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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 10

COMMONWEALTH OF PENNSYLVANIA, PETITIONER

v.

STEVE NELSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the invitation of the Court to the Solicitor General "to file a brief setting forth the views of the Government" (R. 1421).

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania (R. 50) is reported at 172 Pa. Super. 125, 92 A. 2d 431. The majority (R. 50–64) and dissenting (R. 64–92) opinions in the Supreme Court of Pennsylvania are reported at 377 Pa. 58, 104 A. 2d 133.

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JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 25, 1954 (R. 50). A petition for reargument was denied on April 27, 1954. See 377 Pa. 58, 60. The petition for a writ of certiorari was filed on July 24, 1954, and was granted on October 14, 1954 (R. 1421). The jurisdiction of this Court rests upon 28 U. S. C. 1257 (3).

QUESTION PRESENTED

Whether the federal Smith Act, which prohibits the knowing advocacy of the overthrow of established government by force and violence, supersedes or suspends the enforceability of Section 207 of the Pennsylvania Penal Code, which proscribes similar conduct.

STATUTES INVOLVED

The Smith Act (Act of June 28, 1940, c. 439, 54 Stat. 670, 671, 18 U. S. C. 2385) and the Pennsylvania Sedition Act (Section 207 of the Pennsylvania Penal Code of 1939, 18 Purd. Pa. Stat. Ann. 4207) are set forth in the Appendix, *infra,* pp. 50–52.

STATEMENT

The pertinent facts may be summarized as follows: Respondent was charged, in a 12-count indictment (R. 9–20) returned in the Court of Quarter Sessions of the Peace, Allegheny County, Pennsylvania, with twelve violations of the Penn-

sylvania Sedition Act (*infra,* pp. 50–51). The several counts charged different acts of sedition, as therein defined, against the peace and dignity of the Commonwealth of Pennsylvania. Following a trial by jury, respondent was found guilty on all counts and sentenced to imprisonment for 20 years and to pay a fine of $10,000 plus the costs of the prosecution (R. 21). On appeal to the Superior Court of Pennsylvania, the judgment of conviction was affirmed (R. 50), the court adopting the opinion of the trial judge denying motions for a new trial and in arrest of judgment. On appeal to the Supreme Court of Pennsylvania, the judgment of the Superior Court was reversed and the indictment was ordered quashed (R. 50–64), one judge dissenting (R. 64–92). The majority opinion, while it makes reference to various contentions of respondent "which raise serious questions as to whether his conviction resulted from a fair and impartial trial" (R. 52), makes it clear that reversal was predicated solely on the ground that "the Pennsylvania Sedition Act was suspended by operation of law upon the enactment by Congress of Title I of the Act of June 28, 1940, c. 439, 54 Stat. 670, known as the Smith Act, which defines sedition against the United States and prescribes punishments therefor" (R. 53).

SUMMARY OF ARGUMENT

I.

It is settled that a state, as an essential attribute of sovereignty and in the exercise of its police power, may proscribe and punish advocacy of the violent overthrow of organized government, at least in the absence of congressional action to the contrary. *Gitlow* v. *New York,* 268 U. S. 652; *Whitney* v. *California,* 274 U. S. 357. Such advocacy, whether it be directed in terms against the state or federal government, or both, is in fact an assault upon both governments. A state, therefore, has the power to punish acts of sedition committed within the state, whether directed in terms against the state or the federal government.

II.

A. Congress, like the states, has the power to proscribe and punish advocacy of the violent overthrow of organized government (*Dennis* v. *United States,* 341 U. S. 494), which power it exercised in enacting the Smith Act. The threat posed by such advocacy is undoubtedly of paramount importance to the federal government. But to warrant the conclusion that state legislation which is otherwise a valid exercise of the states' police power has been superseded or suspended by the Smith Act, it must be established that the latter is in irreconcilable conflict with the state statute, or the congressional purpose to occupy the entire field exclusively must otherwise clearly appear.

B. The threshold inquiry when an issue of supersedure is raised concerns the available direct evidence as to the congressional purpose. Forty-two states plus Alaska and Hawaii have statutes which prohibit advocacy of the violent overthrow of established government. Most of these statutes have been in existence for many years. All of them would be invalidated, insofar as they prohibit such advocacy, if the view of the majority below were correct. Such congressional nullification of important parts of the basic criminal laws of most of the states requires the clearest sort of showing that such was the purpose of Congress.

The Smith Act itself and its legislative history are barren of any suggestion that supersedure of similar state laws was intended. On the contrary, there is clear evidence that Congress was well aware of the existence of the state legislation and there is no evidence that it intended the Smith Act to affect such legislation. Moreover, the Smith Act is included in the federal Criminal Code as reenacted in 1948, which includes a general saving clause to the effect that nothing in the Code "shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." 18 U. S. C. 3231.

C. In concluding that Congress must have intended to preempt the field, the court below relied heavily on the assumption that enforcement of the Pennsylvania statute would be "hampering

to the exercise of federal power." But this assumption does not accord with federal experience. The administration of the various state laws has not in fact interfered with, embarrassed, or impeded the enforcement of the Smith Act. It should not be assumed by this Court that in the future state laws will be administered with less regard for the paramount federal interest in the prevention of sedition. Cf. *Clothing Workers* v. *Richman Bros.,* 348 U. S. 511, 517–519.

D. No other factors are present warranting the conclusion that Congress intended to ban enforcement of state sedition laws. The emphasis of the court below on the fact that the national interest in the control of sedition is obviously paramount is misplaced. While this factor is of significance in resolving problems of supersedure, it does not itself preclude enforcement of state laws on the same subject. *Gilbert* v. *Minnesota,* 254 U. S. 325. Congress might well have contemplated, as we submit it did here, cooperation by the states against the enemies of all.

The fact that statutes proscribing sedition are ordinary criminal statutes and not regulatory in nature eliminates the possibility of conflict from that source. The regulatory character of the statutes involved has been crucial in every case in which this Court has held a state statute to have been superseded by a federal statute. Thus in *Hines* v. *Davidowitz,* 312 U. S. 52, this Court, in

holding that the federal Alien Registration Act superseded a Pennsylvania statute also providing for the registration of aliens, stressed the regulatory character of the legislation and the fact that it operated in a field which affects international relations. In this case, by contrast, there is a total absence of any continuing regulatory purpose beyond the prohibition of the conduct proscribed. Moreover, the field is that of criminal justice, which, in our federal system, is primarily committed to the care of the states. This Court has stressed that it will not lightly infer that Congress, by the mere passage of a federal act, has impaired the traditional sovereignty of the states. *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 749.

