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FEDERAL SUPREMACY AND STATE ANTI-SUBVERSIVE LEGISLATION*

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STATE legislatures have been prompted by international tensions of recent years to enact new and stringent anti-subversive laws, thus adding to an already large body of statutes directed against various forms of subversion.[1] Many of these statutes are open to serious objection on constitutional grounds. The purpose of this article is to examine those objections which are based upon the notion either that federal power in the area is exclusive or that Congress, expressly or by necessary inference, has pre-empted the field.

I

Four decisions have been selected for close scrutiny as being of particular value in illuminating the questions of federal supremacy and state anti-subversive legislation. The earliest of these decisions was rendered shortly after World War I by the Supreme Court in *Gilbert v. Minnesota*.[2] A Minnesota statute made it a misdemeanor to teach or advocate orally or in writing that men should not enlist in the military forces of the United States or the State of Minnesota. Gilbert was convicted, fined and imprisoned for a violation of this statute. His conviction was affirmed by the state supreme court. He contended that the statute was unconstitutional on the ground that power over the subject matter was vested exclusively in Congress by reason of sole congressional powers to "provide for the common Defense and general Welfare of the United States," to "declare War," to "raise and support Armies," and to "make Rules for the Government and Regulation of the land and naval Forces."[3] States are expressly prohibited, moreover, from engaging in war "unless actually invaded, or in such imminent Danger as will not admit of delay."[4] The Supreme Court, speaking

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[1] See GELLHORN, THE STATES AND SUBVERSION (1952), for a discussion of some of the state programs. In appendices A and B, Professor Gellhorn has set out a classification of state laws and citations for each state, as of January 1, 1951. See also notes, 61 HARV. L. REV. 1215 (1948); 66 HARV. L. REV. 327 (1952). The latter is particularly apposite to the topic of this article.

[2] 254 U.S. 325, 41 S.Ct. 125 (1920).

[3] These powers are delegated to Congress by art. I, §8 of the Constitution.

[4] U.S. CONST., art. I, §10.

through Justice McKenna, rejected this argument. The Minnesota statute was held to be an appropriate aid to the federal war powers based upon legitimate interests of the state in ensuring the successful recruiting of its citizens to serve in national military forces. Further, the statute was declared to be sustainable simply as a local police measure looking to prevention of breaches of the peace and having only an incidental effect on the concededly federal function of raising armies. The judgment of the Minnesota court was affirmed.

Chief Justice White dissented stating that Congress had occupied the field.[5] Justice Brandeis, dissenting at greater length, argued that federal power over enlistments in the military forces and the conduct of the war was exclusive. Alternatively, he argued that even if the power were not exclusive, Congress had occupied the field by passage of the Federal Espionage Act of 1917 with the result that any and all state legislation in the same area must fall since " 'when the United States has exercised its exclusive powers . . . so far as to take possession of the field, the States can no more supplement its requirements than they can annul them.' "[6] Such legislation, moreover, was beyond the area of legitimate state concern once Congress had acted since the primary responsibility for preserving the state government rests upon the federal government. Finally, Justice Brandeis found a repugnancy between the Minnesota statute and congressional policy in two respects. First, it had long been the policy of Congress to provide that enlistments in United States military forces should be the result of an informed and free choice.[7] Second, Congress in the Federal Espionage Act had prohibited only certain tangible obstructions to the conduct of the war committed with criminal intent, whereas the Minnesota act prohibited speech and required no such intent. Justice Brandeis concluded by expressing his doubts as to the constitutionality of the statute when further tested as against the due process clause of the Fourteenth Amendment.

In 1939 the Commonwealth of Pennsylvania adopted an Alien Registration Act similar in effect to registration statutes enacted previously by a number of other states.[8] Such laws can very clearly be

[5] 254 U.S. 325 at 334, 41 S.Ct. 125 (1920).

[6] Id. at 342, quoting Pennsylvania R.R. Co. v. Public Service Commission, 250 U.S. 566 at 569, 40 S.Ct. 36 (1919).

[7] Justice Brandeis noted that the policy of voluntary enlistments had been departed from only once—during the Civil War. He cited United States Army recruiting regulations providing that potential recruits must be given all the facts and information before being signed on. Id. at 339.

[8] The Pennsylvania act is cited as Pa. Stat. Ann. (Purdon, 1949) tit. 35, §§1801 to 1806. There were at the time nineteen states which had statutes or ordinances requiring some form of registration by aliens. This point was made by Justice Stone in his dissent

placed in the category of "anti-subversive legislation" since the registration provisions are generally intended as an aid to the enforcement of other provisions which forbid various forms of subversive activity on the part of aliens. Many of these statutes are in terms operative only in time of war or when public necessity requires. They reflect a general fear and distrust of aliens engendered by two world wars. The Pennsylvania act required the annual registration, with stated exceptions, of aliens over eighteen years of age. Registrants received an alien identification card which they were required to carry at all times and to produce on demand of any police officer. Fine or imprisonment or both were provided for failure to register and also for failure to carry the identification card and to produce it on proper demand. Willfulness was not an element of the offense. At the suit of Davidowitz, an alien, a three-judge district court enjoined enforcement of the act on the ground, inter alia, that it impinged upon federal legislative powers.[9] On appeal, the Supreme Court, in an opinion by Justice Black, affirmed the judgment of the district court, and the case of *Hines v. Davidowitz*[10] has since become an important statement of doctrine with respect to federal power over the alien.

The decision went upon the ground first that by the enactment of the Federal Registration Act of 1940[11] Congress had closed the field to state alien registration acts. Justice Black passed the question whether the registration of aliens is an exclusive federal power, holding that the adoption by Congress of a comprehensive scheme for regulation of aliens left no scope for state action of any kind in this area. In establishing the supremacy of federal power over aliens, Justice Black stressed at some length the paramount interests of the national government in securing non-discriminatory treatment for foreign nationals. Referring to state alien registration acts, he said: "Laws imposing such burdens are not mere census requirements, and even though they may be immediately associated with the accomplishment of a local purpose, they provoke questions in the field of international affairs." On the point he concluded, "Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of Congress, or the treaty, is supreme; and the law of the State,

in Hines v. Davidowitz, 312 U.S. 52 at 79, 61 S.Ct. 399 (1941). Some of these are cited in a note, 29 GEORGETOWN L.J. 755 at 767 (1941).

[9] Davidowitz v. Hines, (D.C. Pa. 1939) 30 F. Supp. 470.

[10] 312 U.S. 52, 61 S.Ct. 399 (1941).

[11] The registration provisions, as they were in 1940, may be cited as 54 Stat. L. 673 (1940), as amended, 66 Stat. L. 223 (1952), 8 U.S.C. (1952) §§1301 to 1306.

though enacted in the exercise of powers not controverted, must yield to it.' "[12]

In few of the cases resolving asserted conflicts between state and federal power is the decision based upon the single ground of exclusive federal power, or federal pre-emption, or actual repugnancy of state to federal policy. Justice Black went on to indicate his belief that the primary test must be whether the Pennsylvania law obstructed or hindered the full accomplishment of congressional purposes. As to this he found conflict between the state and federal acts. The federal act provided for a single registration of aliens fourteen years of age and over, detailed information specified by the act, finger-printing of registrants, and secrecy of the federal files which could be made available only upon approval of the attorney-general. There was at that time no requirement that the alien carry a card, and failure to register was punishable only if shown to be willful. It was noted that bills providing for the carrying of cards had been frequently introduced without success in Congress.[13] Without deciding whether or not registration of aliens was a subject admitting of only a single system of registration, Justice Black read the text and the legislative history of the Alien Registration Act as evidencing a congressional purpose 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 that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against."[14]

Justice Stone, with whom concurred Chief Justice Hughes and Justice McReynolds, dissented. He argued that aliens once admitted to the country become subject to the police powers of the state and that since federal power here is not exclusive the Pennsylvania law was clearly valid in the absence of congressional legislation. Moving to meet the majority holding, Justice Stone said that states should be precluded from acting not on the basis of vague conceptions of occupancy of the field but only upon a showing of a "direct and positive" repugnancy between state and federal acts.[15] No such conflict was found to exist, since compliance with the state law did not preclude or hinder compliance with the act of Congress. Evidence of congressional intent to withdraw power over aliens from the states was considered to be totally

[12] Hines v. Davidowitz, 312 U.S. 52 at 66, 61 S.Ct. 399 (1941).

[13] For examples of congressional legislation of this type and discussion leading to rejection or abandonment, see 72 CONG. REC. 3886 (1930).

[14] 312 U.S. 52 at 74, 61 S.Ct. 399 (1941).

[15] This was the expression of the test employed in the case of Sinnot v. Davenport, 22 How. (63 U.S.) 227 (1859).

lacking. Rather, Congress must be presumed to have known of the numerous state statutes treating the identical subject matter when it passed the federal act.[16] The fact that both state and federal laws may have an impact on the alien was declared to be the result simply of the dual sovereignty to which the alien, like the citizen, is subject. Analogies were drawn to concurrent powers of state and federal governments in the fields of taxation and of licensing. As supporting his conclusion Justice Stone cited, inter alia, the case of *Gilbert v. Minnesota,* which was not mentioned in the opinion of the Court but had been urged as controlling in the appellants' brief.

