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PENNSYLVANIA *v.* NELSON: A CASE STUDY IN FEDERAL PRE-EMPTION*

ROGER C. CRAMTON†

IN THE CELEBRATED CASE of *Pennsylvania v. Nelson*¹ the Supreme Court, drawing on the metaphorical tests for "occupation of the field" developed in commerce clause cases, held that federal legislation regulating communist activity had superseded the Pennsylvania Sedition Act.² The continuing agitation regarding the decision has been largely provoked by its considerable impact on the power of the states to legislate with respect to issues of subversion and loyalty. The Court's decision invalidated the sedition statutes of forty-two states³ and, in addition, raised serious doubt as to the validity of other state measures in this field.⁴ It is not surprising that such a striking displacement of state authority has generated much critical comment and has given rise to rash proposals for congressional reversal.⁵ At the same time, however, the con-

* An earlier draft of this article was prepared as a basis of discussion at a seminar to have been attended by a committee of the Conference of Chief Justices and members of the faculty of the University of Chicago Law School.

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¹ 350 U.S. 497 (1956).

² Pa. Penal Code §207, Pa. Stat. Ann. (Purdon, 1945) §4207.

³ For a summary and description of the state sedition statutes existing as of January 1955, see Fund for the Republic, Digest of the Public Record of Communism in the United States 266-306 (1955) (hereafter cited as "Digest").

⁴ See note 97 *infra*. For an excellent and comprehensive study of the social and legal implications of the national preoccupation with the loyalty of citizens, see Brown, *Loyalty and Security* (1958). The state legislation as of 1955 is summarized and described in plentiful detail in Digest, *op. cit. supra* note 3, at 241-488. The history in a number of states is traced in Gellhorn, *The States and Subversion* (1952).

⁵ The proposals have been of two kinds. Most of the proposed bills would reverse the Nelson case by providing that the various federal communist control measures "shall not prevent the enforcement in the courts of any State of any statute of such State prescribing any criminal penalty for . . . sedition against such State or the United States. . . ." See, e.g., Sen. 2,646, 85th Cong. 2d Sess. (1958), which failed of enactment by a close Senate vote. 104 Cong. Rec. 17,788 (1958). A statute of this type presents a constitutional question only if sedition against the United States is within the exclusive powers of the federal government. The present writer's view is that legislative reversal of the Nelson case, whatever one's view of the Court's use in that case of pre-emption doctrine, would be unwise as a policy matter.

A more drastic type of proposal would establish a general rule of construction against supersession of state laws. See, e.g., Sen. 3,143, 84th Cong. 2d Sess. (1956). The Department of Justice has consistently opposed any broad enactment on the unassailable ground that unforeseen effects on numerous federal programs might result. For an analysis of the problems raised by measures of this broader kind, see Wham and Merrill, *Federal Preemption: How To Protect the States' Jurisdiction*, 43 A.B.A. J. 131 (1957).

centration of attention on the effect of the decision and on the merit of the various legislative proposals it has engendered has resulted in a lamentably diminished discussion of other noteworthy aspects of the case.

The *Nelson* case is apparently the first case in which the Supreme Court has held that a federal criminal statute, not involving a regulatory scheme under the Commerce Clause, supersedes, in the absence of conflicting provisions, the enforceability of a concurrent state criminal statute.⁶ The application of tests developed in commerce clause cases to sedition legislation based on the federal war powers itself marks a significant extension of pre-emption doctrine. And finally, the Court's frequent use in recent years of the pre-emption doctrine to effect broad displacements of state authority reopens the more important question of the soundness of the pre-emption doctrine as it has been developed by the Court.⁷ This article will consider the content and meaning of the Supreme Court's application of pre-emption doctrine in the *Nelson* case, and, on the basis of this examination, attempt an evaluation of the doctrine. However, before turning to the *Nelson* case, a brief resumé of the doctrine of supersession and of the conclusions hereafter advanced will assist in placing the matter in perspective.

The question of federal supersession of state legislation only arises when Congress, exercising a power not within the exclusive competence of the federal government, has dealt in a constitutional fashion with the same conduct or legal relations which is the concern of the otherwise valid state legislation brought into question. Under traditional doctrine, the question is phrased in terms of whether, under the Supremacy Clause of Article VI, existing federal legislation has "occupied the field" to the exclusion of concurrent state legislation. The answer is said to turn on the intent of Congress. Since in any case likely to reach a court Congress has remained silent with respect to the displacement of state law, the courts are left to solve the problem with few if any guides. Ultimately,

⁶ But cf. *Houston v. Moore*, 5 Wheat. (U.S.) 1, 22-23 (1820) (invalidating state statute but sustaining state court martial conviction for militiaman's federal offense); *Prigg v. Pennsylvania*, 16 Pet. (U.S.) 539, 617-618, 636 (1842) (invalidating state criminal statute interfering with constitutionally guaranteed right of slave owner to recapture his fugitive slave); *Matter of Heff*, 197 U.S. 488, 506-8 (1905) (invalidating federal law which subjected Indian allottees to both federal and state liquor statutes). These cases, each of which contains strong statements in support of the view that enactment of a federal criminal statute automatically supersedes a concurrent state criminal statute, are unsatisfactory as precedents because (1) each was ultimately decided on another ground, and (2) subsequent decisions have ignored them or rejected the dicta contained in them. *In re Heff* was explicitly overruled by *United States v. Nice*, 241 U.S. 591 (1916).

⁷ The Supreme Court's doctrine of pre-emption, particularly as applied in commerce clause cases, is discussed in Dunham, *Congress, The States and Commerce*, 8 U. of Chi. L. S. Rec. 54 (Supp., 1958); "Occupation in the Field" in *Commerce Clause Cases, 1936-1946: Ten Years of Federalism*, 60 Harv. L. Rev. 262 (1946); *Supersession of State Laws by Federal Regulations under the Commerce Clause*, 86 U. of Pa. L. Rev. 532 (1938). See also Braden, *Umpire to the Federal System*, 10 U. of Chi. L. Rev. 27 (1942), and Sholley, *The Negative Implications of the Commerce Clause*, 3 U. of Chi. L. Rev. 556 (1936).

the Supreme Court must supply or presume an intent from whatever available materials it deems proper.

The purposes, scope and content of concurrent state and federal legislation are of such vast variety, and situations of concurrence so large in number, that a simple solution to pre-emption problems should not be expected. No abstract formula can resolve complicated problems of federalism. Nevertheless, the confusion of the cases, even bearing in mind that no two pre-emption cases present the same problem, is striking. Various "tests" of supersession are stated in the cases, singly or in combination,⁸ and the choice of a particular test or tests may be more decisive than its application to particular facts. On some occasions only one test is viewed as controlling and others are ignored;⁹ in other cases several are examined.¹⁰ Nor is the content of any test much clearer. What is "conflict" in one case is characterized as "coincidence" in another; a "field" that is narrow here is broad there; and so on. Today as well as thirty-five years ago, it seems true that "[t]he court has drawn its lines where it has drawn them because it has thought it wise to draw them there."¹¹ It is no wonder that lawyers and judges who think that the law is discoverable and that continuity and certainty are indispensable have criticized the Court's handling of pre-emption problems.

If the "tests of supersession" which are inconsistently applied by the Court are themselves lacking in definition or priority, what is the touchstone of decision? The thesis of this article is that the use or non-use of particular tests, as well as their content, is influenced more by judicial reaction to the desirability of the state legislation brought into question than by the metaphorical sign-language of "occupation of the field." And it would seem that this is largely unavoidable. The Court, in order to determine an unexpressed congressional intent, has undertaken the task of making the independent judgment of social

⁸ Among the more common "tests" are the following: (1) *The Conflict Test*—"... in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together. . . ." *Sinnot v. Davenport*, 22 How. (U.S.) 227, 243 (1859). (2) *The Coincidence Test*—"When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition. . . ." *Charleston & W.C. Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915). (3) *The Dominance Test*—"... the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). (4) *The Pervasiveness Test*—"The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Ibid.* (5) *The Conflict in Administration Test*—"... enforcement of [the state law] presents a serious danger of conflict with the administration of the federal program." *Pennsylvania v. Nelson*, 350 U.S. 497, 505 (1956).

⁹ The conflict test is often stated as the exclusive test when state regulation is upheld. E.g., *Townsend v. Yeomans*, 301 U.S. 441 (1937).