It is settled that there is no constitutional obstacle to the punishment by both the states and the United States of the same acts. There can, therefore, be no valid suggestion that the state statutes stand as obstacles to the effective enforcement of the Smith Act on the ground that a state proceeding would bar a subsequent federal prosecution on grounds of double jeopardy. The court below appears, however, to have been influenced by the fact that persons engaging in seditious activities, if prosecuted under the Pennsylvania statute, might, like respondent, receive a sentence longer than the maximum provided by the Smith Act, and, if prosecuted under both state and fed-

eral statutes, might be punished under both. But this is true in all situations where state and federal statutes proscribe the same conduct. And this Court has never held this circumstance to operate as a bar to enforcement of a state statute. A person who engages in seditious activity can, of course, be prosecuted only in those states within the borders of which the seditious acts occur.

III

Much has been written with respect to the wisdom of state sedition laws. Doubts as to the wisdom of such laws or as to the possibility that such legislation may be abused in practice, however, should not be permitted to obscure the fact that within an area, such as this, where both Congress and the states may act, it is for Congress and not the courts to determine, within the constitutional framework, the extent, if any, to which the traditional sovereignty of the states must yield to the paramount federal power. We find no indication, express or by implication, that Congress has at any time considered it in the public interest to displace state sedition laws. If such action should at any time appear to be in the public interest, Congress is free to legislate to that end. The vindication of the public interest poses a legislative problem to be dealt with by Congress.

ARGUMENT

THE SMITH ACT DOES NOT PRECLUDE ENFORCEMENT OF STATE SEDITION STATUTES

The United States is deeply concerned with the effective and appropriate enforcement of laws prohibiting the knowing advocacy of the overthrow by force and violence of established government. It is a concern rooted in the responsibility of the Federal Government to assure the continued vitality of constitutional government as against a real and well organized danger. The federal Smith Act, enacted in 1940, is one statute directed to this objective. Pennsylvania and many other states have similar statutes, some of which date back many years. For convenience of reference, we refer to these laws in this brief as sedition laws.

A majority of the court below held that Congress, when it enacted the Smith Act, banned enforcement of state laws proscribing similar conduct (R. 50–64). The dissenting judge vigorously disagreed (R. 64–92). The Supreme Court of New Hampshire has likewise rejected the decision of the Pennsylvania Supreme Court. *Nelson* v. *Wyman,* 99 N. H. 33, 105 A. 2d 756, 769–770. There can be no real question as to the paramount interest of the federal government in the prevention of sedition. But the question of supersedure turns on the purpose of Congress. The conclusion of the court below that there had been super-

sedure, as we show *infra,* was grounded on inference alone. The Smith Act itself and available congressional materials are barren of any suggestion that Congress intended the Act to supersede or suspend the enforcement of state sedition laws. The assumption of the court below that enforcement of such state laws would be "hampering to the exercise of federal power" (R. 57) is, moreover, contrary to federal experience. During the 15 years the federal and state sedition laws have existed side by side, enforcement experience has been one of cooperation and not of conflict. This record of cooperation, we submit, negates any inferences based on hypothetical possibility of conflict in the administration of the federal and state laws.

It is the position of the United States that the federal government has a paramount but not exclusive interest in the prevention of sedition; that under our federal system the states have the power to punish acts of sedition committed within their respective jurisdictions; and that Congress has done nothing to limit or suspend the exercise of that power. Accordingly, we conclude that the Pennsylvania Sedition Act has not been superseded by the Smith Act or other federal legislation.[1] Since Congress has not acted in the premises, there is no occasion to explore the

[1] The United States takes no position on other issues which may be presented in this case.

constitutional limitations, if any, on the power of Congress to limit or prohibit the enforcement of state statutes prohibiting advocacy of the violent overthrow of established government.

I

AT LEAST IN THE ABSENCE OF CONGRESSIONAL ACTION TO THE CONTRARY, THE STATES HAVE POWER TO PUNISH ACTS OF SEDITION COMMITTED WITHIN THEIR RESPECTIVE JURISDICTIONS

It is settled that a state, as an essential attribute of sovereignty and as part of its fundamental police power, possesses the power to proscribe and punish the advocacy within its borders of the violent overthrow of organized government, at least in the absence of congressional action precluding the exercise of such power. Thus in *Gitlow* v. *New York,* 268 U. S. 652, this Court, in sustaining New York's Criminal Anarchy Act, which, like the Pennsylvania statute here involved, prohibited advocacy of the overthrow of organized government by force and violence, said (268 U. S. at 667–668):

> That a State in the exercise of its police power may punish those who abuse this freedom [of speech and of the press] by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. [Citing cases.] * * *
>
> And, for yet more imperative reasons, a State may punish utterances endangering

> the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. * * * And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. [Citing cases.] In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied.

Whitney v. *California,* 274 U. S. 357, 371, sustaining California's Criminal Syndicalism Act, is to the same effect.[2]

The power to punish seditious advocacy reaches all such advocacy as occurs within the criminal jurisdiction of the state. There is no essential difference between the provisions of the Pennsylvania Sedition Act, which punishes advocacy of the overthrow by force of "the government of

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[2] See also *Fiske* v. *Kansas*, 274 U. S. 380; *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; and *Taylor* v. *Mississippi*, 319 U. S. 583. In these cases convictions under state criminal syndicalism and similar statutes were set aside as violative of the Fourteenth Amendment, owing to insufficiency of the evidence. None, however, questioned the power of a state to punish advocacy of violent governmental overthrow. See Mr. Justice Frankfurter concurring in *Dennis* v. *United States*, 341 U. S. 494, 536–542; Groner, *State Control of Subversive Activities in the United States* (1947), 9 Fed. Bar Journ. 61, 93–94.

this State or of the United States" (*infra,* p. 51), and the more general provisions of the New York statute upheld in *Gitlow* which speaks of the "overthrow of organized government" (268 U. S. at 654) or the California statute upheld in *Whitney* which speaks of the "use of force to accomplish any political change" (274 U. S. at 260). The provisions of each of these statutes reflect the obvious fact that the advocacy of the overthrow of an established government whether it be directed in terms against the state or federal government, or both, is in fact an assault upon both governments. As the majority below observed (R. 58):

> * * * it is difficult to conceive of an act of sedition against a State in our federated system that is not at once an act of sedition against the Government of the United States—the union of the forty-eight component States.[3]

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[3] The converse, of course, is equally true, *i. e.*, an act of sedition against the United States must necessarily be, from a practical point of view, an act of sedition against the state wherein it is committed. For this reason, it seems to us that the majority below expressed an unrealistic point of view when they said (R. 58):

"And, while the Pennsylvania statute proscribes sedition against either the Government of the United States or the Government of Pennsylvania, it is only alleged sedition against the United States with which the instant case is concerned. Out of all the voluminous testimony, we have not found, nor has anyone pointed to, a single word indicating a seditious act or even utterance directed against the Government of Pennsylvania."