Early in 1952 the Michigan Trucks Act, formally entitled the "Michigan Communist Control Law," came into effect.[17] An immediate challenge to the act was issued in the form of a bill seeking an injunction to restrain enforcement of certain sections of the act and an adjudication that these sections were unconstitutional. The bill was brought by the Communist Party of Michigan and its secretary, William Albertson. A temporary restraining order was issued against enforcement of the act while a three-judge court was deciding on the merits of the petition for injunction. Two sections of the Michigan act were considered.[18] One of these requires registration by communists with the State Police under oath and the furnishing of information with respect to the purpose of the registrant's presence within the state, features of identification, and other data. The same section further requires registration by officers of the Communist Party and disclosure by them of the location of offices and meeting places, names of members, financial statements, and the like. Criminal penalties are prescribed for failure to comply with these requirements. The other section of the act against which relief was sought provides that the name of any communist or Communist Party nominee shall not be printed on any ballot used in any primary or general election in the state or political subdivision thereof.

Plaintiff's initial contention was that these sections of the act were invalid on the ground that the Internal Security Act of 1950[19] had

[16] Apparently Congress did have such knowledge. See Hearings before the Subcommittee of the Senate Committee of the Judiciary on H.R. 5138, 76th Cong., 3d sess. (1940).

[17] Mich. Stat. Ann. (Cum. Supp. 1953) §§28.243(11)-28.243(22).

[18] The sections challenged were §§5(a) and 7. Section 4 was also challenged in Albertson's bill. It contains a definition of "communist front organization" for purposes of the act. Judge Simons dismissed the bill as to this section on the ground that no "communist front organizations" were claiming or shown to be parties to the suit. Albertson concededly sued in his own right and on behalf of the Communist Party itself and hence was not in a position to seek relief against §4.

[19] 64 Stat. L. 987 (1950), 50 U.S.C. (1952) §781 et seq. For a complete analysis of the act see note, 51 COL. L. REV. 606 (1951).

"occupied the field" to the exclusion of any exertion of state power. In an opinion by Chief Circuit Judge Simons, the court rejected this and other of plaintiff's contentions and upheld the sections of the Trucks Act which had been called in question.[20] Judge Simons began by pointing to language in *Hines v. Davidowitz* in which the Supreme Court had emphasized that no single test provides an exclusive constitutional yardstick by which to reconcile competing state and federal claims of authority. Judge Simons read the cases cited by plaintiff as establishing the following principles:

> ". . . (1) that where Congress enters a field of regulation, but does not occupy it entirely, the state is not precluded from legislating therein in matters of purely state concern, (2) that exclusion of the exercise of state authority is to be enforced only where state action conflicts, or is likely to conflict, with federal authority and does not apply where state legislation is complementary to the purpose and objectives of federal action. . . ."[21]

Judge Simons held that the Trucks Act provisions, tested by these principles, were not invalidated by the Internal Security Act since there was no conflict between provisions of the two acts. Rather, the statutes were viewed as complementary to each other, one on the national and the other on the local level. The states were considered to have an abundant interest in regulating state and local elections, and in protecting their own governments from violent overthrow and their industrial plants from sabotage. As a final point in support of his holdings, Judge Simons referred to the text and legislative history of the federal act as indicating that Congress did not propose to deal exclusively with the subject matter.

District Judge Levin dissented. He thought that the registration provisions of the Trucks Act invaded a field which had been preempted by Congress when it enacted the registration provisions of the Internal Security Act. Congress, in passing the act, had evidenced particular concern for the welfare of the states in its declared purpose to "guarantee to each State a republican form of government" and had made a further finding to the effect that communism is a world-wide rather than a local problem.[22] Judge Levin drew principal support from

[20] Albertson v. Millard, (D.C. Mich. 1952) 106 F. Supp. 635.

[21] Id. at 640-641.

[22] Under the section entitled "Congressional finding of necessity" [64 Stat. L. 987 (1950), 50 U.S.C. (1952) §781] it was found by Congress that: "There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement. . . ." As a result of this and a number of other findings, it was concluded that: "The Communist organization in the United States . . . and the nature and control of the world Communist movement itself . . . make it necessary

one of the tests enunciated in *Hines v. Davidowitz,* namely, whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The Michigan act was viewed as involving state law enforcement officers in evaluations of Soviet foreign policy with the attendant possibility of serious embarrassment to the federal government in sensitive areas of international affairs. Conceding that there was no outright conflict in the purposes of the registration provisions of state and federal acts, Judge Levin found further possibility of interference with congressional purposes in the wide differences between the two laws in the matter of procedure. In reasoning which was again suggestive of Justice Black's phrases in *Hines v. Davidowitz,* he observed that the federal act demonstrates far greater solicitude for individual liberties in many respects than does the Michigan statute. He concluded, "The Congressional purpose manifested in the safeguards erected in the McCarran [Internal Security] Act could be thwarted and ultimately rendered meaningless were acts like the Michigan Act here in question put into operation in each or any of the forty-eight states." In the second portion of his opinion Judge Levin expressed the further belief that the Michigan act did not meet the standard of due process.

From the decision of this district court in *Albertson v. Millard*[23] an appeal was taken to the Supreme Court. In a per curiam opinion the Supreme Court remanded with directions to vacate the restraining order and to hold the proceedings in abeyance a reasonable time pending construction of the statute by the state courts.[24] The Court invoked familiar doctrine to the effect that state statutes will not be passed upon if there exist terms and provisions of doubtful meaning as yet unclarified in the state courts. An opportunity for such clarification was seen to exist in a bill pending in the circuit court for Wayne County which sought a declaratory judgment that the act was unconstitutional. Justice Black dissented. Justice Douglas dissented in a brief opinion in which he asserted that the case was ripe for decision on the two points presented, namely, whether Michigan could require the Communist Party of Michigan and its secretary to register, and whether Michigan could forbid the names of communists or Communist Party nominees from appearing on the ballot in state and local elec-

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. . . ."

[23] (D.C. Mich. 1952) 106 F. Supp. 635.

[24] 345 U.S. 242, 73 S.Ct. 600 (1953).

tions. In the view of Justice Douglas no decision of a Michigan court could make the issues more specific.

Acting pursuant to a provision of its penal code which defines sedition and makes it a felony,[25] the Commonwealth of Pennsylvania in 1952 convicted Steve Nelson, chairman of the Communist Party of Western Pennsylvania. Nelson filed motions for a new trial and in arrest of judgment, urging that the Smith and McCarran Acts pre-empted the field and precluded enforcement of the Pennsylvania Sedition Act. The Court of Quarter Sessions of Allegheny County rejected this contention on the basis that state legislation is invalid only when the federal government's jurisdiction over the subject matter is exclusive or where its power is supreme *and* the federal government has expressly or by necessary implication indicated its intention of superseding state action. The McCarran Act was read as authorizing rather than precluding state action, particularly in the provision that: "The foregoing provisions of this title shall be construed as being in addition to and not in modification of existing criminal statutes."[26] The court concluded that the case was properly to be categorized as one of "concurrent jurisdiction" resulting from the fact of dual sovereignty, citing *United States v. Lanza*[27] and *Westfall v. United States*,[28] which held that the same acts might be criminal under both state and federal law. On appeal by the defendant to the Superior Court of Pennsylvania, the conviction was affirmed per curiam on the opinion by Judge Montgomery of the Court of Quarter Sessions.[29]

On review by the Pennsylvania Supreme Court, however, the judgment of the superior court was reversed.[30] Judge Jones, for the court, held that the Smith Act precluded Pennsylvania from prosecuting members of the Communist Party under its own sedition law. He rested his decision on two principal grounds. First, the case was considered to be one of federal pre-emption on the basis that where both state and federal government have legislated in a field of paramount importance to the latter, the federal legislation must be taken to supersede that of the state. Judge Jones cited *Hines v. Davidowitz* for this

[25] Pa. Stat. Ann. (Purdon, 1945) tit. 18, §4207.

[26] 64 Stat. L. 1003 (1950), 50 U.S.C. (1952) §796.

[27] 260 U.S. 377, 43 S.Ct. 141 (1922). This is perhaps the leading case on concurrent jurisdiction of dual sovereignties. It is customarily distinguished in decisions rejecting the notion of concurrent jurisdiction on the ground that it involved the 18th Amendment to the Constitution which expressly authorized concurrent jurisdiction in the enforcement of Prohibition.

[28] 274 U.S. 256, 47 S.Ct. 629 (1927).