¹⁰ E.g., *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

¹¹ Powell, *Supreme Court Decisions on the Commerce Clause and State Police Power, 1910-1914 II*, 22 Col. L. Rev. 28, 48 (1922).

values that Congress has failed to make. In making this determination, the Court's evaluation of the desirability of overlapping regulatory schemes or overlapping criminal sanctions cannot but be a substantial factor.

THE NELSON CASE

*Pennsylvania v. Nelson*¹² was a state sedition prosecution. Nelson, an admitted member of the Communist Party, was convicted in a Pennsylvania state court for knowingly advocating the overthrow, by force or violence, of the governments of the United States and of Pennsylvania.¹³ The Pennsylvania Supreme Court, finding that the case involved only sedition against the United States, reversed the conviction, holding that the Smith Act of 1940 had superseded the enforceability of the Pennsylvania Sedition Act.¹⁴ The United States Supreme Court affirmed.¹⁵

The Court, in an opinion by Mr. Chief Justice Warren, held that the federal statutes dealing with national security, particularly the Smith Act of 1940,¹⁶ the Internal Security Act of 1950¹⁷ and the Communist Control Act of 1954,¹⁸ "occupied the field" because each of several "tests of supersession" had been met. (1) "The scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."¹⁹ (2) "[T]he federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject."²⁰ And (3) the "danger of conflict with the administration of the federal program [is] serious."²¹

The scheme of federal regulation was thought "pervasive" because the Smith Act, the Internal Security Act of 1950 and the Communist Control Act of 1954 in the "aggregate" made "inescapable" a conclusion that "Congress has intended to occupy the field of sedition."²² The dominance of the federal interest was evidenced by the "all-embracing program for resistance to the various forms of totalitarian aggression" devised by Congress,²³ including the proscription of sedition against local and state governments as well as against the nation. The congressional finding that communist sedition was "part of a world con-

¹² 350 U.S. 497 (1956).

¹³ *Commonwealth v. Nelson*, 172 Pa.Super. 125, 92 A.2d 431 (1952).

¹⁴ *Commonwealth v. Nelson*, 377 Pa. 58, 104 A.2d 133 (1954).

¹⁵ 350 U.S. 497 (1956). Justices Reed, Burton and Minton dissented, in an opinion written by Mr. Justice Reed.

¹⁶ 54 Stat. 670, 671 (1940), 18 U.S.C.A. §2385 (1952).

¹⁷ 64 Stat. 987 (1950) (codified, as amended, in scattered sections of Title 8, 18, 22, 50 U.S.C.A.).

¹⁸ 68 Stat. 775 (1954) (codified in scattered sections of Titles 50 U.S.C.A.).

¹⁹ 350 U.S. 497, 502 (1955), quoting from *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

²⁰ *Id.*, at 504.

²² *Id.*, at 504.

²¹ *Id.*, at 505.

²³ *Ibid.*

spiracy" indicated that sedition against the United States was a national, rather than a local, offense. The "serious" danger of conflict with federal administration was based on statements of federal officials requesting local law enforcement officers to turn over to the F.B.I. all information relating to subversive activities; on the lack of uniformity and safeguards of the various state sedition laws; and on the peculiar feature of the Pennsylvania statute permitting actions to be brought on private information alone.

Finally, the Court indicated that the possibility of double punishment was a factor in its decision: "Without compelling indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment."²⁴

AMBIGUITY OF THE TESTS APPLIED BY THE COURT

The *Nelson* case builds on and exemplifies the deficiencies of the Supreme Court's law of pre-emption.²⁵ The Court drew three "tests of supersession" from the available armory and undertook, with their guidance, to discover the intent of Congress. Although these tests—the dominance of the federal interest, the pervasiveness of the federal scheme and the possible conflict in administration—represent relevant considerations, their content here as elsewhere is undefined, and their application fails to provide a confident answer to the question to which they were supposedly directed—the intent of Congress.

1. *Dominance of the Federal Interest.*—The Court's assertion that communist sedition is a matter of paramount interest to the federal government must be readily accepted. The Constitution empowers Congress to "provide for the common Defense and general Welfare of the United States,"²⁶ provides war powers of sweeping nature,²⁷ and charges the federal government with the duty of "guarantee[ing] to every State in this Union a Republican Form of Government."²⁸ Whatever may have been the localized impact of street-corner anarchist speeches, the modern problem of subversion by a tightly-organized conspiracy is a national problem calling for a national solution. But to concede this is not to solve the pre-emption problem.

The Court assumed that whenever Congress legislates in a field in which the federal interest is dominant, it intends to preclude enforcement of state laws on the same subject. If congressional intent is really to be controlling, the assumption seems fallacious. Why should it be assumed that state legislation embodying the same purpose and prohibiting the same activity is thereby invalidated? Is it not as reasonable to assume that Congress contemplated the cooperation of the states against the common enemy?²⁹ Either assumption—that of preclusion or

²⁴ *Id.*, at 509-510.

²⁵ Consult materials cited note 7 *supra*.

²⁷ U.S. Const. Art. 1, §8, clauses 11-14.

²⁶ U.S. Const. Art. 1, §8.

²⁸ U.S. Const. Art. 4, §4.

²⁹ See *Gilbert v. Minnesota*, 254 U.S. 325, 328-331 (1920).

that of cooperation—appears equally reasonable (or equally unreasonable) in the absence of any other evidence of congressional intent. And what little evidence there is supports an inference of cooperation rather than preclusion: Congress was aware of the widespread existence of state legislation prohibiting sedition; its own statute was largely copied from one of the older state statutes;³⁰ and Congress did nothing expressly to preclude the continued operation of these state statutes.

Moreover, it is not enough to say that the federal interest is dominant. The interest of the states in self-preservation and in preservation of the Union must also be considered. State legislation based on these interests, proscribing treason, sedition, espionage and similar offenses, is old. Overlapping federal legislation on these matters has existed at various times, and contentions that the federal legislation pre-empted the field have been rejected whenever made.³¹

*Gilbert v. Minnesota*³² was the leading case prior to *Nelson*. Gilbert had been prosecuted and convicted in a state court for interfering with military enlistment during World War I, conduct which was also proscribed by the Federal Espionage Act.³³ The Court, in affirming the conviction, emphasized the cooperative nature of the federal system and the interest of the states in assisting the federal government in preserving the whole. The Court's opinion went on to say that the state statute was justified as a local police power measure designed to prevent breaches of the peace. In the *Nelson* case, *Gilbert* was treated as resting solely on the narrower police power ground.³⁴ Limiting *Gilbert* to its narrowest holding, clearly not the intended one,³⁵ reduces the case to insignificance.

Instead, the Court in *Nelson* relied on *Hines v. Davidowitz*,³⁶ in which the

³⁰ Brief amici curiae of the United States at 25, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

³¹ *Barton v. City of Bessemer*, 234 Ala. 20, 173 So. 626 (1937); *People v. Steelik*, 187 Cal. 361, 203 Pac. 78 (1921); *State v. McKee*, 73 Conn. 18, 46 Atl. 409 (1900); *People v. Lloyd*, 304 Ill. 23, 136 N.E. 505 (1922); *State v. Holm*, 139 Minn. 267, 166 N.W. 181 (1918); *State v. Kahn*, 56 Mont. 108, 182 Pac. 107 (1919); *State v. Tachin*, 92 N.J.L. 269, 106 Atl. 145 (1919); appeal dismissed 254 U.S. 662 (1920); *People v. Most*, 171 N.Y. 423, 64 N.E. 175 (1902); *Commonwealth v. Lazar*, 103 Pa. Super. 417, 157 Atl. 701 (1931); *State v. Hennessy*, 114 Wash. 351, 195 Pac. 211 (1921).

³² 254 U.S. 325 (1920). ³³ 40 Stat. 219 (1917), as amended, 18 U.S.C.A. §2388 (1951).

³⁴ 350 U.S. 497, 501 (1956). *Gilbert* had spoken at a public meeting. His remarks were resented and a threat of disorder was thought to be presented. But cf. *DeJonge v. Oregon*, 299 U.S. 353 (1937).

³⁵ That a broader ruling was intended is shown by the Court's reliance on the *Gilbert* case in dismissing the appeal in *Tachin v. New Jersey*, 254 U.S. 662 (1920). The defendants in that case had been convicted of sedition for asserting that the United States had entered World War I for the benefit of certain capitalistic interests. The state court held that the state could punish the acts under its own law even though the offense was directed solely against the United States. "Primarily sedition against the United States is a crime against the federal government, which is the direct subject of attack; but under our system the federal and state governments are so closely interwoven that an attack on the former may imperil the existence of the latter." *State v. Tachin*, 92 N.J.L. 269, 271-72, 106 Atl. 145, 147 (1918).