Petitioner was indicted and convicted, it should be noted,

This Court expressed the same thought when it noted, in sustaining a Minnesota statute making it unlawful to advocate that men should not enlist in the armed forces of the United States or the State of Minnesota, that "this country is one composed of many and must on occasions be animated as one", and added that "the constituted and constituting sovereignties must have power of cooperation against the enemies of all." *Gilbert* v. *Minnesota,* 254 U. S. 325, 329. "* * * the State is not inhibited from making 'the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.' " *Id.* at 331. See also *Albertson* v. *Millard,* 106 F. Supp. 635, 641 (E. D. Mich.), reversed on other grounds, 345 U. S. 242; *State* v. *Holm,* 139 Minn. 267, 273; *People* v. *Lloyd,* 304 Ill. 23, 34; *State* v. *Tachin,* 92 N. J. L. 269, 271–272, affirmed, 93 N. J. L. 485, writ of error dismissed, 254 U. S. 662.

The nature of acts of sedition as assaults on both the state and federal governments is illustrated by analogy to treason, which like sedition is concerned with the forcible overthrow of the established government. The Constitution itself

of advocating by prescribed means the overthrow by force of "the Government of the State of Pennsylvania and of the United States * * * against the peace and dignity of the Commonwealth of Pennsylvania" (R. 12).

recognizes that treason may be a state as well as a federal crime. See Article III, Section 3, and Article IV, Section 2, Clause 2. Treason, like sedition, has in fact been made a crime under federal statute (18 U. S. C. 2381). Every state has made provisions for treason either in its constitution or statutes, often in both. Most of these provisions closely follow Article III, Section 3, of the United States Constitution, which defines the crime as levying war against the United States or adhering to its enemies. State provisions speak of war against the state, and some include war against the United States as well. See *Digest of the Public Record of Communism in the United States* (Fund for the Republic, 1955), pp. 241–249. The meager authorities which have dealt with the question, moreover, are in agreement that the same act of treason may constitute a crime against both state and federal governments. *Charge to Grand Jury—Treason,* 30 Fed. Case No. 18,275, 30 Fed. Cas. 1046, 1047 (C. C., D. R. I., 1842); *Ex parte Quarrier,* 2 W. Va. 569, 572 (1866); cf. *People* v. *Lynch,* 11 Johns. (N. Y.) 549 (1814).

We conclude that, at least in the absence of congressional action to the contrary, a state has the power to punish sedition and that acts of sedition committed within the state, whether directed in terms against the state or against the United States, are within the scope of that power. It remains to consider whether, as held

by the court below, Congress has acted so as to preclude the enforcement of such a state statute.

II

CONGRESS HAS NOT PREEMPTED THE FIELD OF PUNISHING SEDITIOUS ACTIVITIES

Congress, like the states, has the power to proscribe and punish advocacy of the violent overthrow of organized government. *Dennis* v. *United States,* 341 U. S. 494. It would seem obvious, as the court below noted, that the threat posed by such advocacy is of "paramount importance to the Federal Government" (R. 57). The Constitution itself empowers Congress to "provide for the common Defence and general Welfare of the United States" (Art. I, Sec. 8), and charges the federal government with the duty of "guarantee[ing] to every State in this Union a Republican Form of Government." Art. IV, Sec. 4. We think it clear, moreover, that the problem of sedition as it was understood at the time the Smith Act was enacted and as it exists today is "a national problem" which calls for a solution "on a national scale." Cf. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 123. This case, therefore, poses a problem involving "the complex system of polity" (*Ex parte McNiel,* 13 Wall. 236, 240) within our federal system, in an area where the "national interest is obviously paramount" (R. 57). Where

state and valid federal legislation conflict, the latter, of course, prevails as "the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U. S. Constitution, Art. VI.

A. THE CONCLUSION THAT THE EXERCISE OF STATE POLICE POWERS HAS BEEN SUSPENDED IS WARRANTED ONLY WHERE THE CONGRESSIONAL PURPOSE TO EFFECT THAT RESULT IS CLEARLY MANIFESTED

The question whether a state statute which is otherwise a valid exercise of the state's police power has been suspended, superseded, or displaced by a federal statute, enacted pursuant to the paramount power of Congress over the subject matter under the Constitution, has been before this Court many times. Usually, though not invariably,[4] the basis of the assertion of the superior federal authority has been the commerce clause. Each decision has of course turned on the particular provisions of the statutes involved and the facts of the case, but the broad governing principle is clear: To warrant the holding that state legislation which is otherwise a valid exercise of the state's police power has been superseded or suspended by an act of Congress deal-

[4] See, *e. g.*, *Hines* v. *Davidowitz*, 312 U. S. 52, discussed *infra*, p. 40 (control over aliens under the foreign relations and immigration powers); *Gilbert* v. *Minnesota*, 254 U. S. 325, discussed *infra*, pp. 33–36 (control over recruiting activities of the armed forces of the United States under war powers); and *Case* v. *Bowles*, 327 U. S. 92 (price control legislation under war powers).

ing with the same subject matter, the congressional act must be in irreconcilable conflict with the state act, or the congressional intent to occupy the entire field exclusively must otherwise clearly appear. *Gibbons* v. *Ogden,* 9 Wheat. 1; *Sinnot* v. *Davenport,* 22 How. 227, 243; *Missouri, Kansas & Texas Railway Co.* v. *Haber,* 169 U. S. 613, 623; *Reid* v. *Colorado,* 187 U. S. 137, 148; *Savage* v. *Jones,* 225 U. S. 501, 533; *Missouri, Kansas & Texas Railway Co.* v. *Harris,* 234 U. S. 412, 418–419; *Southern Railway Co.* v. *Railroad Commission of Indiana,* 236 U. S. 439, 447–448; *Illinois Central Railroad Co.* v. *Public Utilities Commission,* 245 U. S. 493, 510; *Gilbert* v. *Minnesota,* 254 U. S. 325, 328–330; *Napier* v. *Atlantic Coast Line,* 272 U. S. 605, 610–611; *Mintz* v. *Baldwin,* 289 U. S. 346, 350; *Townsend* v. *Yeomans,* 301 U. S. 441, 454; *Kelly* v. *Washington,* 302 U. S. 1, 9–10; *Welch Co.* v. *New Hampshire,* 306 U. S. 79, 85; *Maurer* v. *Hamilton,* 309 U. S. 598, 614; *Hines* v. *Davidowitz,* 312 U. S. 52, 66–68; *Cloverleaf Co.* v. *Patterson,* 315 U. S. 148, 157 (and see dissenting opinion, p. 170); *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 749–750; *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202; *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 766; *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230–231; *Auto Workers* v. *Wisconsin Employment Relations Board,* 336 U. S. 245, 252–253; *California* v. *Zook,* 336 U. S. 725, 733;

Weber v. *Anheuser-Busch, Inc.*, 348 U. S. 468, and cases under the Wagner Act and Taft-Hartley Act, cited at pp. 474–477; *General Drivers, Warehousemen, and Helpers* v. *American Tobacco Co.*, 348 U. S. 978.[5] *Cf. Cohens* v. *Virginia*, 6 Wheat. 264. A typical statement of the pertinent principle is the following from *Reid* v. *Colorado*, 187 U. S. at 148:

> It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that "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. 227, 243.