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

[30] Commonwealth v. Nelson, 377 Pa. 58, 104 A. (2d) 133 (1954), rehearing den. April 27, 1954.

proposition and, in establishing the character of the federal interest as paramount, declared that no federal interest could be more dominant than the maintenance of the security of the federal government itself. The cases cited in the superior court opinion to support the principle of "concurrent jurisdiction" were distinguished on the basis that there the state was properly punishing for a separate offense to its own dignity whereas here Pennsylvania sought to punish Nelson for sedition against the United States. Possible implications from this statement to the effect that a state might not be precluded from punishing sedition against its own government were foreclosed by Judge Jones' further statement that it would be difficult to conceive of acts of sedition against a state that were not also acts of sedition against the federal government—"the Union of the 48 component states." Moreover, the duty of suppressing sedition against a state government is placed squarely upon the federal government by article IV, section 4 of the Constitution which charges the federal government to guarantee "to every State in this Union a Republican Form of Government." Congress undertook this duty when, in the revised Smith Act of 1948, it outlawed the attempted overthrow "of the government of the United States or the government of any State, Territory, District or Possession thereof. . . ."[31] Judge Jones concluded, "Federal pre-emption could hardly be more clearly indicated."[32]

The second principle on which the decision rests is essentially the test employed in *Hines v. Davidowitz* and again by Judge Levin dissenting in *Albertson v. Millard.* The test is whether or not the state act gives promise of hindering or obstructing congressional purposes. On this ground Judge Jones distinguished *Gilbert v. Minnesota.* Conceding that a state retains the power to punish breaches of the peace, this does not carry with it the right to "conflict or interfere with, curtail or complement, the federal law." Such interference was found in the disparity of sentences prescribed for the same offense by the federal and Pennsylvania acts.[33] Judge Jones observed, "This disparity could not help but confuse and hinder the attack on sedition, which calls for uniform action on a national basis." There is a very strong suggestion

[31] 18 U.S.C. (1952) §2385. This language was substituted in the 1948 revision for the former wording: "any government in the United States. . . ." The change does not appear to be one of substance.

[32] 377 Pa. 58 at 70, 104 A. (2d) 133 (1954).

[33] The Smith Act provides a penalty of not more than $5000 fine or six years imprisonment, or both, for "seditious conspiracy" [18 U.S.C. (1952) §2384] and a fine of not more than $10,000 or ten years imprisonment, or both, for willfully advocating the overthrow of the government of the United States, state or political subdivision [18 U.S.C. (1952) §2385]. Under the Pennsylvania statute, the defendant Nelson had received a twenty-year sentence.

here of the *Cooley* doctrine of one uniform system of regulation which has long been applied in cases arising under the commerce clause,[34] but the point was not stressed. In the final paragraph of his opinion, Judge Jones expressed his strong disapproval of the provision of the Pennsylvania law permitting indictment upon information of a private individual. Pointing to the opportunities thus afforded for the venting of personal spite, he stated his view that defense of the nation by law should be a public and not a private undertaking, and that were the task accomplished by the central administration of the federal government individual rights freely to criticize the government might better be maintained. In a brief concurring opinion Chief Justice Stern stressed the importance of prosecuting sedition, a crime against the nation, in the federal courts. He indicated his belief that the question would be finally determined by the United States Supreme Court. That Court has in fact recently agreed to review the Pennsylvania court's decision.[35]

Judge Bell entered a lengthy and vigorous dissent. He contended that since the power of the federal government to punish sedition is concededly not exclusive, federal supersedure can occur only where there is a direct and positive conflict between state and federal acts. In adopting the repugnancy test he echoed the language of Justice Stone, dissenting in the *Hines* case, and cited many of the same decisions. Having established his criterion, Judge 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 complete control of the field. In support of this conclusion, he set out a number of facts known to Congress at the time of the passage of the revised Smith Act in 1948 which he considered relevant in ascertaining congressional intent with respect to pre-emption. Among these facts, he cited the large number of state treason and sedition laws known by Congress to be in effect at that time, and the further fact, also known to Congress, of demonstrated inability on the part of the federal government acting alone to cope with the problem of domestic Communism. In the same connection, Judge Bell 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

[34] The rule enunciated in the leading case of Cooley v. Board of Wardens of Port of Philadelphia, 12 How. (53 U.S.) 299 (1851), will be considered at more length below.

[35] Certiorari was granted in Commonwealth of Pennsylvania v. Nelson, 75 S.Ct. 58 (October 14, 1954). The Solicitor General was invited to file a brief presenting the view of the government.

States under the laws thereof."[36] Finally, he introduced into his opinion a portion of a letter written by Congressman Smith, author of the Smith Act, to the Attorney-General of Pennsylvania in which the writer stated that Congress had never intended to oust the concurrent jurisdiction of states in prosecuting for subversive activities and that: "It would be a severe handicap to the successful stamping out of subversive activities if no state authority were permitted to assist in the elimination of this evil, or to protect its own sovereignty."[37]

In his review of the decisions Judge Bell urged that the principles enunciated in *Gilbert v. Minnesota* should be controlling. He read the decision in *Hines v. Davidowitz* as resting on the premise that state alien registration acts would be likely to involve the nation in international controversies and might even lead to war. In his view these considerations can have no force where state treason or sedition laws are concerned. In conclusion, stress was laid by Judge Bell on the decisions upholding the concurrent jurisdiction of states and the federal government to punish for offenses against their respective sovereignties, and upon decisions in the field of labor-management relations and the commerce clause in which the exercise of state power has been upheld.

II

If the decisions which have been summarized above are to be useful in predicting the course of future decisions in the field, it is necessary to isolate and classify the ideas which appear in the opinions. It has already been observed that questions of federal supremacy and federal pre-emption are seldom decided on a single ground. It can be further observed that in deciding these questions courts are not very precise in marking off the limits of the various grounds for decision. Terms like "exclusive federal power" or " occupancy of the field" tend to be used in a variety of senses. In the above summary of the decisions a certain amount of systematization has of necessity been introduced. What follows is an attempt at even further systematization in the interests of determining just what considerations are likely to move a court one way or the other in testing state anti-subversive legislation against federal power and congressional purposes. The following ideas and assumptions are offered for further examination as underlying the decisions which have been reviewed.

[36] 18 U.S.C. (1952) §3231. This is a general provision, of course, having reference to all of Title 18, and appears in the chapter dealing with the jurisdiction and venue of district courts.

[37] 377 Pa. 58 at 90-91, 104 A. (2d) 133 (1954).

A. *Exclusive Federal Power.* It is settled by a long line of decisions, chiefly concerned with regulation of commerce, that in areas where federal power is exclusive, states may not act within the area at all even though Congress has not exercised its power.[38] In the area of anti-subversive legislation the decisions indicate little disposition to hold that federal power is exclusive. In part this may be the result of the fact that Congress has actually made wide use of its powers, and questions which would have been presented had such powers lain dormant need not be considered. Justice Brandeis, dissenting in *Gilbert v. Minnesota,* was of the opinion that federal power over recruiting for the armed forces was exclusive, but he went on to point to the Federal Espionage Act of 1917 as precluding legislation by the states. In cases involving the regulation of aliens as a class by the states there are decisions to the effect that the powers of the federal government are exclusive.[39] Insofar as the state regulations have encroached upon federal powers over immigration, naturalization, or foreign commerce, the decisions seem eminently sound. Justice Black in the *Hines* case, however, was unwilling to hold that the federal power to compel registration of aliens was exclusive,[40] and Chief Justice Stone, in dissent, thought that such regulations were very clearly within the police powers of the state. Even the decision in *Commonwealth v. Nelson,* which recognizes the federal government's paramount interest in protecting national and state governments from violent overthrow, apparently rejects the view that this is an exclusive prerogative of the national government which must be denied to states even where Congress has not acted.

B. *Uniform National System of Regulation.* Ever since the decision in *Cooley v. Board of Wardens of Port of Philadelphia*[41] the Supreme Court has observed a distinction in cases arising under

[38] The rule was implied in the opinion of Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1 (1824) and was subsequently applied by Marshall in Brown v. Maryland, 12 Wheat. (25 U.S.) 419 (1827) and in McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819).

[39] For example, see Chirac v. Chirac, 2 Wheat. (15 U.S.) 259 (1817) (naturalization); Henderson v. Mayor of the City of New York, 92 U.S. 259 (1875) and Head Money Cases, 112 U.S. 580, 5 S.Ct. 247 (1884) (power over foreign commerce); Chy Lung v. Freeman, 92 U.S. 275 (1875) and Fong Yue Ting v. United States, 149 U.S. 698, 13 S.Ct. 1016 (1893) (power to conduct foreign relations).

[40] Despite two decisions, one in a federal district court and the other in the California Supreme Court, which struck down state alien registration acts on the sole ground that such acts constituted an invasion of the powers of the federal government. See Arrowsmith v. Voorhies, (D.C. Mich. 1931) 55 F. (2d) 310, and Ex parte Ah Cue, 101 Cal. 197, 35 P. 556 (1894). These statutes do appear, however, to have gone considerably beyond the Pennsylvania act in regulating the alien.

[41] 12 How. (53 U.S.) 299 (1851).

the commerce clause between regulations of subject matter which demands a uniform national system of regulation and subject matter in which local diversity can be permitted. In cases falling into the former category, the tendency has been to hold that the states are precluded from acting at all; in cases of the latter class, state regulations have generally been upheld until Congress has manifested its intent to regulate in the field, or to leave it free from all regulation. This doctrine is potentially of great force in the area of anti-subversive legislation. A strong argument can be made that the problem of subversion is a national one which must be handled, if at all, on a national basis. Considerations of international politics and of foreign policy can be adduced to reinforce the argument. Only the federal government, it may be urged, is in a position to coordinate the related problems of the Cold War and internal subversion. There is more than a hint of this type of thinking in the decisions which have been reviewed, and Judge Levin, dissenting in *Albertson v. Millard,* pointed to the congressional finding in the Internal Security Act that communism was a world-wide rather than a local problem Yet it cannot be said that the rule of the *Cooley* case has been clearly articulated as a major ground for decision in any of the opinions which have been examined.