³⁶ 312 U.S. 52 (1941).

Federal Alien Registration Act of 1940³⁷ was held to supersede a Pennsylvania alien registration statute. The common feature of the two cases is that both involve matters of vital federal interest. But there the resemblance ceases. The state regulation involved in the *Davidowitz* case required aliens to carry an identification card at all times, a burdensome feature which Congress had rejected. Moreover, the Court felt that the existence of dual regulation would have repercussions on United States foreign policy, a matter within the exclusive power of the federal government. Finally, overlapping regulation was involved in the *Davidowitz* case, rather than concurrent criminal statutes as in the *Nelson* case, and, as will be seen, this factor is of some significance.

2. *Pervasiveness of the Federal Scheme.*—It is true that the Smith Act, the Internal Security Act of 1950, and the Communist Control Act of 1954 add up to a tidy bit of legislation. But it does not follow from the fact that Congress enacted three major communist control measures in the space of fifteen years that Congress “intended to occupy the field of sedition.”

It should be noted first that only one of these statutes deals with sedition. The Smith Act,³⁸ the only federal statute dealing directly with sedition, is a criminal statute pure and simple, prohibiting certain defined conduct. It proscribes among other things the advocacy of the overthrow of federal or state governments by force or violence. The Internal Security Act of 1950 and the Communist Control Act of 1954 have more of a regulatory character. The former requires the registration of “Communist-action organizations” and “Communist-front organizations;”³⁹ the latter declares “that the Communist Party . . . is in fact an instrumentality of a conspiracy to overthrow the Government of the United States”⁴⁰ and that it is a “Communist-action” organization within the meaning of the Internal Security Act of 1950, and provides that “knowing” members of the Communist Party are “subject to all the provisions and penalties” of that act.⁴¹

Moreover, it is not true that the broad treatment by Congress of any subject within its power automatically bars supplemental action by the states dealing with the same subject matter. *California v. Zook*⁴² serves as an extreme illustration in an area complicated by the negative implications of the Commerce Clause. A regulation of the Interstate Commerce Commission pursuant to the Motor Carrier Act of 1935 prohibited the sale of “share expense” automobile passenger transportation in interstate commerce where the transporting carrier had no permit from the ICC. Despite the broad regulatory character of the fed-

³⁷ 54 Stat. 673 (1940), 8 U.S.C.A. §451 et seq. (repealed June 27, 1952).

³⁸ 62 Stat. 808 (1948), as amended, 18 U.S.C.A. §2385 (Supp., 1957).

³⁹ 64 Stat. 987 (1950), as amended, 50 U.S.C.A. §781 et seq. (1951).

⁴⁰ 68 Stat. 775 (1954), as amended, 50 U.S.C.A. §841 (Supp., 1957).

⁴¹ 68 Stat. 776 (1954), as amended, 50 U.S.C.A. §843 (Supp., 1957).

⁴² 336 U.S. 725 (1949).

eral legislation, the Court affirmed a conviction under a California statute prohibiting conduct identical to that proscribed by the federal act.

An example drawn from another area of federal action may clarify the point. A complicated set of federal statutes, filling 220 pages of the United States Code, deals with banks and banking.⁴³ These include comprehensive legislation covering the organization and regulation of national banks, the Federal Reserve System and the Federal Deposit Insurance Corporation, to name only a few. A related provision of the criminal code proscribes bank robbery and related crimes involving banks organized, operating, or insured under the laws of the United States.⁴⁴ Does the existence of this comprehensive federal legislation mean that states are without power to punish robberies from such banks which occur within their jurisdiction? The answer has always been thought to be otherwise.⁴⁵

The existence of concurrent state and federal criminal statutes dealing with sedition can with equal logic support either the inference that Congress intended to supplement state law or that it intended to replace state law. To label other federal legislation dealing with national security as a "pervasive scheme of regulation" does not advance this logic, but states a conclusion which must have been reached on other grounds.

3. *Possible Conflict of Administration*.—A clear-cut showing that state sedition prosecutions had interfered with the administration of the Smith Act would have redeemed the deficiencies of the "dominance" and "pervasiveness" tests. Unfortunately, despite the considerable period of concurrent legislation, the Court was unable to adduce any evidence of actual conflict in administration. It relied instead on the possible danger of administrative conflict in the future which might result from dual legislation and lack of uniformity in the provisions of the state statutes.

Statements made during 1939 and 1940 by President Roosevelt and J. Edgar Hoover requesting the states to turn over any information with respect to subversive activities to the federal government were quoted as supporting a danger of conflict. As Mr. Justice Reed pointed out in the dissent, these statements contained "no suggestion from any official source that state officials should be less alert to ferret out or punish subversion."⁴⁶ The views of the Department of Justice, appearing at the invitation of the Court to state the position of the United States, to the effect that the state legislation had not impeded federal enforcement, would appear to be entitled to at least as much weight.

⁴³ 12 U.S.C.A. §1—§1831 (1957).

⁴⁴ 62 Stat. 796 (1948), as amended, 18 U.S.C.A. §2113 (Supp., 1958).

⁴⁵ See *Jerome v. United States*, 318 U.S. 101 (1943); *In re Morgan*, 80 F.Supp. 810 (N.D. Iowa, 1948); *People v. Candelaria*, 139 Cal.App.2d 432, 294 P.2d 120 (1956); *State v. Cioffe*, 130 N.J.L. 160, 32 A.2d 79 (1943).

⁴⁶ *Pennsylvania v. Nelson*, 350 U.S. 497, 518 (1956).

INAPPLICABILITY OF COMMERCE CLAUSE TESTS

Enough has been said to indicate that the Court treated the *Nelson* case as though it were a case such as *Hines v. Davidowitz*,⁴⁷ in which a state exacted additional requirements on a matter regulated by Congress. The tests applied in *Nelson* were largely drawn from Commerce Clause cases involving a deviation of state law from the federal pattern, rather than a mere coincidence of state and federal law.⁴⁸ It would seem that the case would more properly have been treated as one of coincidence of state and federal criminal statutes.

The common feature of the Smith Act of 1940, the Internal Security Act of 1950 and the Communist Control Act of 1954 is that each is concerned with national security. But, as pointed out above, the Smith Act is the only federal criminal statute dealing directly with sedition. Although the Internal Security Act contained new criminal provisions proscribing conspiracy to establish a totalitarian dictatorship and communication or receipt of classified information,⁴⁹ its major concern is the elaborate registration scheme for communist organizations.⁵⁰ The criminal penalties for failure to register⁵¹ are incidental to the regulatory scheme. The Communist Control Act expanded the registration scheme to include "Communist-infiltrated" organizations and extended the requirements of the Internal Security Act to knowing members of the Communist Party.⁵²

Although these statutes are interrelated, only the registration and related provisions of the Internal Security Act and the Communist Control Act would seem to constitute a comprehensive regulatory scheme of the type that has been thought to require a pre-emptive intent. The question in the *Nelson* case was not whether state statutes requiring registration of communist organizations and members had been superseded, but only whether state sedition prosecutions were precluded.⁵³ The case before the Court involved only the coincidence of

⁴⁷ 312 U.S. 52 (1941).

⁴⁸ Pre-emption cases may be divided into three general classes, each of which has been accorded somewhat different treatment because of the differing policy considerations that are applicable. (1) Where federal and state statutes are in *conflict* in the sense that compliance with one necessarily constitutes violation of the other. (2) Where a state pattern of regulation *deviates* from the federal pattern, without directly conflicting. The state regulation may differ in that it imposes an additional requirement on the same matter, or in that it closes a gap in the federal scheme by regulating a closely related matter. (3) Where federal and state statutes *coincide* by requiring or forbidding exactly or substantially the same thing. A similar classification is suggested in Sholley, *Cases on Constitutional Law* 946-47 (1951).

For a more detailed discussion of the various kinds of pre-emption cases, and the differing problems they present, see discussion at pp. 104-7 *infra*.

⁴⁹ 64 Stat. 991 (1950), 50 U.S.C.A. §783 (1951).

⁵⁰ *Id.*, at 987, 989, 993, 995-98, 1002 and §§781-82, 786-93.