Where the express provisions of the state and federal statutes are in direct conflict, there is, of course, no problem—the state legislation is necessarily superseded. *Kelly* v. *Washington*, 302

[5] Of the cases cited, *Gibbons*, *Sinnot*, *Southern Railway*, *Napier*, *Hines*, *Cloverleaf*, *Rice*, *Weber* (and nine cases under the Wagner Act or Taft-Hartley Act cited therein), and *General Drivers* held that the state law in question had been superseded; the state laws involved were upheld in the remaining cases.

U. S. at 9. Similarly, there is no problem where "the subject is one demanding uniformity of regulation" throughout the country; in such a case "state action is altogether inadmissible" even "in the absence of federal action." *Ibid.* The problem typically arises in "those cases where States may act in the absence of federal action but where there has been Federal action governing the same subject." *Ibid.* In all cases the ultimate problem is that of ascertaining the purpose of Congress. But, while the congressional purpose to suspend or displace state legislation must be clear to warrant the holding that that result has been accomplished, such purpose need not be expressly spelled out in the federal statute. In the following excerpt from *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. at 230–231, this Court summarized the more important factors to be considered in determining the congressional purpose:

> Congress legislated here in a field which the States have traditionally occupied. [Citing cases.] So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. [Citing cases.] Such a purpose may be evidenced in several ways. 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. [Citing cases.] Or 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. *Hines* v. *Davidowitz,* 312 U. S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. [Citing cases.] Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill* v. *Florida,* 325 U. S. 538. It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide. [Citing cases.]

And in *Hines* v. *Davidowitz,* 312 U. S. 52, 67, this Court stated that the question of whether Congress intended the federal Alien Registration Act to supersede a Pennsylvania statute dealing with the same subject was in essence the question of "whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

B. THE AVAILABLE DIRECT EVIDENCE INDICATES THAT CONGRESS INTENDED TO LEAVE STATE LEGISLATION UNAFFECTED BY THE SMITH ACT

The threshhold inquiry when an issue of supersedure is raised concerns the available direct evidence as to the intent of Congress.

Pennsylvania's Sedition Act is, of course, by no means unique. As of January 1955, some 30 states plus Alaska and Hawaii had sedition laws on their statute books, and 12 others had either criminal syndicalism or criminal anarchy statutes or both, making a total of 42 states plus Alaska and Hawaii which had criminal legislation in this general field.[6] The statutory line of distinction between these different offenses—sedition, criminal syndicalism and criminal anarchy—is in many instances so fine that the offenses are, in the language of the Maryland State Commission on Subversive Activities, "almost indistinguishable."[7] There is of course considerable variation in the phraseology of the statutes, but the practical effect of each is, as the Maryland report states, "very similar," *viz,* "to penalize the advocacy in any manner of the overthrow of the government of the United States or of the state

[6] The various state statutes are classified and digested in *Digest of the Public Record of Communism in the United States* (Fund for the Republic, Jan. 1955), pp. 266–306. See also Gellhorn, *The States and Subversion* (1952), Appendices A and B; Emerson and Haber, *Political and Civil Rights in the United States* (1952), p. 463; Prendergast, *State Legislatures and Communism: The Current Scene* (1950), 44 Am. Pol. Sci. Rev. 556; Groner, *State Control of Subversive Activities in the United States* (1947), 9 Fed. Bar J. 61, 73–85.

[7] Report of the Maryland State Commission on Subversive Activities, January 1949, pertinent excerpts from which are incorporated as Appendix 1 (pp. 25–46) to the *Annual Report of the Committee on Un-American Activities for the Year 1949* (H. Rep. No. 1950, 81st Cong., 2d sess.). The quoted language from the Maryland report appears at p. 26.

by force and violence, or by other unlawful means."[8] The great majority of these statutes had been in existence for many years prior to the enactment in 1940 of the Smith Act, most of them dating, like the Pennsylvania act here in issue, from the period of or immediately following World War I.[9] All these statutes, as pointed out in the dissenting opinion below (R. 72), have been superseded and in effect invalidated by the Smith Act if the view of the majority below is correct.[10] This result—congressional nullification of important parts of the basic criminal laws of most of the states—obviously requires the clearest

[8] See *Annual Report of the Committee on Un-American Activities for the Year 1949* (H. Rep. No. 1950, 81st Cong., 2d Sess.), p. 26.

[9] *Id.*, pp. 33–44.

[10] Furthermore, if the states are precluded from enforcing their antisedition *criminal* laws, the question arises as to how effectively they can enforce their antisedition *civil* laws. (Cf. *Gerende* v. *Board of Supervisors of Elections of Baltimore*, 341 U. S. 56; *Garner* v. *Los Angeles Board*, 341 U. S. 716; *Adler* v. *Board of Education of the City of New York*, 342 U. S. 485). These laws are collected, classified and digested in *Digest of the Public Record of Communism in the United States* (Fund for the Republic, Jan. 1955), pp. 324–434. For example, as pointed out in the dissenting opinion below at R. 72, many states now have laws which expressly or in effect deny state employment to persons who teach or advocate or are members of organizations which teach or advocate the overthrow of government by force and violence. See also Note, *State Control of Subversion: A Problem in Federalism* (1952), 66 Harv. L. Rev. 327, 328; Prendergast, *State Legislatures and Communism: The Current Scene* (1950), 44 Am. Pol. Sci. Rev. 556, 556–557, 561–564, 570–571; Gellhorn, *The States and Subversion* (1952), Appendices A and B.

of showings that such was the purpose of Congress in enacting the Smith Act.

We find no evidence that Congress intended to accomplish so drastic a result.[11] On the contrary, the available direct evidence strongly indicates that Congress intended to leave state legislation unaffected.

We start with the text of the Smith Act itself (*infra,* pp. 50–51). Certainly there is nothing in the language of the Act indicative of an intent on the part of Congress to preempt the field of punishing seditious activities to the exclusion of the states. Nor does any other federal legislation dealing with the control of Communism provide that Communist control measures shall be the exclusive responsibility of the federal government. A congressional purpose to preempt the field, if there be such, must therefore be found other than in the terms of the Smith Act or related federal legislation.