C. *Congressional Action in an Area of Supreme Federal Power and Interest.* It is in this situation that doctrines of federal pre-emption or occupancy of the field are typically and properly applied. Within the area, application of the doctrines seems to involve a balancing process. Where federal supremacy is very clear, and the interests of the national government undeniably paramount, it will require very little in the way of legislation by Congress to spell exclusion from the field for the states. It is clear that in such cases an actual repugnance or conflict between state and federal statutes has not been required, nor have the courts demanded any clear expression of congressional intent to pre-empt the field. *Hines v. Davidowitz,* in fact, has since been interpreted as creating a presumption of congressional intent to pre-empt the field in areas of supreme national importance.[42] Correspondingly, however, where the national interest appears less paramount a court may insist upon more evidence of congressional intent to oust state power. There is, of course, no agreed upon set of rules for determining when the national interest is of this stature, and a point of conflict running through the decisions is the degree to which the national interest actually is supreme. A judge's view on this point is likely to

[42] See Rice v. Santa Fe Elevator Corp., 331 U.S. 218 at 230, 67 S.Ct. 1146 (1947), and Braden, "Umpire to the Federal System," 10 UNIV. CHI. L. REV. 27 (1942).

have a profound influence on the way he reads the statutes for indicia of congressional intent.

A second problem in cases presenting the question of whether Congress has occupied the field is the matter of defining the "field." Judge Simons in *Albertson v. Millard* conceded that Congress had entered the field, but he did not believe that Congress had occupied it so fully that no scope for state action remained. In this connection it is of particular significance to examine the extent to which Congress has acted to regulate the subject matter in question. From the cases which have been decided under the commerce clause it may be deduced as a fairly safe principle that where Congress has enacted a detailed and comprehensive system of regulation there is greater likelihood that it will be held to have occupied the field than where it has touched only lightly on the subject.[43] There is ample scope for the application of this idea in the area of anti-subversive legislation. In *Hines v. Davidowitz* Justice Black made the point that Congress has enacted a detailed body of rules respecting alien registration and had further made a real effort to harmonize these rules with other federal statutes in the same general area so as to ensure uniform and comprehensive treatment of the subject.

D. *Repugnancy or Conflict Between State and Federal Acts.* One of the few principles which can be stated with assurance in the broad area of federal supersedure is that where there is a "direct and positive conflict" between a state law and a federal act the state law cannot stand.[44] This is the so-called "repugnancy" or "conflict" test, and it has been applied in decisions covering a very broad range of subject matter. Typically the test is asserted as controlling and then rejected as not applicable to the facts by a judge who believes that a state act should be upheld.[45] Reasoning of this kind was employed by Judge Simons in *Albertson v. Millard* and by the Pennsylvania Superior Court in *Commonwealth v. Nelson.* It was also used by the dissenting judges in *Hines v. Davidowitz* and by the Supreme Court of Pennsylvania in the *Nelson* case. Parenthetically it may be remarked that

[43] Compare Townsend v. Yeomans, 301 U.S. 441, 57 S.Ct. 842 (1937) and Savage v. Jones, 225 U.S. 501, 32 S.Ct. 715 (1912) with Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 62 S.Ct. 491 (1942) and McDermott v. Wisconsin, 228 U.S. 115, 33 S.Ct. 431 (1913).

[44] Sinnot v. Davenport, 22 How. (63 U.S.) 227 (1859), contains the classic statement of the test, including the "direct and positive conflict" clause. See also Southern Ry. Co. v. Reid, 222 U.S. 424, 32 S.Ct. 140 (1912). In general see note, 60 HARV. L. REV. 262 (1946), and particularly the cases cited at pp. 263-264.

[45] That this is true also in commerce clause decisions, see note, 60 HARV. L. REV. 262 at 263, n. 10 (1946).

Chief Justice Stone, who urged the test as controlling in the *Hines* case, has on other occasions made plain his conviction that, absent exclusive federal power, an actual conflict is the only basis on which state legislation may properly be held to have been superseded.[46] The views of a number of other Supreme Court justices also have become fairly well crystallized on this question.[47]

There are, however, many possible variations of the repugnancy test. The easiest case is one where there is such a direct conflict that compliance with one statute means defiance of the other.[48] In such a case the test is essentially objective. It is a matter simply of comparing the texts of the state and federal acts in question. A variant which introduces the subjective element of congressional intent is the test used in the *Hines* case by Justice Black. As has been indicated, he thought that the Pennsylvania act must fall if it obstructed or hindered the full accomplishment of congressional purposes, and this formulation was employed again by the Pennsylvania Supreme Court in *Commonwealth v. Nelson.* The test in this form is of peculiar importance in decisions involving anti-subversive legislation since it furnishes a ground for saying that since Congress has evinced a greater regard for individual rights than has the state legislature (which has commonly been the case), Congress must have intended that the safeguards it wrote into its own act should not be impaired by state legislation which omits comparable safeguards. This type of thinking is an important part of the rationale both in the *Hines* case and in *Commonwealth v. Nelson.* It is clear that while such a test retains an element of the "conflict" idea, it has moved a very great distance from the strict statement of that doctrine and understandably has not met with the approval of judges like Chief Justice Stone or Judge Simons.

E. *Congressional Intent to Supersede State Action.* It has already been indicated that judges differ sharply in their views as to how much and what kind of evidence of congressional intent to supersede legislation by the states will be necesary in order to invalidate a state law. A presumption of such intent requiring little if any support

[46] See his dissenting opinions in Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 62 S.Ct. 491 (1942) and Hill v. Florida, 325 U.S. 538, 65 S.Ct. 1373 (1945).

[47] In the commerce field, Justice Black is of the view that where Congress has not acted an actual discrimination against interstate commerce is necessary. Where Congress has acted, Justice Black's opinion in the Hines case provides an illustration of his thinking, at least where he believes that the matter is of paramount concern to the national government. In several majority and dissenting opinions Justice Frankfurter has evinced a special concern for the administrative realities of the asserted conflict, and has inquired whether competing agencies can as a practical matter reconcile their respective spheres of regulation.

[48] Judge Hutcheson in Cloverleaf Butter Co. v. Patterson, (5th Cir. 1940) 116 F. (2d) 227 at 232.

from text or legislative history will be indulged in cases of direct conflict between state and federal laws, and by some judges in cases of inconsistency or disparity of provisions between the statutes if the national interest is thought to be of overriding importance. There can be no serious doubt that Congress could preclude the states from enacting anti-subversive legislation and could nullify many existing state laws if it chose to include in its statutes an unequivocal statement of its intent to assert exclusive control over the field. Moreover since Congress may remove constitutional obstacles to legislation by the states in areas of exclusive federal concern,[49] it can certainly grant to the states statutory authorization to combat subversion which will be honored by the courts. But it is apparent from the decisions that it has done neither, and that judges of either persuasion can cite portions of congressional acts to support their position and then either conclude that no conflict exists or rule on the basis of an obstruction to "congressional purposes." The legislative history is unsatisfactory on the point,[50] and evidence such as that adduced by Judge Bell of the Pennsylvania Supreme Court in the form of a letter from Congressman Smith would not be accepted as proper under usual principles of statutory interpretation.[51] Much must be made of what Congress "knew" at the time, and again on the point it can be said both that Congress knew of the many state anti-subversive laws then in effect and that it recognized that subversion was a problem of national scope best dealt with at the national level. Congressional intent, it must be concluded, has been an unsatisfactory guide for decision, much having been presumed or inferred which may or may not be warranted in actual fact.

F. *Dominant Interest and Responsibility.* No judge would suggest that subversion is not a problem of vital concern to the federal government, but the decisions reflect a wide difference of opinion as to whether it is of such vital and overriding concern that it has ceased to become a legitimate subject for legislation by the states. The judges who believe that the national interest is primary to the exclusion of the states would not of course leave the states unprotected. They assert that it is the responsibility and duty of the federal government under article IV, section 4 of the Constitution to shield the state as well as the federal government from forcible overthrow. That section of the Constitution states:

[49] Such is the teaching of In re Rahrer, 140 U.S. 545, 11 S.Ct. 865 (1891), which was followed by cases like Whitfield v. Ohio, 297 U.S. 431, 56 S.Ct. 532 (1936).

[50] Legislative history will be discussed more fully below.

[51] SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, 3d ed., Horack, 504 (1943).

> "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."

As has been seen it is fairly common to construct an argument on the basis of the federal duty to guarantee to states a republican form of government, but the second part of the section appears to suggest an argument on the other side. Can it not be fairly implied from that language that "domestic violence" is to be the concern of the states unless they have made application for the intervention of the federal government? Perhaps it could be shown that the intent of the framers cannot be said to have included subversion in the sense of incitement to violent overthrow. In any event, the argument has not been made. The opinion of Judge Jones in *Commonwealth v. Nelson* provides a good example of the view that advocacy of the destruction of state governments is an immediate threat to the safety and existence of the national government itself which is, after all, a "Union of the 48 component states." If the decision in that case is to be confined to its facts, of course, it is significant that Nelson was charged only with sedition against the United States. At the same time assertions that there remains at least a residuum of state interest which justifies state legislation are strongly pressed. In *Gilbert v. Minnesota* the majority said that Minnesota possessed a real interest in ensuring the success of federal recruiting since her citizens were being called upon to serve. Similarly, Justice Stone, dissenting in the *Hines* case, thought that Pennsylvania's Alien Registration Act was a wholly appropriate exercise of the police power which afforded to the state "a convenient method of ascertaining the number and whereabouts of aliens within the state, which it is entitled to know, and a means of their identification."[52] Judge Bell dissenting in the *Nelson* case was particularly emphatic in asserting that states must be permitted to defend their own governments since, in his view, the federal government had shown its inability to cope with the problem. In the absence of clearer indications of congressional intent and policy than have so far been forthcoming, it may be expected that the question as to what extent federal interests and responsibilities dominate the field will be a crucial one.

