<sup>148</sup> For reasons similarly beyond the scope of a study of the legal effect of these bills, they were not brought to a vote during the final session of the Eighty-Fourth Congress. Since there is cause to believe that they will be reintroduced at the first session of the Eighty-Fifth Congress, a few brief observations may be in order.

First, H.R. 3 and S. 3617 are infinitely better than their predecessors, which would unquestionably have introduced new uncertainties into an area of law which stands already in great need of clarification. They represent an approach not radically different from the amendment of existing and future federal anti-subversive laws on an individual basis. If enacted into law, they will constitute a clear statement of congressional intent respecting state power which is long overdue in this area. Second, they permit the exercise of state power not only in cases of sedition against the states as such, but against the United States as well, although they do not appear to comprehend advocacy of the overthrow of local political subdivisions, nor do they provide any sure guide in determining the validity of related state laws requiring the registration of Communists or making membership in the Communist Party a crime.<sup>149</sup> Finally, unless the Supreme Court should show some new-found disposition to treat federal power over sedition as constitutionally exclusive,<sup>150</sup> they would doubtless be effective in their primary purpose to upset the decision in *Pennsylvania v. Nelson*. Since that decision clearly turned upon what the Court believed to be congressional intent, the Court should be properly receptive to an express indication of what it had been obliged to find by inference. In the event of a direct and irreconcilable conflict between the provisions of state and federal law, however, courts will continue to invalidate state legislation, since the Constitution's command that the federal law is supreme must be given precedence over the word of Congress. It is not unlikely that the Supreme Court might one day have to choose between the two.

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148. H.R. Rep. No. 2576, 84th Cong., 2d Sess. 13-17 (1956).

149. If approved by Congress, however, they would likely be offered as evidence of congressional intent respecting state legislation not strictly within their terms.

150. See note 49 *supra*.

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