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[11] In *Dennis* v. *United States*, 341 U. S. 494, sustaining the constitutionality of the Smith Act as there applied, the several opinions discussed at length this Court's earlier *Gitlow* and *Whitney* decisions (see pp. 11–12, *supra*) and the state statutes involved in those cases (see 341 U. S. at 505–507, 510, 513, 515, 536–537, 538, 541–542, 543, 545, 562 (fn. 2), 567 (fn. 10), 568 (fn. 12), 585–586, 592), and the close similarity between the Smith Act and the state statutes there involved was noted (see, *e. g.*, 341 U. S. at 536, 562, fn. 2). Yet—and the point is not without significance—it is nowhere suggested in any of the *Dennis* opinions that such state statutes may have been superseded or suspended by the Smith Act.

We have examined the legislative history of the Smith Act and find nothing that indicates in any way a congressional purpose to supersede or suspend state sedition laws. The Smith Act had its origin in H. R. 5138, 76th Congress. Nothing in the legislative history of that bill evidences any congressional intent to preempt the field. On the contrary, there is a clear showing in that history that Congress was well aware of the existence of state legislation in this field and there is no evidence that it intended the Smith Act to affect such legislation.

For example, in the hearings before a subcommittee of the House Judiciary Committee on H. R. 5138, repeated references were made to state legislation similar to that covered by the pertinent provisions of the federal bill, but no one indicated that such state legislation would be affected in any way by the bill.[12] One of the witnesses who appeared in support of the legislation referred to the fact that New York's Criminal Anarchy statute, which served as the model for the Smith Act,[13] had been upheld in

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[12] Hearings before Subcommittee No. 3, Committee on the Judiciary, House of Representatives, on H. R. 5138, 76th Cong., 1st Sess., pp. 7, 69, 83–85.

[13] See *Gitlow* v. *New York*, 268 U. S. at 654–655, for the terms of the New York act, and Hearings before Subcommittee No. 3, *supra*, p. 1, for the original text of H. R. 5138.

this Court's decision in *Gitlow* v. *New York*, 268 U. S. 652. While several members of the subcommittee as well as the author of the bill, Representative Smith of Virginia, who participated in the hearings as sponsor of the proposed legislation, all evidenced their particular interest in this fact, no one intimated that either the New York Act or other similar state legislation would be superseded, invalidated, or in any wise affected by the enactment of the federal bill.[14]

The committee reports submitted to the House and Senate on this legislation are equally bare of any indication that the bill, if enacted, would displace state laws.[15]

The congressional debates, like the hearings which preceded them, contain references to the similar state laws and the decisions of this Court upholding such legislation.[16] But the Congressional Record may be searched in vain for any indication that anyone in either house thought that enactment of the federal legislation would affect in any way the power of the states to proscribe advocacy of the overthrow of established

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[14] See Hearings before Subcommittee No. 3, Committee on the Judiciary, House of Representatives, on H. R. 5138, 76th Cong., 1st Sess., pp. 83–85.

[15] See H. Rep. No. 994, 76th Cong., 1st sess.; S. Rep. No. 1154, 76th Cong., 1st sess.; S. Rep. No. 1721, 76th Cong., 3d sess.; S. Rep. No. 1796, 76th Cong., 3d sess.; and H. Rep. No. 2683, 76th Cong., 3d sess. (Conference Report).

[16] See, *e. g.*, 84 Cong. Rec. 10452.

government by force. Indeed, Congressman Smith, the sponsor of the bill, affirmatively stated, in answer to a question as to the relationship between the penalties provided in the proposed law and those provided under the various state laws, that the proposed legislation "has nothing to do with State laws." 84 Cong. Rec. 10452. Congressman Smith has since made even more explicit his personal understanding that the Smith Act did not and was not intended to supersede state sedition laws. He has stated that the opinion of the court below in the instant case was "the first intimation I have ever had, either in the preparation of the act, in the hearings before the Judiciary Committee, in the debates in the House, or in any subsequent development, that Congress ever had the faintest notion of nullifying the concurrent jurisdiction of the respective sovereign states to pursue also their own prosecutions for subversive activities" (see R. 75–76).[17]

The Smith Act became law in 1940. Since that date, both the federal and state governments have

[17] It should be noted that Representative Smith is not simply giving an *ex post facto* interpretation of the Act. He is calling attention to the *fact* that at no time during the consideration of the legislation was it ever suggested to him, the sponsor of the bill, that state sedition legislation would be superseded. Cf. *United States* v. *Howell Electric Motors Co.*, 78 F. Supp. 627 (E. D. Mich.), affirmed, 172 F. 2d 953 (C. A. 6); *United States* v. *Whyel*, 28 F. 2d 30, 32 (C. A. 3), petition for certiorari dismissed, 278 U. S. 664.

assumed that the state statutes were operative. An agency of Congress itself has affirmatively noted the continuing existence of state legislation proscribing advocacy of the overthrow of the government by force. In a report issued in March 1950, the House Committee on Un-American Activities noted that since January 1940, "various state legislatures have shown increasing concern with the problem of Communism" and appended to the report a digest, which had been prepared by the Maryland State Commission on Subversive Activities, of all then existing national and state laws dealing with control of subversives, including the Smith Act and the Pennsylvania statute in issue here. *Annual Report of the Committee on Un-American Activities for the Year 1949,* H. Rep. 1950, 81st Cong., 2d sess., pp. 25–46. Again in August 1950, in the report accompanying H. R. 9490, which became the Internal Security Act of 1950 (Act of September 23, 1950, c. 1024, 64 Stat. 987), the House Committee on Un-American Activities reiterated the fact that: "Concern over the Communist threat has not been overlooked by the different State legislatures," and reported that at "the present time * * * 12 States have criminal anarchy laws; 16 have criminal syndicalism laws; 22 have sedition laws; * * *." H. Rep. 2980, 81st Cong., 2d sess., p. 2. Certainly the House Committee on Un-American Activities, which issued the report quoted, would have been

surprised to learn that the state laws proscribing advocacy of the overthrow of the government by force, about which it had informed the House, had been nullities since 1940, when Congress enacted the Smith Act.