G. *Double Punishment and Dual Sovereignty.* The ideas of double punishment and dual sovereignty are closely related in the

[52] Hines v. Davidowitz, 312 U.S. 52 at 75, 61 S.Ct. 399 (1941).

decisions which have been reviewed. *Commonwealth v. Nelson* provides the best vehicle for exploration of the relationship between these ideas. The notion that individuals might be punished twice for the same acts if the state legislation were allowed to stand was stressed in the majority opinion by Judge Jones. Judge Jones was also impressed with the fact of wide disparity in the punishments prescribed in state and federal laws. The point appears to have been made for two reasons. First, it bears upon congressional intent since Congress presumably would not wish further and more stringent penalties to be added to the ones it has prescribed and, second, it indicates the capacity of state acts for hindering and obstructing the efforts of the federal government to deal with the problem. Judge Bell in his dissent read the opinion of the majority as resting in part upon an objection of double jeopardy in the constitutional sense. While it is difficult to see how the majority opinion could be thus construed, Judge Bell is certainly on firm ground when he demonstrates that the same acts constituting an offense against both state and federal law may be punished by either without valid constitutional objection.[53] As the two opinions very clearly show, the really ultimate issue is that of dual sovereignty. The majority willingly accept the decisions supporting the concurrent jurisdiction of dual sovereigns to punish for the same acts. The difficulty with the doctrine, in the view of Judge Jones, is that the acts of Nelson constituted an offense against the United States *alone*. The same division of opinion occurs in the other decisions as well: if these are offenses against dual sovereigns, each may punish; if they are offenses only against the federal government, the federal government alone should punish. For principles controlling the decision as to how many sovereigns are properly involved, one is then pushed back still further to considerations of dominant interest and responsibility.

H. *Belief as to the Unwisdom or Unconstitutionality of the State Act on Other Grounds.* In this as in related fields where questions of federal pre-emption arise, it is obvious from a reading of the opinions that a judge's determination on the issue of pre-emption is profoundly influenced by his view as to the wisdom or the constitutionality on other grounds of the state act in question. Justice Brandeis, dissenting in *Gilbert v. Minnesota,* entertained grave doubts as to whether the Minnesota statute met the standards of due process. Judge Levin in his dissent in *Albertson v. Millard* had similar doubts which he expressed

[53] Judge Bell cites a number of the usual decisions including United States v. Lanza, 260 U.S. 377, 43 S.Ct. 141 (1922); Westfall v. United States, 274 U.S. 256, 47 S.Ct. 629 (1927); and Gilbert v. Minnesota, 254 U.S. 325, 41 S.Ct. 125 (1920).

at some length. Stern disapproval of the state laws, moreover, stands out all through the majority opinions in *Hines v. Davidowitz* and *Commonwealth v. Nelson.* Since judges, like many other informed persons, differ sharply on the question of how best to meet the problem of internal subversion, it may be confidently predicted that considerations of this kind will continue to influence the decisions of these cases.

III

A brief examination of the decisions and doctrine in the fields of regulation of commerce and labor-management relations is appropriate, since there are many more decisions bearing on the question of federal supremacy and pre-emption in these fields than in the area of anti-subversive legislation. To facilitate prediction, particular attention will be paid to what appear to be the most recent trends in Supreme Court thinking.

Substantially all of the ideas examined in the preceding section appear repeatedly in the decisions involving the commerce clause of the Constitution and congressional legislation enacted in the exercise of the power which that clause confers. State statutes have been invalidated on the ground that they invaded an area of exclusive federal power, whether Congress has acted or not, and also on the ground that the subject matter of the regulations by its very nature demanded uniform national legislation.[54] The test of direct conflict between the provisions of state and federal acts has been widely conceded as appropriate, but less widely used in actually striking down state legislation. This objective, textual conflicts test has often been urged as the only valid criterion in the absence of exclusive federal power or facts calling for an application of the rule of the *Cooley* case. Other judges have believed that conflict with congressional purposes and policy is all that is required. Beyond this, in the area of so-called "occupation of the field," there are decisions in accord with *Hines v. Davidowitz* which go on the ground that in certain areas of primary national concern the fact of congressional action in itself raises a presumption that Congress intended to occupy the entire field to the exclusion of the states. As in that case, there are strenuous dissents from such an approach. A second criterion which has been used in a number of decisions is the extent to which Congress has regulated in the area. Comprehensive systems of regulation which have been actually implemented are more

[54] See notes 38, 39 and 41 supra. See also Braden, "Umpire to the Federal System," 10 UNIV. CHI. L. REV. 27 (1942), note, 60 HARV. L. REV. 262 (1946).

likely to displace state laws than are congressional acts which only skirt the fringes of the subject matter.[55]

While the commerce clause has largely replaced the due process clause as the constitutional weapon in striking down state economic legislation,[56] and the decisions, broadly speaking, have followed the trend of recent years toward increasing the powers of the federal government at the expense of the states, the rules and doctrines with respect to reconciliation of state and federal power have by no means crystallized in favor of the federal government. An examination of three comparatively recent commerce clause decisions should make this clear. In *Rice v. Santa Fe Elevator Corp.*[57] the question was whether Congress by the enactment of the United States Warehouse Act had precluded Illinois from regulating warehouses under its Public Utilities and Grain Warehouse Acts. There was language in the federal act which unequivocally expressed the intent of Congress to eliminate dual regulation of warehouses subject to the act. Justice Douglas, for the Court, held that Congress had gone further than to make the federal act override state law in the event of conflict and that accordingly as to all matters regulated by the federal law any state regulation was wholly displaced. In dissent, Justice Frankfurter stated, ". . . due regard for our federalism, in its practical operation, favors survival of the reserved authority of a State over matters that are the intimate concern of the State unless Congress has clearly swept the boards of all State authority, or the State's claim is in unmistakable conflict with what Congress has ordered."[58] Justice Frankfurter, of course, read the congressional intent differently from the majority of the Court. In *California v. Zook*[59] the Supreme Court had before it a California statute which made it unlawful to sell or arrange for transportation over the public highways of the state unless the transporting carrier had a permit from the Interstate Commerce Commission. The Federal Motor Carrier Act contained a provision which was substantially identical with respect to carriers in interstate commerce. Justice Murphy, for the majority, held that the California statute was not rendered invalid by the Federal Motor Carrier Act. The majority's reasoning was that the test must be whether the state act conflicts with national policy and whether Congress intended its regulations to be exclusive. On the latter point Justice Murphy stated that congressional intent to displace state laws

[55] Cases are cited in note 43 supra.
[56] Braden, "Umpire to the Federal System," 10 UNIV. CHI. L. REV. 27 (1942).
[57] 331 U.S. 218, 67 S.Ct. 1146 (1947).
[58] Id. at 241.
[59] 336 U.S. 725, 69 S.Ct. 841 (1949).

must be clearly manifested, and on the former it was held that there was clearly no conflict in the terms of the statutes and that mere coincidence of provisions did not amount to a forbidden conflict.[60] There were dissents in the case by Justices Frankfurter, Burton, Douglas and Jackson. Justice Frankfurter thought that when Congress had prescribed specific sanctions for specific offenses the states were no longer free to impose additional punishments. He stressed the desirability of avoiding double punishment even though such punishment might be constitutionally permissible.[61] Finally, he thought that the "conflict" test for displacing state power as an exclusive criterion was applicable only when Congress had chosen to occupy a limited field. Justice Burton, with whom concurred Justices Douglas and Jackson, dissented at length principally on the basis that Congress intended to assert exclusive jurisdiction over the subject matter. He also found conflicts between the provisions of the state and federal acts.

In *Lloyd A. Fry Roofing Co. v. Wood*[62] a majority of the Supreme Court applied the "conflicts" test to an Arkansas statute requiring permits of "contract carriers" which were in this case engaged in interstate commerce. Justice Black in the majority opinion declared that no showing had been made of conflict between the Arkansas law and the Federal Motor Carrier Act or regulations of the Interstate Commerce Commission issued thereunder. The Arkansas act, moreover, required its commission to reconcile state regulation with the regulation of the Interstate Commerce Commission. Justice Douglas dissented and was joined by Justices Burton and Minton and Chief Justice Vinson. He contended simply that Congress had pre-empted the field, citing, inter alia, *Hines v. Davidowitz* and *Rice v. Santa Fe Elevator Corp.*

Perhaps the best that can be done by way of rationalizing the commerce clause decisions is to view the entire process as one of balancing a number of conflicting considerations which impress themselves upon different justices with varying force. While similarities with the decisions respecting anti-subversive legislation are striking, and while *Hines*

[60] This reasoning is difficult to reconcile with the oft-quoted statement of Justice Holmes: "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." Charleston & Carolina R. Co. v. Varnville Co., 237 U.S. 597 at 604, 35 S.Ct. 715 (1915).