⁵¹ *Id.*, at 1002 and §794.

⁵² 68 Stat. 586, 775-78, 780 (1954), 50 U.S.C.A. §§782, 784, 786, 789-92a, 793, 841-57 (Supp., 1958).

⁵³ The Pennsylvania Supreme Court considered only the effect of the Smith Act. 377 Pa. 58, 104 A.2d 133 (1954). Although the Supreme Court stated that the question for decision was

state and federal criminal legislation, not differing state and federal regulatory schemes.

The Pennsylvania Sedition Act and the Smith Act, by very similar language, attempt to reach the same objectives—the punishment of advocacy of the violent overthrow of established government. They are criminal statutes proscribing specified conduct and creating substantive crimes independently of any administrative or statutory regulation. In this respect they are like statutes punishing murder, robbery, or kidnapping, which are crimes against both state and nation whenever elements giving rise to both federal and state jurisdiction are present.⁵⁴ Although the federal government may have a more vital interest in punishing sedition, particularly when a world-wide conspiracy is involved, the states would nevertheless seem to have a legitimate interest not only in self-preservation but also in the preservation of the Union.⁵⁵ Once it is assumed, as the Court did, that the states have concurrent power with the federal government to punish sedition against the federal government, it is difficult to see why cooperative federalism is a one-way street. Since the federal government through its criminal statutes may aid the states in the preservation of public order—a primary responsibility of the states in our tradition—the states would seem to have an equal right to assist the federal government in the achievement of primarily federal objectives such as the preservation of the Union. In the absence of any compelling evidence of congressional intent or of a conflict of statutory provisions, federal unity would be more adequately served by allowing cooperative state action. Thus a pre-emptive intent should not have been inferred in the *Nelson* case absent a showing of conflict.

THE SAVING CLAUSE

In a footnote to its opinion⁵⁶ the Court disposed of an argument, accepted by the dissent, that the saving clause of the criminal code demonstrated a congressional intent not to supersede state criminal statutes. This saving clause presently appears as the second sentence of Section 3231 of the criminal code, which in its entirety reads as follows:

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

whether the Smith Act "supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct," 350 U.S. 497, 499 (1956), the Court considered the case as involving the impact of all federal communist control measures on state power, not only the Smith Act.

⁵⁴ *Fox v. Ohio*, 5 How. (U.S.) 410 (1847); *United States v. Marigold*, 9 How. (U.S.) 560, 569 (1850); *Moore v. Illinois*, 14 How. (U.S.) 13, 19–20 (1852); *Ex parte Siebold*, 100 U.S. 371, 389–91 (1879); *Gilbert v. Minnesota*, 254 U.S. 325, 329–30 (1920); *United States v. Lanza*, 260 U.S. 377, 382 (1922); *California v. Zook*, 336 U.S. 725, 731 (1949).

⁵⁵ See, e.g., *Gitlow v. New York*, 268 U.S. 652, 668 (1925); *Whitney v. California*, 274 U.S. 357 (1927).

⁵⁶ *Pennsylvania v. Nelson*, 350 U.S. 497, 501 n.10 (1956).

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.⁵⁷

The Court said that the saving clause was intended "merely to limit the effect of the jurisdictional grant of the first sentence" of Section 3231, and was not intended "to resolve particular supersession questions. . . ."⁵⁸ The court apparently viewed the saving clause as affecting only the jurisdiction of the state courts, but not the impact of federal legislation on state legislation. This construction of the saving clause does violence to the plain meaning of the words used and is contrary to its long-established interpretation.

The first sentence of Section 3231, by vesting exclusive jurisdiction of "all offenses against the laws of the United States," operates to preclude the states from enforcing *federal* criminal laws.⁵⁹ Standing alone, it might also have been susceptible of the interpretation that state power to punish for any act constituting an offense against the laws of the United States had been superseded. The Court, in the *Nelson* case, is apparently saying that the only function of the saving clause is to negative this possible inference. The language, however, is much broader: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." Taken literally, the saving clause means that the states retain their original powers to define and punish criminal conduct occurring within their respective jurisdictions, *notwithstanding the fact that the same conduct is punishable as an offense against the United States*.

Of course, a general provision of the criminal code, such as the saving clause, cannot prevent Congress from subsequently enacting legislation which is intended to supersede state legislation. The specific enactment would control rather than the more general. But the general provision would seem to create a policy of non-pre-emption which could be overborne only by an actual conflict of provisions or a clear expression of congressional intent to the contrary.

The history of the two sentences of Section 3231 is instructive. The first sentence of Section 3231, vesting exclusive jurisdiction of federal crimes in the federal courts, may be traced back to Section 11 of the Judiciary Act of 1789,⁶⁰ which declared that the Circuit Courts of the United States shall have "exclu-

⁵⁷ 62 Stat. 826 (1948), 18 U.S.C.A. §3231 (1951).

⁵⁸ 350 U.S. 497, 501 n.10 (1956).

⁵⁹ Without this provision it would not have been certain that state courts could not punish for federal offenses. See *Houston v. Moore*, 5 Wheat. (U.S.) 1 (1820) (sustaining state court martial conviction for militiaman's federal offense; state can prosecute federal offenses when Congress has not given exclusive jurisdiction to the federal courts). See also *Tennessee v. Davis*, 100 U.S. 257 (1880) (sustaining removal of state criminal prosecution of federal revenue officer to federal court); *Testa v. Katt*, 330 U.S. 386 (1947) (requiring state to entertain war-time price control treble-damage action even though a "penal" law). See *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 Harv. L. Rev. 966 (1947).

⁶⁰ 1 Stat. 73 (1789).

sive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides or the law of the United States shall otherwise direct." Most of the early federal criminal statutes, by language almost identical to the present saving clause, did "otherwise direct." Federal statutes of 1806 and 1807 prohibiting counterfeiting and uttering of "current coin" of the United States were the first to do so:

[N]othing in this act contained shall be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states, over offenses made punishable by this act.⁶¹

A similar provision was contained in the Federal Crimes Act of 1825,⁶² the first comprehensive federal criminal legislation. With slight changes in phraseology, the saving clause was incorporated in the Revised Statutes of 1878 and made applicable to the entire criminal code.⁶³ Since 1909 it has been applicable to what is now Title 18 of the United States Code—the criminal code.⁶⁴

Until the 1948 revision of the criminal code, the first sentence of present Section 3231, vesting exclusive jurisdiction of federal crimes in the federal courts, and the second sentence, saving to the states jurisdiction "under the laws thereof," were separate sections.⁶⁵ The reviser, as part of the revision of Title 18 combined them to form present Section 3231. The change, of course, was not intended to make any change in substance.⁶⁶

The Supreme Court definitively construed the saving clause in *Sexton v. California*.⁶⁷ Sexton was convicted in a California state court of extorting money from another by threatening to accuse him of violating the internal revenue laws of the United States. The identical conduct was prohibited by a federal criminal provision. The Court, emphasizing the fact that the federal statute was within the scope of the saving clause, unanimously held that the conduct was "an offence both against the State and the United States, punishable in each jurisdiction under its laws."⁶⁸ The saving clause was said to "take the case out of the" exclusive jurisdiction of the criminal code, and its function described as follows:

The [saving clause] was not intended to merely permit a state court to punish a different offense involved in the one act. It was intended to leave with the state court, unimpaired, the same jurisdiction over the act that it would have had if Congress had not passed an act on the subject.⁶⁹

⁶¹ 2 Stat. 404 (1806); 2 Stat. 423 (1807).

⁶³ Rev. Stat. §5328 (1878).

⁶² 4 Stat. 122, §26 (1825).

⁶⁴ 35 Stat. 1151 (1909).

⁶⁵ See reviser's note to 18 U.S.C.A. §3231 (1951).

⁶⁶ *Ibid.*

⁶⁷ 189 U.S. 319 (1903). See also *State v. Duncan*, 221 Ark. 681, 255 S.W.2d 430 (1953) (fraudulent sale of mortgaged property); *Ex parte Dixon*, 41 Cal.2d 756, 264 P.2d 513 (1953) (counterfeiting); *Nastasi v. Aderhold*, 201 Ga. 237, 39 S.E.2d 403 (1946) (counterfeiting); *People v. Welch*, 141 N.Y. 266, 36 N.E. 328 (1894) (manslaughter by officer of vessel).

⁶⁸ 189 U.S. 319, 323 (1903).