Finally, and more generally, the Smith Act is included in the federal Criminal Code as re-enacted in 1948 (18 U. S. C. 2385). Like most criminal statutes, it prohibits entirely certain defined conduct; it is not a regulatory statute like the Interstate Commerce Act, the National Labor Relations Act, or the Taft-Hartley Act. It falls within the field of criminal justice, the administration of which, in our federal system "is predominantly committed to the care of the States." See *Rochin* v. *California,* 342 U. S. 165, 168; *Jerome* v. *United States,* 318 U. S. 101. In recognition of this predominant interest of the states, Congress included in the Criminal Code a general saving clause which provides that "Nothing in this title [the Criminal Code] shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." 18 U. S. C. 3231. See *Sexton* v. *California,* 189 U. S. 319, 324–325. Thus not only did Congress in the Smith Act fail to hint that it intended to preempt the field of legislation against advocacy of the overthrow of government by force, as it well knew how to do,[18] but it included the Act in the Criminal

[18] Cf., *e. g.*, Sec. 10 (a) of the National Labor Relations Act, as amended by the Labor-Management Relations Act, 1947 (61 Stat. 146), 29 U. S. C. 160 (a).

Code in which it explicitly sought to protect state legislation against supersedure by inference.

C. FEDERAL ENFORCEMENT EXPERIENCE HAS BEEN THAT THE STATE SEDITION LAWS, AS ADMINISTERED BY THE STATES, DO NOT STAND AS OBSTACLES TO THE ACCOMPLISHMENT OF THE FULL PURPOSES AND OBJECTIVES OF THE SMITH ACT

In concluding that Congress, in enacting the Smith Act, must have intended to preempt the field, the court below relied heavily on its assumption that enforcement of the state statutes would be "hampering to the exercise of federal power" (R. 57). It thought that arrests by state enforcement officers "could readily impair and even thwart the Federal Government's contemporaneous investigation of the alleged offenders," particularly where offenders in any one state were "part of a larger group spread over a number of States" (*ibid*). But this assumption of the Pennsylvania court does not accord with federal experience.

The administration of the various state laws has not, in the course of the fifteen years that the federal and state sedition laws have existed side by side, in fact interfered with, embarrassed, or impeded the enforcement of the Smith Act.[19] The

[19] While there have been a number of state investigations into the problem of control of seditious activities (see, *e. g.*, *Nelson* v. *Wyman*, 99 N. H. 33, 105 A. 2d 756), so far as we know there have in recent years been prosecutions only in Pennsylvania and Massachusetts. See *Digest of the Public Record of Communism in the United States* (Fund for the Republic, Jan. 1955) pp. 266–306. This may well reflect regard by the states for federal activity in the field. See p. 31, n. 20, *infra*.

significance of this absence of conflict in administration or enforcement of the federal and state sedition laws will be appreciated when it is realized that this period has included the stress of wartime security requirements and the federal investigation and prosecution under the Smith Act of the principal national and regional Communist leaders.[20] Moreover the problem of subversion, as we think Congress recognized, is of such magnitude as to invite federal-state cooperation in the enforcement of their respective sedition laws. Thus the Attorney General of the United States recently informed the attorneys general of the several states in this connection that a full measure of federal-state cooperation would be in the public interest. See *New York Times,* Sept. 15, 1955, p. 19.

[20] As of June 30, 1955, 131 Communist party leaders had been arrested on Smith Act charges, and 90 (two of whom have been granted new trials) had been convicted in federal court. See Department of Justice Press Release, July 18, 1955. The principal cases include *Dennis* v. *United States*, 341 U. S. 494 (members of National Board of Communist Party); *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2), certiorari denied, 348 U. S. 909 (New York area); *Frankfeld* v. *United States*, 198 F. 2d 679 (C. A. 4), certiorari denied, 344 U. S. 922 (Baltimore-Washington area); *Yates* v. *United States*, decided March 17, 1955 (C. A. 9), pending on petition for certiorari, Nos. 308, 309, 310, O. T. 1955 (Los Angeles area); *United States* v. *Mesarosh*, 223 F. 2d 449 (C. A. 3) (Pittsburgh area). Other prosecutions have been concluded or are pending in Seattle, Detroit, St. Louis, Philadelphia, Cleveland, Connecticut, Puerto Rico, and Hawaii. See *Digest of the Public Record of Communism in the United States* (Fund for the Republic, Jan. 1955), pp. 195–205.

These practical considerations fortify the position of the United States as *amicus curiae* in this litigation. We have shown that there is no suggestion in the legislative history of the Smith Act that Congress deemed that the concurrent enforcement of state sedition statutes would interfere with the effective enforcement of the federal act. Federal enforcement experience confirms the view that the state sedition laws, as administered by the states, do not stand as obstacles to the accomplishment of the full purposes and objectives of the Smith Act. It should not be assumed by this Court that in the future the state laws will be administered with less regard for the paramount federal interest in the prevention of sedition. Cf. *Clothing Workers* v. *Richman Bros.*, 348 U. S. 511, 517–519. Hypothetical suggestions as to the possibility of conflict should the state laws not be responsibly administered should have no part in the Court's decision in this case.

D. NO OTHER FACTORS SUPPORT THE INFERENCE THAT CONGRESS INTENDED TO BAN ENFORCEMENT OF STATE SEDITION LAWS

1. *The fact that the acts proscribed fall within a field of predominant federal interest does not of itself render the state statutes unenforceable*

The court below seems also to have assumed that because Congress legislated in a field where the "national interest is obviously paramount" "[i]t follows necessarily that the Federal Govern-

ment's control of the field must be exclusive if it is to protect itself effectively and completely. And that means no sharing of the jurisdiction with the States" (R. 57). The nature of the federal interest in the subject matter is, of course, of significance in resolving problems of supersedure. See *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230–231; *Hines* v. *Davidowitz,* 312 U. S. 52; *California* v. *Zook,* 336 U. S. 725. But it is equally clear that the dominant federal interest in the prevention of sedition does not itself preclude enforcement of state laws on the same subject. Congress might well have contemplated, as we submit it did here, cooperation by the states against the enemies of all.

This is settled by this Court's decision in *Gilbert* v. *Minnesota,* 254 U. S. 325. The Court there upheld a state statute which made it unlawful for any person to teach or advocate that "men should not enlist in the military or naval forces of the United States or the state of Minnesota" or that "the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States" (*id.* at 326–327). The Federal Espionage Act of June 15, 1917, proscribed substantially the same types of activity as did the Minnesota statute.[21]

[21] Section 3, Title I, of the Espionage Act, c. 30, 40 Stat. 217, 219 (now contained in 18 U. S. C. 2388), provided for the punishment of "whoever, when the United States is at

There was no question as to the predominant federal interest in the subject matter. Indeed much of this Court's opinion dealt with the question whether the constitutional delegation of power to Congress to "provide for the common Defence," "declare War," and "raise and support Armies" (Art. I, Sec. 8) vested in the federal government all power of legislation regarding the subject matter. But the Court held that the predominant federal interest in raising and maintaining armies did not preclude cooperation by the states (254 U. S. at 328–329):

> Undoubtedly, the United States can declare war and it, not the States, has the power to raise and maintain armies. But there are other considerations. The United States is composed of the States, the States are constituted of the citizens of the United States, who also are citizens of the States, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the States as well as the United States are intimately concerned. * * *

From the contention that state legislation of the type under review "encroaches upon or usurps

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war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States."

any power of Congress," the Court continued, "there is an instinctive and immediate revolt" (*id.* at 329):

> * * * Cold and technical reasoning in its minute consideration may indeed insist on a separation of the sovereignties and resistance in each to any cooperation from the other, but there is opposing demonstration in the fact that this country is one composed of many and must on occasions be animated as one and that the constituted and constituting sovereignties must have power of cooperation against the enemies of all.