[61] An early formulation of this notion is that of Justice Washington in Houston v. Moore, 5 Wheat. (18 U.S.) 1 at 23 (1820), where in speaking of concurrent state and federal legislation he observed: "If the one imposes a certain punishment, for a certain offence, 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."

[62] 344 U.S. 157, 73 S.Ct. 204 (1952).

v. Davidowitz is as frequently cited in these cases as any commerce clause decision, there are at least two important points of difference. First, the commerce clause itself, in the absence of any congressional enactment, stands as a bulwark of federal power. The policy of the framers against "Balkanization" of the country through the erection of tariff barriers and other obstructions to the free flow of commerce is well known and has been re-emphasized in numerous decisions. No constitutional provision bearing upon state laws against subversion is of anything like this stature. Second, there are in the matter of anti-subversive statutes important civil liberties considerations which do not intrude so forcibly into the area of regulation of commerce. The presence of these considerations may be of very real significance in determining the views of certain of the justices.

The very considerable body of state and federal legislation pertaining to the relation between labor and management has presented the Supreme Court with a number of complex questions involving federal supremacy and pre-emption.[63] These questions have in large measure been answered without the benefit of clearly expressed congressional intent respecting the areas sought to be left to the states.[64] The important decisions can be grouped as follows: (1) decisions resting upon direct conflict between federal and state law or policy; (2) decisions based upon interference by the states with the exercise of federally-protected rights; (3) decisions involving state prohibition of conduct also proscribed under federal law; and (4) decisions concerning the regulation of practices neither protected nor proscribed under federal law.

Direct conflict between federal and state law or policy has been found in cases involving state representation proceedings, a state law prescribing strike votes, and a state law which prohibited strikes in public utilities.[65] In *Bethlehem Steel Co. v. New York State Labor*

[63] It is not intended here to treat comprehensively the problems of federalism and labor-management relations. There is much recent and highly competent commentary in the field. See Cox, "Federalism in the Law of Labor Relations," 67 HARV. L. REV. 1297 (1954); Hall, "The Taft-Hartley Act v. State Regulation," 1 J. PUB. L. 97 (1952); Hays, "Federalism and Labor Relations in the United States," 102 UNIV. PA. L. REV. 959 (1954); Ratner, "Problems of Federal-State Jurisdiction in Labor Relations," 3 LAB. L.J. 750 (1952); Rose, "The Labor Management Relations Act and the State's Power to Grant Relief," 39 VA. L. REV. 765 (1953).

[64] See Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 at 771, 67 S.Ct. 1026 (1947), and International Union, UAW-AFL v. WERB, 336 U.S. 245 at 252, 69 S.Ct. 516 (1949). In both of these cases Justice Jackson noted the failure of Congress to lay down guides for construction of the NLRA in the matter of permissible scope for state action.

[65] This attempt to segregate grounds for decision and fit them into categories of labor-relations cases produces a pattern which is more clear-cut than the decisions warrant. Actually the decisions uniformly employ two or more of the possible conflict and pre-emption doctrines.

Relations Board[66] foremen of the steel company had filed petitions for representation with the New York State Labor Relations Board at a time when the National Labor Relations Board had adopted a policy of denying separate bargaining rights to foremen. Although this policy was subsequently reversed, the possibilities of conflict in the rulings of state and federal boards were obvious, and the Supreme Court concluded that New York was without power to entertain these petitions. The reasoning in *Bethlehem Steel* was followed in *LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board.*[67] That decision deprived the WERB of jurisdiction to determine a representation question involving employees who were subject to the NLRA even though the federal board had not acted. The constitutionality of the strike vote provision in the Michigan labor mediation law was tested in *International Union, UAW-CIO v. O'Brien.*[68] Inspection and comparison of the Michigan law and the NLRA disclosed conflicting provisions, the federal act permitting strikes at a different time and not requiring the majority authorization which Michigan had prescribed. There was a further inconsistency in the bargaining units which might be established under the respective statutes. Accordingly, the state legislation was held invalid under the commerce clause as conflicting with federal law and as an infringement on rights safeguarded by Congress. Disparity between the provisions of the Wisconsin Public Utility Anti-Strike law and the NLRA, borne out by instances of actual conflict in the record, likewise resulted in the invalidation of the state statute.[69]

Decisions involving interference by the states with the exercise of federally-protected rights involve the application of pre-emption doctrines, and, more particularly, of the principle of *Hines v. Davidowitz* that state laws cannot be permitted to stand as obstacles to the full accomplishment of congressional purposes. In *Hill v. Florida*[70] a state statute which required the licensing of union business agents and the filing of union reports as prerequisites to engaging in collective bargaining was held invalid as repugnant to the Wagner Act. The federal law was thought to establish a policy in favor of free collective bargaining which the states could not qualify.

[66] 330 U.S. 767, 67 S.Ct. 1026 (1947).
[67] 336 U.S. 18, 69 S.Ct. 379 (1949).
[68] 339 U.S. 454, 70 S.Ct. 781 (1950).
[69] Amalgamated Assn. of Street, Electric Railway & Motor Coach Employees v. WERB, 340 U.S. 383, 71 S.Ct. 359 (1951).
[70] 325 U.S. 538, 65 S.Ct. 1373 (1945). In contrast to most of the decisions under discussion, this case arose prior to the enactment of the Labor-Management Relations Act of 1947.

The question whether state courts retain power to enjoin conduct also proscribed under federal law is one to which widely divergent answers have been given. With respect to employer unfair labor practices, the Supreme Court has taken the position that states are powerless to grant administrative remedies in industries under NLRB jurisdiction,[71] but with respect to concerted employee activity of a type apparently forbidden under the NLRA the Supreme Court has only recently ruled.[72] In *Garner v. Teamsters, Chauffeurs & Helpers*[73] an injunction was sought against picketing which at least arguably fell within the prohibitions both of Pennsylvania law and of the NLRA.[74] The Pennsylvania Supreme Court reversed the lower court's decision granting an injunction and in reversal reasoned that the comprehensive federal remedy provided under the NLRA precluded the states from affording additional remedies.[75] The Supreme Court of the United States affirmed on the ground that since Congress had entrusted primary responsibility for enforcement of the NLRA rules to one specialized body, it must have intended that there should be centralized and uniform application of those rules. Justice Jackson, for the Court, observed, "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."[76]

The power of the states to regulate employee activity has been upheld by the Supreme Court where the conduct involved was considered to fall well outside the field of congressional cognizance. It was said in *International Union v. WERB*: "This conduct is governable by the State or it is entirely ungoverned."[77] Earlier, in *Allen-Bradley*

[71] Plankinton Packing Co. v. WERB, 338 U.S. 953, 70 S.Ct. 491 (1950) (per curiam).

[72] Examples of the diversity of judicial thinking include State ex rel. Tidewater Shaver Barge Lines v. Dobson, 195 Ore. 533, 245 P. (2d) 903 (1952); Norris Grain Co. v. Nordaas, 232 Minn. 91, 46 N.W. (2d) 94 (1950); and Capital Service, Inc. v. NLRB, (9th Cir. 1953) 204 F. (2d) 848.

[73] 346 U.S. 485, 74 S.Ct. 161 (1953).

[74] There could of course be no adjudication as to whether the picketing was actually unlawful under the NLRA since such an adjudication would have usurped the powers of the NLRB. It was sufficient to hold that the conduct involved was within the jurisdiction of the NLRB, and it was also significant that the sections of the Pennsylvania and federal acts bearing on such conduct were markedly similar, thus heightening the possibility of conflict between state and federal decisions.

[75] 373 Pa. 19, 94 A. (2d) 893 (1953). A dissent in the case was filed by Judge Bell. His approach was similar to the position he took in Commonwealth v. Nelson.

[76] 346 U.S. 485 at 490-491, 74 S.Ct. 161 (1953). The Court also rejected the argument that the NLRB was entrusted only with the enforcement of public rights and that Congress had laid down no rules respecting private rights. This interesting thesis, which must now be considered academic, is advanced in Rose, "The Labor Management Relations Act and the State's Power to Grant Relief," 39 VA. L. REV. 765 (1953).

[77] 336 U.S. 245 at 254, 69 S.Ct. 516 (1949).

Local v. WERB,[78] the Court had approved an order of the Wisconsin board requiring a striking union to cease and desist from mass picketing and threats of violence. The union contended that since the employer was subject to the Wagner Act the state board could have no jurisdiction. Justice Douglas, for a unanimous Court, found that Congress had not made union conduct of the kind involved a subject of regulation under the federal act, and added that an intent to exclude states from exercising traditional police powers must be clearly shown.[79] The decision in *Hines v. Davidowitz* was distinguished as involving legislation which had an impact on the conduct of foreign relations, an area in which whatever state power might exist was at its lowest ebb. It was further observed that the federal system of alien registration in the *Hines* case was a "single integrated and all-embracing" one, while in the instant case Congress had deliberately left open an area for state control. Justice Douglas concluded that the situation was similar to the common case in which a state moves to prevent breaches of the peace in connection with labor disputes. This portion of the Court's reasoning bears a close resemblance to one of the arguments used in upholding the state statute in *Gilbert v. Minnesota.* The *International Union* case developed from an order of the Wisconsin Employment Relations Board directing the cessation of intermittent work stoppages which it considered to be unlawful under Wisconsin labor legislation. The order of the Wisconsin board was upheld by the supreme court of the state, and the United States Supreme Court affirmed.[80] It was necessary to determine initially that the work stoppages involved were not protected under the NLRA and, conversely, that the NLRB had not been authorized to forbid them. From these determinations there followed the conclusion that the state police power had not been superseded by congressional enactment.