⁶⁹ *Id.*, at 324-25.

The Smith Act is one of the criminal provisions of the criminal code and is subject to the general provisions of Section 3231.⁷⁰ Thus, it seems clear that the Supreme Court should have held that the saving clause operates to preserve, after the enactment of the Smith Act, the pre-existing power of the states to legislate with respect to sedition. Mr. Justice Reed would appear to be correct in stating that "this one point seems in and of itself decisive. . . ."⁷¹ The Court's application of the ambiguous tests of supersession becomes more startling when juxtaposed with its rejection of the mandate expressed in the general saving clause.

IMPORTANCE OF OTHER FACTORS

The Court's opinion itself suggests that the real problem of the case—whether state sedition prosecutions should be permitted once Congress had actively entered the field—was decided on more pragmatic grounds than are comprehended in the hazy aphorisms of pre-emption. The opinion manifests a strong distaste for the state statutes in this field: many "are vague and are almost wholly without . . . safeguards."⁷² The Pennsylvania statute in particular was severely criticized: one of its provisions was characterized as "strangely reminiscent of the Sedition Act of 1798"⁷³ and the fact that it permitted the initiation of a prosecution by a private individual was seen as presenting "a peculiar danger of interference with the federal program" and as providing an opportunity "for the indulgence of personal spite and hatred or for furthering some selfish advantage or ambition. . . ."⁷⁴ Finally, and most importantly, the Court gave great weight to the possibility of double punishment.⁷⁵

The magnitude of the threat to civil liberty presented by overlapping state and federal criminal statutes should not be minimized. The possibility that an individual may be subjected to successive state and federal prosecution for what would otherwise be regarded as a single crime raises serious questions of policy if not of constitutional law. Exposing an individual to a second trial when the first has resulted in an acquittal by a jury contravenes an honored tradition of Anglo-American society. Likewise, punishing an individual twice for the same act violates "the principles of the common law, and the genius of our free government."⁷⁶ Concurrent criminal statutes may be the cause of other dilemmas. The privilege against self-incrimination may be deprived of substance if a witness in a proceeding in one jurisdiction is compelled to answer questions which

⁷⁰ 54 Stat. 670, 671 (1940); 18 U.S.C.A. §2385 (1951).

⁷¹ *Pennsylvania v. Nelson*, 350 U.S. 497, 519 (1956).

⁷² *Id.*, at 508 (1956).

⁷³ *Id.*, at 498 n.2.

⁷⁴ *Id.*, at 507, quoting *Commonwealth v. Nelson*, 377 Pa. 58, 74-5, 104 A.2d 133, 141 (1954).

⁷⁵ *Id.*, at 509-510.

⁷⁶ Mr. Justice Story in *Houston v. Moore*, 5 Wheat. (U.S.) 1, 72 (1820) (dissenting opinion).

incriminate him under the laws of another jurisdiction. The right to be secure against unreasonable searches and seizures may be abased if evidence illegally obtained by state officers is utilized in a federal trial.

Despite the impairment of civil liberty, the Supreme Court has held that a second prosecution or punishment by a different government for the same act does not violate the Due Process Clause⁷⁷ or the constitutional provision against double jeopardy.⁷⁸ Similarly, it has held that the constitutional privileges protecting against self-incrimination and illegal searches and seizures do not prevent the use in a federal proceeding of incriminating evidence obtained by testimonial compulsion from a witness in a state proceeding⁷⁹ or obtained illegally from him by state officials.⁸⁰

The possibilities of double punishment and attendant difficulties created by overlapping state and federal criminal laws are considerations which a legislature should bear in mind in deciding whether dual legislation is desirable. But the history and development of federal criminal legislation suggests that ordinarily such factors as these should not influence the decision of pre-emption questions.⁸¹

The early denial of federal common-law criminal jurisdiction⁸² placed the primary responsibility for the maintenance of public order on the states. Prior to the Civil War the criminal legislation enacted by Congress was confined entirely to matters of distinctive federal concern: offenses not subject to state jurisdiction (District of Columbia, territories, high seas)⁸³ and offenses directly threatening the existence, integrity or property of the federal government and its institutions (treason, contempt of court, resistance or obstruction to federal process, bribery of federal officers, theft of federal property, defrauding of the revenue and the like).⁸⁴ The protection of private individuals from harms committed by other private individuals, and the use of criminal sanctions to deter and punish such harms, became a traditional responsibility of the states.

⁷⁷ *Hebert v. Louisiana*, 272 U.S. 312 (1926).

⁷⁸ *United States v. Lanza*, 260 U.S. 377 (1922).

⁷⁹ *Feldman v. United States*, 322 U.S. 487 (1944).

⁸⁰ *Weeks v. United States*, 232 U.S. 383 (1914); cf. *Gambino v. United States*, 275 U.S. 310 (1927).

⁸¹ Useful comments on the general problem of pre-emption when overlapping criminal statutes are involved are: Hunt, *Federal Supremacy and State Anti-Subversive Legislation*, 53 Mich. L. Rev. 407 (1955); Grant, *The Scope and Nature of Concurrent Power*, 34 Col. L. Rev. 995 (1934); Pre-emption by Federal Criminal Statutes, 55 Col. L. Rev. 83 (1955).

⁸² *United States v. Coolidge*, 1 Wheat. (U.S.) 415 (1816); *United States v. Hudson & Goodwin*, 7 Cranch (U.S.) 31 (1812). But cf. Crosskey, 2 *Politics and the Constitution* 764-84 (1953).

⁸³ See Hart and Wechsler, *The Federal Courts and the Federal System* 1090-95 (1953).

⁸⁴ See Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 *Law & Contemp. Prob.* 64 (1948), where the development of federal criminal jurisdiction is traced.

When the federal government entered the same field in a major way in the twentieth century,⁸⁵ it did so primarily to aid the states in enforcing their criminal laws. In some instances (mail fraud, lottery by mail), the use of federal instrumentalities was involved, but the connection would appear to be a jurisdictional handle rather than a real connection with any distinctive interest of the federal government. In some instances (e.g., mail fraud), the lack of any local incentive to prosecute for harms which have their primary impact elsewhere seems to have been involved. But the major factors have been either a congressional desire to enlist the powerful forces of the nation to preserve public morality (lottery, white slave, narcotics) or a desire to aid state enforcement in situations where it might be frustrated by the inability of state law enforcement officers of limited territorial authority to cope with the interstate movement of criminals or stolen property (motor vehicle theft, kidnapping, stolen property).⁸⁶

The circumstances of enactment, if not express provision, made it clear in most of these instances that Congress did not intend to displace state criminal action in these fields. Even when matters of distinctive federal concern, such as the protection of federal property, were involved, the natural inference was that Congress intended to supplement state laws and not to displace them.⁸⁷ The state interest in preventing breaches of the peace is involved to the same extent no matter whose property is taken. State law enforcement officers have provided protection to federal property from the earliest days of the government. It is in the interest of the federal government to have them active in the protection of federal property, for otherwise a more extensive national law enforcement staff would be required. Possible conflicts in the administration of these dual criminal laws and the general undesirability of possible double prosecution or double punishment cannot outweigh the manifest intention of Congress to *supplement* existing state criminal legislation. Thus the historical development of federal criminal legislation and its interstitial character have been thought to preclude a finding that Congress intended to "occupy the field."⁸⁸

Other factors have contributed to this conclusion. In many instances Congress has by specific language dealt with the problem, either saving state juris-

⁸⁵ Several reconstruction era measures anticipated the later development. 14 Stat. 27 (1866), 42 U.S.C.A. §1982 (1957) (Civil Rights Act of 1866); 16 Stat. 144 (1870), 42 U.S.C.A. §1981 (1957) (Civil Rights Act of 1870); 17 Stat. 283, 302, 323 (1872) (Post Office Code of 1872) (mail fraud, lottery by mail).

⁸⁶ Cf. Schwartz, *op. cit.* supra note 84, at 73.