And notwithstanding the predominant federal interest which it recognized, this Court rejected the further argument that the federal Espionage Act, because it proscribed the same conduct, had abrogated or superseded the Minnesota statute. In so doing, the Court cited with approval *State* v. *Holm,* 139 Minn. 267, where, in the words of this Court (254 U. S. at 329–330):

> * * * after a full discussion, the contention was rejected that the Espionage Law of June 15, 1917, abrogated or superseded the [Minnesota] statute, the court declaring that the fact that the citizens of the State are also citizens of the United States and owe a duty to the Nation, does not absolve them from duty to the State nor preclude a State from enforcing such duty. "The same act," it was said, "may

> be an offense or transgression of the laws of both'' Nation and State, and both may punish it without a conflict of their sovereignties.

This principle seems to have been so well settled that the Court found it unnecessary, when it later upheld the New York and California statutes prohibiting advocacy of the overthrow of government by force, even to consider the effect, if any, of the federal seditious conspiracy statute which antedated both state laws [22] or of the federal sedition statute of May 16, 1918.[23] *Gitlow* v. *New*

[22] The federal seditious conspiracy statute dates from 1861 and punishes, *inter alia*, conspiracy "to overthrow, or to put down, or to destroy by force, the Government of the United States." Act of July 31, 1861, c. 33, 12 Stat. 284; Criminal Code of 1909, Sec. 6, 35 Stat. 1089; now 18 U. S. C. 2384.

[23] The federal sedition statute of May 16, 1918, c. 75, § 1, 40 Stat. 553 (referred to by the majority below as the "Sedition Act of 1918" (R. 62)), made it an offense "when the United States is at war," *inter alia*, to "wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States * * * or * * * any language intended to incite, provoke, or encourage resistance to the United States" or to "willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated. * * *" This statute was in effect on July 5, 1919, and November 28, 1919, when the utterances charged to be violations of the New York and California sedition statutes, respectively, were alleged to have been made. See Transcript of Record, page 13, *Gitlow* v. *New York*, 268 U. S. 652; Transcript of Record, page 15, *Whitney* v. *California*, 274 U. S. 357. In 1919, the United States was still "at war," notwithstanding the armistice of November 11, 1918. See *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *Ludecke* v. *Watkins*, 335 U. S.

York, 268 U. S. 652; *Whitney* v. *California,* 274 U. S. 357.

It would appear, therefore, that the emphasis of the court below on the paramount interest of the federal government in the prevention of sedition is misplaced. The dominant federal interest endows Congress with the power to assume exclusive jurisdiction over the proscription and punishment of sedition threatening the nation, at least to the extent of protecting the federal program against all obstacles to the accomplishment of the full purposes and objectives of Congress. But it throws little light on the crucial question whether Congress in the Smith Act has in fact sought to assume such exclusive jurisdiction.

2. The statutes in question not being regulatory in nature, there is no possibility of conflict from that source

In considering the question whether Congress intended to preclude enforcement of state sedition statutes, it is important to examine the nature of those statutes. In this brief, we are considering the question of supersedure only with respect to statutes prohibiting advocacy of

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160, 167–170. The "Sedition Act of 1918" was repealed by the Joint Resolution of March 3, 1921, c. 136, 41 Stat. 1359. The majority below notes (R. 62) that the Act was no longer in effect "when the *Gitlow* and *Whitney* cases were before the Supreme Court." While this is true, it would seem immaterial, for, if there had been supersedure while the federal sedition statute remained in effect, the indictments concerned would not have charged violations of law.

the violent overthrow of established government.[24] These are ordinary criminal statutes which proscribe completely, as substantive evils, certain types of conduct and create a substantative crime 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 wherever elements giving rise to federal jurisdiction are present. *E. g., Moore* v. *Illinois,* 14 How. 13, 20; cases cited at page 43, *infra.* The statutes of the type in issue do not contemplate any scheme of regulation. They do not establish any administrative agency with power to issue rules, orders, or regulations. They are not registration statutes, with attendant administrative requirements. There is therefore no possibility of conflict between the requirements of federal and state administrative regulations stemming from these statutes.

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[24] Different problems arise with respect to state statutes requiring the registration of foreign agents or communists, the labelling of literature, etc. See, *e. g.*, *Albertson* v. *Millard*, 106 F. Supp. 635 (E. D. Mich.), reversed on other grounds, 345 U. S. 242; *People* v. *Noble*, 68 Cal. App. 2d 853, 892, 158 P. 2d 225, 246. "It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230–231. We do not intend to suggest herein that state communist registration statutes have not been superseded by federal communist control legislation.

The state sedition laws are ordinary penal laws which have as their object the protection of the established government of the state. "To interfere with the penal laws of a state, where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government of the country," Chief Justice Marshall cautioned, "is a very serious measure, which congress cannot be supposed to adopt lightly or inconsiderately. * * * It would be taken deliberately, and the intention would be clearly and unequivocally expressed." *Cohens* v. *Virginia,* 6 Wheat. 264, 443. Indeed we know of no instance where this court has held a state criminal statute directed at substantive evils, separate and apart from any purpose of regulation, to have been superseded by a federal statute.

The cases where the Court has found federal preemption to have taken place have all involved situations where the state statute was one of a regulatory nature which in some way clashed with a federal regulatory statute—either with specific provisions of the statute or with the congressional policy and purpose that the federal statute alone should provide for the regulation of the subject in question. See, *e. g., Sinnot* v. *Davenport,* 22 How. 227; *Southern Railway Co.* v. *Railroad Commission of Indiana,* 236 U. S. 439; *Napier* v. *Atlantic Coast Line,* 272 U. S. 605; *Hines* v. *Davidowitz,* 312 U. S. 52; *Cloverleaf Co.* v. *Pat-*

terson, 315 U. S. 148; *Hill* v. *Florida,* 325 U. S. 538; *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218.