In summary it may be stated that doctrines of federal supremacy and pre-emption have been particularly potent in the labor-management relations field. This is true for two reasons. First, Congress has written into law a comprehensive statutory scheme for the control of labor-management relations which fall within the reach of the commerce

[78] 315 U.S. 740, 62 S.Ct. 820 (1942).

[79] Id. at 749. Two of the cases cited by Justice Douglas for this proposition appear with especial frequency. In Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 47 S.Ct. 207 (1926), the Supreme Court, despite the oft-quoted language, held that a Georgia statute regulating locomotive equipment was precluded by congressional delegation of power to the Interstate Commerce Commission in the same area. In Kelly v. Washington, 302 U.S. 1, 58 S.Ct. 87 (1937), however, the Supreme Court upheld state inspection and regulation of tugboats on the basis that an exercise of the state's police power should stand in the absence of direct and positive conflict with federal statutes.

[80] 336 U.S. 245, 69 S.Ct. 516 (1949).

power.[81] Second, the agency to which enforcement of this statutory scheme was entrusted has in turn created a vast network of administrative rules and regulations. As a consequence the Supreme Court has in a majority of instances found outright or potential conflict between state and federal regulation, or at least an interference with express or implied congressional purpose. Only in a peripheral area has the Court felt warranted in concluding that Congress had no intent either to protect or to prohibit.

IV

Although the commerce clause and labor-management relations cases just discussed suggest some of the ideas which the Court may apply, they also demonstrate that in all fields presenting questions of federal supersedure, prediction is an uncertain business.

When the Supreme Court takes up the question of whether the states have been deprived of the power to secure convictions under their own sedition laws, as it will in reviewing the decision in *Commonwealth v. Nelson*,[82] a number of possibilities for result and rationale will be offered. It is conceivable, though not probable, that one or more of the justices may believe the passage of laws to protect the existence of the United States and state governments to be an exclusive federal function. Such a view could proceed in part on the basis of article IV, section 4 of the Constitution,[83] and also on the basis that the federal government alone possesses the peculiar competence necessary to deal with the threat of world-wide Communist domination in all of its manifestations. Of greater significance, in all likelihood, will be the extent to which the justices may believe the national interest in this area to be paramount rather than exclusive. An individual justice's thinking on this point may well determine his decision on the really critical issue of whether to apply a strict repugnancy test, or a broader notion of conflict with congressional policy, or finally a doctrine of occupation of the field. The two recent commerce clause decisions in *California v. Zook* and *Fry Roofing Co. v. Wood* give an indication of how difficult it is to predict which test may ultimately be used. Both of these decisions must be categorized as employing a "conflict" ap-

[81] This statement might have been questionable before 1947. The Labor-Management Relations Act of that year, however, represents an assertion of federal power vastly more broad than under the earlier Wagner Act. See Ratner, "Problems of Federal-State Jurisdiction in Labor Relations," 3 LAB. L.J. 750 at 754 (1952).

[82] See note 35 supra. For comment on the Nelson case, see 67 HARV. L. REV. 1419 (1954); 29 N.Y. UNIV. L. REV. 1293 (1954); and 102 UNIV. PA. L. REV. 1089 (1954).

[83] This provides that the United States shall guarantee to every state a republican form of government.

proach in judging the validity of state laws, but both were 5-4 decisions and the writer of the majority opinion in the *Zook* case, Justice Murphy, is now deceased, while the writer of the decision in *Wood,* Justice Black, may well feel that state sedition legislation demands application of the broader test of obstruction of congressional purposes which he employed in *Hines v. Davidowitz.* This test has of course been used since that case and was stated recently in *Garner v. Teamsters, Chauffeurs and Helpers.*[84] While it is fairly clear that the test of actual textual repugnancy would in the *Nelson* case require an approval of the state legislation, the test of conflict with congressional policy might well give a different result on several grounds. First, it is not unlikely that evidence could be introduced which would show that in the actual process of administration the federal act was being hindered and obstructed by the administration of overlapping state laws. Second, the argument used in both the *Hines* and *Nelson* cases that Congress had evinced larger concern for individual liberties than had the state legislatures might make a strong appeal to several of the justices. Finally, the idea of double punishment may be a basis for declaring that Congress would not have intended the state act to stand. In particular, the distaste of Justice Frankfurter for double punishment, though it is constitutionally permissible, is indicated in his dissent in the *Zook* case.[85]

It is further possible that some members of the Court may be willing to apply an occupancy test. Should this be the criterion adopted, the Pennsylvania sedition law could be invalidated on the ground that Congress had fully occupied the field of anti-sedition legislation, and that consequently state laws which coincide with the federal acts are no more permissible than state laws which conflict with the federal act.[86] An approach of this nature would call for careful scrutiny by the Court of the legislative history and texts not only of the Smith and Internal Security Acts, but of the recently-passed "Communist Control Act of 1954"[87] as well. The purposes of this recent act, and its relationship to the earlier statutes, are worth examining in some detail.

The Communist Control Act of 1954 was passed in the closing days of the second regular session of the Eighty-third Congress. Contemporary observers, even those who might have been in sympathy with

[84] 346 U.S. 485 at 500, 74 S.Ct. 161 (1953), where the Court said, "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

[85] California v. Zook, 336 U.S. 725 at 739-740, 69 S.Ct. 841 (1949).

[86] See note 60 supra for Justice Holmes' formulation of the idea that coincidence may be as repugnant to federal law as conflict.

[87] P.L. No. 637, 83d Cong., 2d sess. (August 24, 1954).

the aims of the legislation, were outspoken in criticism of the highly political atmosphere and absence of careful consideration which marked the process of its enactment into law.[88] The records of the debates, it is believed, will not furnish even the most minimal guidance for construction of the act. Statements made even by those legislators who spoke with this problem in mind are totally irreconcilable.[89] Difficult as it may be, however, some notions of what Congress was seeking to accomplish will eventually have to be pieced together.

As first introduced into the Senate, the Communist Control bill was aimed at the problem of Communist domination of labor unions.[90] The means adopted were the broadening and strengthening of the Internal Security Act through the addition of new provisions covering "Communist-infiltrated organizations." The bill was soon amended, however, to provide that criminal sanctions should attach to membership in the Communist Party when coupled with the commission of any acts designed to effectuate the purposes of that party.[91] The House of Representatives, which had approved the provisions relating to Communist infiltration of labor unions, questioned the wisdom and the constitutionality of the Senate addition.[92] As the bill finally came from

[88] See editorials in the *New York Times*, the *New York Herald Tribune*, and the *Wall Street Journal*, August 19, 1954.

[89] On the question whether the act made Communist Party membership a "crime," for example, compare statements at 100 CONG. REC. 14333 (August 19, 1954) with those at 100 CONG. REC. 14391 (August 19, 1954).

[90] The original bill, S. 3706, was reported in 100 CONG. REC. 9217 (July 6, 1954).

[91] This amendment, sponsored by Senator Humphrey of Minnesota, was passed unanimously [100 CONG. REC. 13583 (August 12, 1954)]. The criminal penalties were to be those imposed by the Internal Security Act, but were apparently to be applied directly without the necessity of showing non-compliance with that act.

[92] Many Congressmen, on the other hand, strongly favored the Senate amendments. The principal objection raised in the House was that were Communist Party membership made a crime the registration provisions of the Internal Security Act would be held invalid as compelling self-incrimination in violation of the 5th Amendment to the Constitution.

Instructive in this connection is the recent decision of the United States Court of Appeals for the District of Columbia in Communist Party of the United States v. Subversive Activities Control Board. 23 U.S. LAW WEEK 2296 (December 23, 1954).

The Communist Party there sought review of the Board's order that it must register as a "Communist-action organization" under the Internal Security Act. One objection made by the party was that the act itself violated the 5th Amendment to the Constitution since it compelled the furnishing of information which might expose party members to prosecution under the Smith Act. A majority of the court rejected this argument. The principal grounds for decision on the point were the following: (1) the 5th Amendment privilege is personal and does not extend to the membership records of an organization; (2) the statute is not a violation of any criminal statute; (3) as to offenses involving more than mere membership, there is no assurance that the 5th Amendment privilege would or could be asserted in some future proceeding, and successful assertion of the privilege would at most render the act unenforceable in a given case.

Judge Bazelon based his dissent from the opinion of the majority on his conclusion that the registration provisions of the act could not be reconciled with the 5th Amendment prohibition against compulsory self-incrimination.

It will be noted that much of the majority's reasoning could be used to support the

conference, the controversial Senate amendment had been replaced by provisions which, in their final form, do two things: (1) they strip the Communist Party of all legal rights and privileges under the laws of the United States or any political subdivision; (2) they make subject to the provisions of the Internal Security Act any member of the Communist Party or other organization having as an objective the violent overthrow of the United States Government, or that of any state.[93] These provisions are preceded by a section in which are stated congressional findings with respect to the conspiratorial and authoritarian nature of the Communist Party, the policies of which are declared to be secretly prescribed by the foreign leaders of world Communism. The conclusion is that "the Communist Party should be outlawed."