⁸⁷ *United States v. Amy*, 24 Fed. Cas. 792, No. 14,445 (C.C. Va., 1859), is the leading case (dictum of Mr. Chief Justice Taney). See also *Quinn v. State*, 95 So.2d 273 (Ala.App., 1957); *State v. Moore*, 143 Iowa 240, 241-2, 121 N.W. 1052, 1053 (1909); *Commonwealth v. Ponzi*, 256 Mass. 159, 152 N.E. 307 (1926); *In re Van Dyke*, 276 Mich. 32, 267 N.W. 778 (1936); *People v. Burke*, 161 Mich. 397, 126 N.W. 446 (1910); *Ex parte Groom*, 87 Mont. 377, 381-2, 287 Pac. 638, 639 (1930); *State v. Stevens*, 60 Mont. 390, 199 Pac. 256 (1921); *Hayner v. State*, 83 Ohio 178, 93 N.E. 900 (1910); *State v. Morrow*, 40 S.C. 221, 18 S.E. 853 (1893); *State v. Ferree*, 88 W.Va. 434, 437, 107 S.E. 126, 127 (1921).

⁸⁸ Cases cited note 54 supra.

diction by express provision⁸⁹ or preventing dual prosecution.⁹⁰ And the inference of pre-emptive intent that might otherwise be drawn from the fear of dual prosecutions is considerably diluted by the fact that, in practice, such prosecutions are extremely rare.⁹¹

The *Nelson* case is not the first case in which the Court has been influenced in its decision of pre-emption questions by fear that the existence of overlapping state and federal criminal legislation would result in deprivation of civil liberties.⁹² Nor can it be said that under present Supreme Court pre-emption doctrine, which requires the Court to make a search for congressional intent that is almost invariably illusory, this is an irrelevant consideration. But it is questionable whether a court should undertake such a task. Attempting to ascertain the intention of Congress on the basis of an assessment of possible deprivations of civil liberties, which have not occurred and may not occur, involves the weighing of legislative considerations and the dangers of advisory opinions. It would seem preferable to adjudicate any constitutional questions as they arise.

The Supreme Court appears about ready to take some action to avoid the dangers of double prosecution or punishment by a different government for the same act. There have been intimations in recent years that the Court was unhappy with the doctrine of the *Lanza* case⁹³ and might be willing to overrule it or distinguish it as involving a special Eighteenth Amendment problem. The Court has recently heard argument in two cases reopening the issue which *Lanza* had appeared to settle: whether a second prosecution or punishment by a different government for the same act violates the Due Process Clause or the constitutional provision against double jeopardy. In *Bartkus v. Illinois*,⁹⁴ the

⁸⁹ See discussion at 94-97 *supra*.

⁹⁰ Several federal criminal statutes contain a clause providing that a state conviction or acquittal shall act as a plea in bar in the federal court. See 62 Stat. 729 (1948), as amended, 18 U.S.C.A. §659 (1950) (embezzlement or theft of baggage from interstate commerce); 62 Stat. 730 (1948), 18 U.S.C.A. §660 (1950) (embezzlement of funds of interstate carriers); 62 Stat. 794 (1948), 18 U.S.C.A. §1992 (1951) (wrecking of trains); 62 Stat. 797 (1948), as amended, 18 U.S.C.A. §2117 (1951) (breaking into interstate carrier with intent to steal).

⁹¹ Cf. Schwartz, *op. cit. supra* note 84, at 71-3.

⁹² *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Houston v. Moore*, 5 Wheat. (U.S.) 1, 31 (1820); cf. *California v. Zook*, 336 U.S. 725, 740, 752 (1949) (dissenting opinion of Mr. Justice Burton).

⁹³ *United States v. Lanza*, 260 U.S. 377 (1922). In *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937), it was held that the double jeopardy clause barred double prosecution for the same conduct by the United States and its subordinate government in a territory. In *Jerome v. United States*, 318 U.S. 101 (1943), possible double punishment was given as a reason for narrow construction of a federal criminal statute. In the *Nelson* case the Court was careful to say that "we do not reach the question whether double or multiple punishment for the same overt acts . . . has constitutional sanction," citing an article, Grant, *The Lanza Rule of Successive Prosecutions*, 32 Col. L. Rev. 1309 (1932), which severely criticizes the *Lanza* rule. 350 U.S. 497, 509 (1956).

⁹⁴ *Bartkus v. Illinois*, No. 1, October Term, 1958. See *People v. Bartkus*, 7 Ill.2d 138, 130 N.E.2d 187 (1955), cert. granted 352 U.S. 907 (1956), affirmed by an equally divided court, 355 U.S. 281 (1958) (Mr. Justice Brennan not participating), judgment vacated and case restored for reargument, 356 U.S. 969 (1958).

petitioner was convicted of bank robbery in a state court after an acquittal in a federal court of robbery of the same bank. The elements of the state and federal offenses, and the interests protected, were the same, aside from the jurisdictional allegation in the federal case that the bank's funds were federally insured. In *Abbate v. United States*,⁹⁵ the other pending case, a federal conviction for conspiracy to destroy communication facilities operated or controlled by the United States followed a state conviction for conspiracy to injure private property. In this case, unlike *Barthkus*, the interests sought to be protected by the federal and state laws do not appear to be the same, and it is arguable that the elements of the two offenses are different.⁹⁶ In any event, the Court now has before it the constitutional problems which, one surmises, had an important influence on the *Nelson* decision. It seems likely that the *Lanza* rule will be overturned and that the states will be forbidden to prosecute a person acquitted of the same act after a federal trial. If this occurs, the justification for deciding in favor of pre-emption in the *Nelson* case disappears to the extent that the decision was based on a desire to prevent dual prosecution and punishment.

IMPACT OF THE NELSON CASE ON OVERLAPPING FEDERAL AND STATE OFFENSES

The significant effect of the *Nelson* decision in invalidating state sedition statutes and other state laws dealing with subversion and loyalty has been fully treated elsewhere.⁹⁷ It may have an equally significant effect on state criminal statutes not dealing with subversion or loyalty which duplicate or overlap federal criminal statutes. For *Nelson* suggests that there is no state power to punish conduct which also constitutes a federal offense unless the conduct threatens or produces a local breach of the peace. This is the necessary implication of the Court's treatment of *Fox v. Ohio*⁹⁸ and *Gilbert v. Minnesota*,⁹⁹ distinguishing them both on the ground that each involved a breach of the peace. Apparently a state does not "impinge on federal jurisdiction" unless it attempts to punish conduct not involving violence, disorder, fraud or other conduct having local effects.¹⁰⁰

⁹⁵ *Abbate v. United States*, No. 7, October Term, 1958. See 247 F.2d 410 (C.A.5th, 1957), cert. granted 355 U.S. 902 (1957).

⁹⁶ If the state statute expresses a separate and distinct state interest, it is arguable that the state is free to enforce its own law without regard to federal action. See *Fox v. Ohio*, 5 How. (U.S.) 410 (1847); *United States v. Cruikshank*, 92 U.S. 542, 560-61 (1875) (dissenting opinion); *Ex parte Siebold*, 100 U.S. 371 (1879); *Screws v. United States*, 325 U.S. 91 (1945).

⁹⁷ See Cramton, *Supersession and Subversion: Limitations on State Power to Deal with Issues of Subversion and Loyalty*, 8 U. of Chi. L. S. Rec. 24, 31-2 (1958); Hunt, *State Control of Sedition: The Smith Act as the Supreme Law of the Land*, 41 Minn. L. Rev. 287 (1957); *Supersession of State Sedition Laws by Federal Legislation*, 11 U. of Fla. L. Rev. 224 (1958).

⁹⁸ 5 How. (U.S.) 410 (1847).

⁹⁹ 254 U.S. 325 (1920).

¹⁰⁰ *Pennsylvania v. Nelson*, 350 U.S. 497, 500-501 (1956).

This distinction might be viewed as resting upon the notion that the police power of the states is narrowly limited to conduct having such local effects. But the Court expressly disclaimed this position: "the decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct."¹⁰¹ Sedition against the United States thus is treated as within the police power of the states; Pennsylvania was prohibited from prosecuting such conduct in the *Nelson* case only because it was said that Congress, by the enactment of laws penalizing and regulating seditious activity, had intended to displace state law.

In *Fox v. Ohio*¹⁰² a similar distinction between offenses involving a local breach of the peace and those not involving such conduct was suggested, albeit under somewhat false colors. Fox had been convicted in a state court for uttering false coin, and the Court, in sustaining his conviction, stated that counterfeiting and uttering of spurious coin were distinct and independent crimes. Counterfeiting affected a distinctive interest of the federal government—its monopoly over the coinage of money—whereas utterance of spurious money affected a distinctive local interest—the protection of the local citizenry from fraud. This distinction might have made some sense if the utterance of base coin had not also been prohibited by a federal statute. The Court's deliberate blindness to this crucial fact, relied on by the appellant and stressed by a dissenting judge, merely raised doubts as to the constitutionality of the federal statute prohibiting utterance. Three years later, by a unanimous decision in *United States v. Marigold*,¹⁰³ the federal statute was upheld and the doubt settled. Ever since, it has been established doctrine that both the states and the federal government can punish the utterance as well as counterfeiting of spurious money.¹⁰⁴ In the *Nelson* case, the Court relied on *Fox*, but did not advert to this subsequent history.

The likely effect of the *Nelson* decision is not to prevent all state prosecutions for an offense also punishable under federal law, but only to require that some aspect of local police power be involved. Both state and federal governments can continue to punish such overlapping offenses as bank robbery,¹⁰⁵ assault on a

¹⁰¹ *Id.*, at 500.

¹⁰² 5 How. (U.S.) 410 (1847).

¹⁰³ 9 How. (U.S.) 559 (1850).

¹⁰⁴ *Ex parte Geisler*, 50 Fed. 411 (C.C. Tex., 1882); *In re Dixon*, 41 Cal.2d 756, 264 P.2d 513 (1953); *People v. McDonnell*, 80 Cal. 285, 22 Pac. 190 (1889); *Nastasi v. Adehold*, 201 Ga. 237, 39 S.E.2d 403 (1946); *State v. Moore*, 6 Ind. 436 (1855); *State v. Mix*, 15 Mo. 153 (1851).

Prior to *Fox v. Ohio*, 5 How. (U.S.) 410 (1847), the state courts had uniformly reached the same conclusion in reliance on the saving clause appended to federal counterfeiting statutes; See *Chess v. State*, 1 Blackf. 198 (Ind., 1822); *Commonwealth v. Fuller*, 49 Mass. 313 (1844); *State v. Antonio*, 3 Frev. 562 (S.C., 1816).

¹⁰⁵ See cases cited note 45 *supra*. Cf. *People v. Bartkus*, 7 Ill.2d 138, 130 N.E.2d 187 (1955), *aff'd* by an equally divided court, 355 U.S. 281 (1958), rehearing granted 356 U.S. 969 (1958), in which no pre-emption question was suggested.

federal officer,¹⁰⁶ theft from a post office¹⁰⁷ and the like,¹⁰⁸ since in each case the criminal conduct inevitably involves a local breach of the peace.

It is probable, however, that state power to punish other overlapping offenses, such as interference with federal recruitment,¹⁰⁹ desecration of the United States flag,¹¹⁰ impersonation of a federal officer¹¹¹ and the like, is no longer permissible absent a showing that a local breach of the peace was involved. In each of the above instances the state law is auxiliary to federal law enforcement. The states are seeking to aid the federal government in maintaining respect for federal institutions. Although there is no logical reason why the police power of a state should not encompass the furthering of national purposes and unity, these matters are of distinctive federal interest, and the existence of a federal penalty may be thought to require a finding of pre-emption.

People v. Von Rosen,¹¹² a recent Illinois case, is the first case subsequent to *Nelson* to apply these principles. The defendants, who had published a picture of a young woman innocent of any clothing other than a large hat, sunglasses, and a small but appropriately placed piece of cloth resembling the United States flag, were convicted in a state court for public desecration of the United States flag, conduct also prohibited by a federal statute. The Illinois Supreme Court, in response to the argument that the federal statute had "occupied the field," concluded: "While it might be inferred that Congress has left no room for the States to punish desecration *qua* desecration, it cannot be inferred that Congress intended to prevent the States from prohibiting that which incites or tends to incite a breach of peace."¹¹³ The court therefore interpreted the state statute as limited to situations where the conduct was likely to produce a breach of peace within the state. Since there was no evidence in the record tending to show likelihood of a breach of the peace, the court reversed the conviction: "[T]he Illinois act cannot be constitutionally applied to these defendants."¹¹⁴

THE PRE-EMPTION DOCTRINE—AN EVALUATION

The foregoing analysis of the *Nelson* case suggests that the Court erred (1) in failing to examine critically the applicability of the "tests of supersession"

¹⁰⁶ See *Brooke v. State*, 155 Ala. 78, 46 So. 491 (1908) (assault and battery in post office).

¹⁰⁷ *Quinn v. State*, 95 So.2d 273 (Ala.App., 1957). For cases preceding the *Nelson* decision, see cases cited note 87 *supra*.

¹⁰⁸ Pre-emption arguments based on the *Nelson* case have been rejected in the following cases: *Geurin v. State*, 315 P.2d 965 (Nev., 1957) (narcotics); *People v. Knapp*, 4 Misc. 2d 449, 157 N.Y.S.2d 820 (Gen.Sess., 1956) (labor extortion); *People v. Bianchi*, 3 Misc. 2d 696, 155 N.Y.S.2d 703 (Co.Ct., 1956) (excessive motorboat speed).

¹⁰⁹ 62 Stat. 811 (1948), as amended 18 U.S.C.A. §2387 (1951).

¹¹⁰ 36 U.S.C.A. §§173-178 (not a criminal statute).

¹¹¹ 62 Stat. 742 (1948), 18 U.S.C.A. §912 (1950).

¹¹² 13 Ill.2d 68, 147 N.E.2d 327 (1958).

¹¹³ *Id.*, at 71 and 329.

¹¹⁴ *Ibid.*

drawn from commerce clause cases and (2) in failing to reckon in serious fashion with the saving clause of 18 U.S.C. §3231.¹¹⁵ The discussion thus far has proceeded entirely on the assumption that the states have concurrent power with the federal government to prescribe criminal penalties for sedition directed against the United States. This assumption has been made only because the Supreme Court decided the case on that basis. It is possible, however, that the assumption is unwarranted and that the case reaches the right result, although for the wrong reasons.

The federal war powers are broad and inclusive. It could be argued that they are exclusive. Surely some of them, such as the declaration of war, the maintenance of armed forces and the conduct of war, are responsibilities of the federal government alone.¹¹⁶ And although the states retain the power of self-preservation to suppress insurrection and repel invasion, the duty of preserving the state governments rests upon the federal government. It could be questioned whether the states have any role to play when a seditious attack upon the federal government is made. It would seem that just as the states may not punish treason against the United States,¹¹⁷ so also the power to punish sedition directed against the United States is beyond their province.¹¹⁸ This, at least, is an arguable position, which finds some support in history and which results in a tenable distinction between federal and state spheres of action: State action involving a matter within the exclusive competence of the federal government, such as national defense and foreign relations, is justified only insofar as conduct constituting a local breach of the peace has occurred. This view justifies the result, if not the rationale, in *Nelson* and in *Hines v. Davidowitz*.

The *Nelson* case, however, has not been given this lengthy treatment merely to demonstrate that its result is right or wrong. The analysis of the case has significant implications for pre-emption doctrine generally. These more general conclusions are set forth below.

Cases presenting pre-emption problems may be divided into three general classes, each of which has been accorded somewhat different treatment because of the differing policy considerations that are applicable. First, in a few cases federal and state statutes have been found in *conflict* in the sense that compliance

¹¹⁵ 62 Stat. 826 (1948), 18 U.S.C.A. §3231 (1951).

¹¹⁶ U. S. Const. Art. 1, §8, clauses 11-16; Art. 1, §10, clauses 1, 3.

¹¹⁷ In *People v. Lynch*, 11 Johns. 611 (N.Y., 1814), and in *Ex parte Quarrier*, 2 W.Va. 569 (1866), charges of treason were found improperly laid against a state, where the accused was deemed to have acted rather against his allegiance to the United States. Professor Hurst in his study of Treason in the United States, 58 Harv. L. Rev. 226, 395, 806 (1945), states that "[t]he trials of Thomas Dorr, and of John Brown, for treason by levying war against the states of Rhode Island and Virginia, respectively, are the only completed treason prosecutions by state authorities." *Id.*, at 806.

¹¹⁸ Mr. Justice Brandeis argued unsuccessfully in his dissenting opinion in *Gilbert v. Minnesota*, 254 U.S. 325, 334 (1920), that penalties for interference with federal recruitment were within the exclusive power of the federal government.

with one necessarily constitutes violation of the other. *Southern Ry. Co. v. Reid*¹¹⁹ is one of the infrequent cases of this kind. A North Carolina statute which subjected rail carriers to penalties for failure to transport freight to interstate points as soon as received was held to conflict with a federal statute forbidding such transportation until rates had been fixed and published. While it may be difficult to determine whether a conflict actually exists, where one is found the Supremacy Clause of Article VI controls the result. The state statute must give way.