It is clear that this most recent federal legislation will be a significant factor in future determinations of the validity of state anti-subversive legislation. How significant a factor it will be is difficult to say, but a number of observations can be made. First, the Communist Control Act does not lay the basis for a finding of outright conflict between federal law and state anti-sedition statutes of the type enacted by Pennsylvania and by other states. Stated another way, there is no inconsistency between federal and state laws such that compliance with one would involve violation of the other. In this respect the new law does not differ from prior federal legislation in the field. Second, it is believed that neither the text of the new law nor the reports and debates which comprise its legislative history contain any clear statement of congressional intent to preclude the states from passing laws against sedition, nor do they indicate that Congress wished the states to be free so to legislate. On the latter point it can at least be argued that had Congress been seriously disturbed by the holding of the Pennsylvania Supreme Court in the *Nelson* case, it could very easily have eliminated the force of that decision.[94] In fact it was one of the avowed purposes of the Communist Control Act to strengthen the Smith Act, which, as will be remembered, underlay the Pennsylvania court's decision. Third, Congress has by its detailed declaration and findings of fact bearing on the nature of the Communist Party reinforced the argument that internal subversion is a problem of paramount national concern, and that accordingly there arises what may be called a presumption of

registration provisions of the Internal Security Act even assuming that Congress were to make Communist Party membership criminal per se.

[93] Sections 3 and 4 of P.L. No. 637, 83d Cong., 2d sess. (August 24, 1954).

[94] There is some evidence that Congress, at least in 1950, did not believe that the Smith Act had pre-empted the field. See H.R. Rep. No. 2980, 81st Cong., 2d sess. 2 (1950); H.R. Rep. No. 1950, 81st Cong., 2d sess. 25-46 (1950).

federal supersedure. An argument based on similar congressional findings made in the Internal Security Act won approval from the dissenting judge in *Albertson v. Millard.*[95] Fourth, if the controlling test is to be occupation of the field, the Communist Control Act represents an extension of federal law further into the area of anti-subversive legislation, and affords that much more basis for concluding that Congress has enacted a comprehensive scheme of regulation which must be taken to exclude regulation by the states. In both the Smith Act and the Communist Control Act Congress expressly recognized and dealt with attempts to bring about the violent overthrow not only of the United States Government but also of the states and other political subdivisions. It is surely a tenable conclusion that Congress has laid a firm hand upon these matters. Finally, this latest law makes possible the contention that in rejecting the imposition of direct criminal sanctions upon membership in the Communist Party or other groups having similar purposes, Congress indicated that it wished such persons to be subject to the general provisions of the Internal Security Act and by implication did not wish to expose them to prosecution under state criminal laws.[96] One answer to this is that Congress decided against these automatic criminal penalties largely on the suggestion that if they were to be imposed much of the Internal Security Act would thereby be rendered unconstitutional. Punishment under state criminal statutes would not raise this issue.[97]

The Pennsylvania anti-sedition law shortly to be tested in the Supreme Court is only one of a variety of state statutes directed at the problem of subversion.[98] The bulk of these laws are not susceptible to the objection that they encroach upon areas in which the federal government's interest is supreme. For example, laws prescribing qualifications for teaching, for public employment and incidental benefits, and for public office are well within the sphere of legitimate state interest.[99] It is equally clear, on the other hand, that states may not, con-

[95] See note 22 supra.

[96] This approach was also consciously rejected by Congress when it chose the registration procedures of the Internal Security Act. See H.R. Rep. No. 2980, 81st Cong., 2d sess. 5 (1950).

[97] Constitutional prohibitions against compulsory self-incrimination restrain only the government, federal or state, which demands disclosure. United States v. Murdock, 284 U.S. 141, 52 S.Ct. 63 (1931).

[98] Reference has already been made to the collection of such laws in GELLHORN, THE STATES AND SUBVERSION (1952), and to the note in 66 HARV. L. REV. 327 (1952). To the state statutes must be added municipal ordinances which seek to accomplish similar ends. For a listing, see Sutherland, "Freedom and Internal Security," 64 HARV. L. REV. 383 at 388 (1951).

[99] State laws which deny the use of election facilities to the Communist Party and other subversive groups would now seem to be in the clearest accord with congressional

sistently with the Constitution, act to bar the immigration or naturalization of subversive aliens, withhold passports from members of Communist organizations, or deny the use of the mails to subversive groups, since such legislation would intrude upon a domain which is not only exclusively federal as an initial proposition but one in which Congress has acted as well.[100] The types of state law which raise the most serious questions of federal pre-emption, in addition to general laws directed against sedition, are statutes which require the registration of subversive groups, and laws which prohibit membership in the Communist Party.

State registration statutes can be questioned more properly under the Internal Security Act than under the Smith Act, since it is with the registration provisions of the former that the state statutes are largely coincident. The Communist Control Act may be considered as a reaffirmation of congressional faith in the registration procedures created under the 1950 act, but sheds little more light on the question whether Congress intended its procedures to be exclusive. The decision of the federal district court in *Albertson v. Millard* provides an excellent summary of the arguments which can be urged against and on behalf of state registration requirements. Should an eventual Supreme Court decision turn upon legislative history, the evidence assembled by Judge Simons in that case seems to support his conclusion that Congress did not wish to preclude the states from compelling the registration of subversive groups.[101] In the absence of a more convincing showing of legislative intent than has thus far been assembled, however, it seems probable that a decision would not be placed on this ground alone.

Laws which make Communist Party membership illegal per se involve a more direct conflict with federal statutes and congressional policies than do laws requiring registration. Section 4(f) of the Internal Security Act provides: "Neither the holding of office nor mem-

policy. In fact, to permit such groups to appear on the ballot would now violate that section of the Communist Control Act which declares that these organizations are not entitled to any rights, privileges or immunities heretofore granted by the United States or political subdivisions. The question would rather seem to be whether Congress has not intruded into areas of exclusive state concern. For a discussion of these matters prior to this recent legislation see 25 NOTRE DAME LAWYER 319 (1950).

[100] The federal statutes involved are, respectively, the Immigration and Nationality Act of 1952, 66 Stat. L. 166 (1952), 8 U.S.C. (1952) §1101 et seq. and the Internal Security Act, 64 Stat. L. 993 and 996 (1950), 50 U.S.C. (1952) §§785 and 789. It should also be apparent that states cannot seek to regulate Communist influence in labor unions where the unions are within the sphere of federal power.

[101] A summary of the legislative history of the Internal Security Act is furnished in EMERSON AND HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 595-596 (1952). Judge Simons pointed particularly to the fact that in the House Committee Debates when an amendment was offered extending the bill to any government in the United States it was ruled not germane since the bill dealt only with the federal government.

bership in any Communist organization by any person shall constitute per se a violation of . . . this section or of *any other criminal statute.*"[102] The meaning of this final phrase is not clear. If it may be taken to include state statutes, then a direct conflict between federal and state law is unmistakable. If it is taken to refer only to federal statutes, there is a question of contravention of congressional policy that Communist Party membership per se is not to constitute a crime.[103] The effect of the Communist Control Act in this regard is uncertain. There are members of Congress who believe that Congress has itself declared Communist Party membership to be a crime.[104] The better interpretation of the act is believed to be that Congress meant to subject members of the Communist Party and other like groups to the registration procedure of the Internal Security Act and to the penalties provided in that act for non-registration. This interpretation of the Communist Control law is strongly supported in the text itself, and in one part of the act Congress specifically provided: "That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended."[105]

In formulating conclusions as to the probable impact of supersedure doctrines on state anti-subversive legislation, perhaps the most that can be said is that there exists a firm though not unassailable basis for invalidating many of these state laws. Invalidation may proceed not so much on the ground of exclusive federal power or direct conflict with federal law as on the ground of obstruction of congressional purpose or invasion of a federally-occupied field. Recent legislation has put the federal government further into the business of suppressing subversion. It may be, however, that the Supreme Court's relative tolerance of state anti-subversive legislation on other constitutional grounds will extend to its conclusions as to pre-emption.[106] If actual legislative intent is to be weighed, moreover, a likely estimate is that few members of Congress favor denying the states power to protect themselves from the danger of forcible overthrow.

[102] 64 Stat. L. 991 (1950), 50 U.S.C. (1952) §783. Emphasis added.

[103] See the discussion of the point in note, 66 HARV. L. REV. 327 at 330-331 (1952).

[104] Congressman Dies of Texas stated, "The legislative intent of this House is that membership in the Communist Party constitutes a crime in itself, and can be punished as such." 100 CONG REC. 14333 (August 19, 1954).

[105] Section 3, P.L. No. 637, 83d Cong., 2d sess. (August 24, 1954). This is the section which deprives the Communist Party and like organizations of all rights and privileges under the laws of the United States or political subdivisions.

[106] See Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380 (1952); Garner v. Los Angeles, 341 U.S. 716, 71 S.Ct. 909 (1951); and Gerende v. Board of Supervisors, 341 U.S. 56, 71 S.Ct. 565 (1951). In these cases the state and municipal regulations concerned matters conceded to be within the states' legitimate domain.