A second class of cases, involving situations where a state pattern of regulation *deviates* from the federal pattern without directly conflicting with it, is more difficult of solution. The state regulation may differ in that it imposes an additional requirement on the same matter,¹²⁰ or in that it closes a gap in the federal scheme by regulating a closely related matter.¹²¹ In either case a similar problem arises: Did Congress intend that its regulation should stand alone? In the usual case congressional intent is unclear, and conflicting inferences may be drawn from the fact that the regulatory patterns differ from one another. On the one hand it is possible that congressional failure to embody the deviating provisions of the state regulation in the federal regulation indicates congressional rejection of those provisions. This negative inference may be nourished by judicial speculation concerning possible "inconsistency" of the state regulation with the policy, purpose or administration of the federal statute. On the other hand, the very difference of the federal and state statutory schemes gives rise to the inference that the state statute serves a state interest independent from the federal interest safeguarded by the federal enactment. In a federal system the interests of both governments should be given recognition if it is possible to do so. This approach results in the validation of dual regulation.

Although various predictive factors exist, such as the historic pattern of state or federal regulation of particular matters, the Court has been extremely inconsistent in dealing with cases of this second type. The hollow repetition of catchwords such as "pervasiveness," "dominance," and the like, has merely obscured the Court's *ad hoc* fluctuation from the negative inference that deviation is an inconsistency to the inference that it expresses an independent state interest. In truth, both factors are almost invariably present. Any difference makes a

¹¹⁹ 222 U.S. 424 (1912).

¹²⁰ E.g., *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944) (state statute requiring license of foreign corporations held valid as applied to customhouse brokers licensed under a federal statute); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (state alien registration statute requiring aliens to carry identification cards held superseded by federal registration statute not containing a similar provision); *Savage v. Jones*, 225 U.S. 501 (1912) (state statute requiring a more descriptive labelling of a product than was required by Federal Pure Food and Drug Act held valid).

¹²¹ *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942) (a state inspection system of the *ingredients* used in making renovated butter, with power of condemnation, held superseded by a federal statute authorizing factory inspection and condemnation of unfit *products*); *Kelly v. Foss Co.*, 302 U.S. 1 (1937) (state inspection law as applied to motor tugs which were not covered by federal inspection laws applicable to practically all other vessels held valid).

difference (even if it be only the narrow one that the regulated party has two slightly different regulatory schemes to reckon with rather than a uniform scheme); and the state statute, to the extent that it differs from the federal, always expresses a peculiar concern of the state.

The third class of cases involves situations where federal and state statutes *coincide* by requiring or forbidding exactly or substantially the same thing. Cases of this type, like deviation cases, are frequent, but unlike deviation cases a large number of them involve criminal sanctions. Federal and state penalties dealing with share-expense automobile transportation,¹²² transportation of diseased cattle,¹²³ and robbery of national banks¹²⁴ illustrate the variety of cases of this kind. Whatever the subject matter, however, the significant characteristic is that the same purpose underlies the respective action of the state and the federal government. This characteristic makes coincidence cases easier, and at the same time more difficult, of solution than deviation cases. Because the state legislation serves no independent purpose of its own it appears to lack justification, and there is a tendency to infer a pre-emptive intent.¹²⁵ On the other hand, given the realities of cooperative federalism in regulation and law enforcement, there is a natural inference that each jurisdiction may simultaneously protect its own interest and reinforce the interest of its governmental partner.¹²⁶

These contradictory views may be based on different conceptual theories concerning the nature of our federal system. If the state and federal governments are viewed as jealous sovereignties contending for power, with the Court in the position of an arbiter, the burden of overlapping regulation and the resulting possibilities of friction are likely to be magnified. The result is an inclination to infer a pre-emptive intent. Particularly is this so if the states have entered a field which is thought to be one of "predominant" federal interest. On the other hand, if one views the federal system as a cooperative whole, the fact that Congress, by enforcing the same regulation or proscribing the same conduct, has thought it wise to aid the states, or the states to aid Congress, is unlikely to induce the inference that Congress intended to displace the state legislation. It is only fitting that as partners in the same enterprise they should seek to assist one another toward their common objectives. Overlapping criminal statutes have long been viewed in this fashion.¹²⁷

It is obvious from even a moment's reflection that both of these conceptual patterns contain elements of truth. A degree of competition and strife between

¹²² *California v. Zook*, 336 U.S. 725 (1949).

¹²³ *Mintz v. Baldwin*, 289 U.S. 346 (1933); *Asbell v. Kansas*, 209 U.S. 251 (1908).

¹²⁴ *Jerome v. United States*, 318 U.S. 101 (1943).

¹²⁵ *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), and *Parker v. Brown*, 317 U.S. 341 (1943), illustrate this tendency.

¹²⁶ *California v. Zook*, 336 U.S. 725 (1949); *Hoke v. United States*, 227 U.S. 308 (1913); *Ex parte Siebold*, 100 U.S. 371 (1879).

¹²⁷ Cases cited note 54 *supra*.

the governments of a federal system is inevitable. Yet the entity could not long survive unless it also brought forth a high degree of cooperation. The inconsistent resolution of coincidence questions suggests that the court has not adopted either one of these generalized views but proceeds in a more particularistic fashion. Insofar as congressional intent is unclear (the thesis here is that this would be the normal case) and precedent does not control the result (as it does with much overlapping criminal legislation), decision seems to turn on a case by case determination of whether the duplication of legislation is wise. If the burden placed on persons subject to the dual regulation or exposed to dual punishment is not outweighed by the positive value the Court sees in legislative duplication, such as more effective enforcement, the state statute is likely to be struck down. It should go without saying that subjective considerations with respect to the desirability of particular kinds of economic regulation or criminal penalties cannot help but participate in this balancing process.

The most significant problem raised by pre-emption cases is the role which should be played by the Supreme Court. The thesis of this article is that in the *Nelson* case, as in most pre-emption cases, congressional intent is not only unclear but unfathomable, and that the "tests of supersession" which the Court purports to apply do not provide an answer to the question to which they are supposedly directed—the intent of Congress. The conclusion which is drawn is that judicial notions concerning the desirability in particular cases of overlapping regulatory schemes or overlapping criminal sanctions are more significant in determining the results.

The ultimate issue is whether the Supreme Court should exercise this type of policy judgment. It is worth noting that the alternatives of the Court are extremely limited—if there is no objective method of determining congressional intent and if the Court eschews the broader policy judgment of the desirability of the overlapping legislation, the only alternative is the automatic application of a conclusive presumption for or against a pre-emptive intent on the part of Congress. The Court apparently has felt that the exercise of a broader judgment is the wiser course. No doubt it has been influenced by the reluctance and inability of Congress to provide legislative solutions. The close balance of contending groups in the Congress may operate to foreclose any immediate legislation or to force a compromise which leaves the displacement of state law deliberately vague. Congressional performance in the field of labor relations may be of this character.¹²⁸ Perhaps it is not unfair for the Court to interpret congressional silence as an invitation for the Court to provide answers as problems arise. In other areas, lack of interest in the subject matter or lack of awareness of the complexity of the problems may explain the failure of Congress to lay down adequate guides. Even in these situations the Court may be justified in making the policy judgments which Congress has failed to make. And, this writer feels,

¹²⁸ See Meltzer, *The Supreme Court, Congress and State Jurisdiction over Labor Relations*, 8 U. of Chi. L. S. Rec. 95 (1958).

as a policy matter the Court for the most part has exercised its judgment in pre-emption cases in a wise fashion.

Despite the appeal of the Court's record, it is believed that the exercise of such functions by the Court is inappropriate. A democratic society should not commit such important matters to the relatively unencumbered judgment of nonelected officers. Moreover, the application of a presumption would have the virtue of forcing legislative concern with problems which no legislature should be permitted to avoid. If a presumption were to be applied, it seems clear that it should be a presumption that Congress did not intend to supersede overlapping state legislation. In a federal system the interests of both the states and the federal government should be given recognition until they come into collision with one another. The states cannot remain as independent centers of governmental power if the expression of state policies is foreclosed merely by the enactment of federal legislation dealing with the same or a closely related subject-matter. A presumption in favor of pre-emption is destructive of state power. The opposing presumption permits the state to continue as viable units while leaving Congress free to protect the federal interest when it is threatened by state legislation.