In *Hines* v. *Davidowitz,* 312 U. S. 52, heavily relied on by the court below (R. 56, 61), this Court had before it a federal statute[25] setting up a "single integrated and all-embracing system" for the registration of aliens (312 U. S. at 74). Moreover, the system operated "in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority" (312 U. S. at 68). In holding that this statute superseded and rendered unenforceable a Pennsylvania statute also providing for the registration of aliens which established overlapping but not conflicting requirements (see *id.* at 78), this Court stressed the regulatory character of the legislation. See *id.* at 61, 62, 66–68, 70, 74. In the instant case, by contrast, there is a total absence of any regulatory purpose beyond the prohibition of the conduct proscribed.[26]

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[25] The Alien Registration Act (Act of June 28, 1940, c. 439, 54 Stat. 670), Title III. The fact that the "Smith Act" was contained in Title I of the same act is without significance.

[26] In *California* v. *Zook,* 336 U. S. 725, the Court, dividing 5–4, affirmed the conviction of an operator of a travel bureau arranging "share expense" transportation in automobiles under a California statute prohibiting the sale of transportation over the public highways of the state where

The nature of this Court's decision in *Hines* was examined in *Allen-Bradley Local* v. *Board,* 315 U. S. 740. There the Court considered whether the enactment of the National Labor Relations Act, without more, precluded the enforcement of a Wisconsin statute regulating picketing in connection with labor disputes. In holding that the federal act did not preclude the sort of state regulations there involved, the Court said (*id.* at 749):

> * * * this Court has long insisted that an "intention of Congress to exclude States from exerting their police power must be clearly manifested." * * * In the *Hines* case, a federal system of alien registration

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the transporting carrier had no permit from the Interstate Commerce Commission. The majority, stressing the state's interest in dealing with "a real danger to its residents" and the state's "normal power to enforce safety and good-faith requirements for the use of its own highways" (*id.* at 737), held the state statute not in conflict with national policy.

The dissenters stressed the regulatory character of the federal and state legislation as giving rise to conflicts and the fact that Congress had entered the field only after a series of legislative, administrative, and judicial proceedings had shown state regulation of such travel to be highly unsatisfactory (*id.* at 757–775). Under the circumstances, they were unwilling to infer a purpose on the part of Congress to share its exclusive regulatory jurisdiction over this form of interstate transportation with the states (*id.* at 775–776). The absence of a regulatory purpose or any indication that Congress had found that state sedition laws impinged on the federal authority precludes a similar approach to the question of preemption in the instant case.

> was held to supersede a state system of registration. But there we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. In that field, any "concurrent state power that may exist is restricted to the narrowest of limits." P. 68. Therefore, we were more ready to conclude that a federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. * * * Here, we are dealing with the latter type of problem. We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard.

For the same reasons, the *Hines* case is hardly a precedent for the proposition underlying the decision below that the mere passage of the Smith Act impaired the traditional sovereignty of Pennsylvania by depriving it of legislation deriving from the state's "primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied." *Gitlow* v. *New York,* 268 U. S. 652, 668.

3. *The fact that persons engaging in seditious activities are subject to punishment under both federal and state statutes does not in itself give rise to an inference that Congress intended to suspend the operation of the state statutes*

It has long been settled that it is not double jeopardy within the meaning of the Fifth Amendment for both a state and the United States to punish the same act where each of the distinct sovereignties has a legitimate interest to be vindicated. *Fox* v. *Ohio,* 5 How. 410; *United States* v. *Marigold,* 9 How. 560, 569; *Moore* v. *Illinois,* 14 How. 13, 19–20; *Ex parte Siebold,* 100 U. S. 371, 389–391; *Gilbert* v. *Minnesota,* 254 U. S. 325, 329–330; *United States* v. *Lanza,* 260 U. S. 377, 382; *California* v. *Zook,* 336 U. S. 725, 731. The same act, as this Court pointed out in *Gilbert* v. *Minnesota,* 254 U. S. at 330, may be an offense against both a state and the nation, "and both may punish it without a conflict of their sovereignties." There can therefore be no valid suggestion that the state statutes stand as obstacles to the effective enforcement of the Smith Act on the ground that a state proceeding would bar a subsequent federal prosecution on grounds of double jeopardy.

The majority below, however, appear to have been influenced by the fact that persons engaging in seditious activities, if prosecuted under the Pennsylvania statute, might, like respondent, receive a sentence longer than the maximum

provided by the Smith Act, and if prosecuted under both state and federal statutes, might be punished under both. "The difference in the penalties," the court remarked, "strongly argues that it was not the congressional purpose that, after enactment of the Smith Act, conflicting or disparate state statutes on the same subject should be called into play for the punishment of sedition against the United States" (R. 59). Cf. Mr. Justice Frankfurter dissenting in *California* v. *Zook,* 336 U. S. 725, 738–740. But in most cases where state and federal statutes proscribe the same conduct, the offender is subject to different or cumulative punishments depending upon the statute or statutes under which he is prosecuted,[27] and this Court has never held this

[27] Title 18 of the United States Code contains many examples of offenses made punishable by the United States which are also punishable by the state in which they occur. Some of these are collected in *California* v. *Zook*, 336 U. S. at 732. See also Grant, *The Lanza Rule of Successive Prosecutions* (1932), 32 Col. L. Rev. 1309, 1316. In the case of some such offenses, the federal statute contains a provision barring federal prosecution for the "same act or acts" constituting the offense where there has been a judgment of conviction or acquittal under the laws of a state. *E. g.*, 18 U. S. C. 659 (stealing from interstate carrier); 18 U. S. C. 660 (misapplication of funds by officer or employee of interstate carrier); 18 U. S. C. 1992 (wrecking interstate train); 18 U. S. C. 2117 (entering vehicle containing interstate shipment with intent to commit larceny). In the absence of such a statutory bar, however, such offenses are punishable by both sovereignties. See *California* v. *Zook*, 336 U. S. at 732, and the other cases cited in the text, *supra*, p. 43.

circumstance to operate as a bar to enforcement of the state statute. The court below seems to have regarded sedition as an offense against the United States alone. But this suggestion overlooks the legitimate interest of the states, explicitly recognized by this Court (see pp. 11–12, *supra*), in protecting themselves by constitutional means against internal subversion.

The majority below further reasoned that, if state sedition laws survived the passage of the Smith Act, not only would it be possible for a state and the federal government both to punish the same seditious conduct, but (R. 59):

> * * * if each of the other forty-seven States had a Sedition Act like Pennsylvania's, one chargeable with sedition against the government of the United States could be indicted, convicted and punished in any or all of such States as were able to obtain service of their criminal process upon him * * *.

This view, however, is clearly untenable. Sedition, to be punishable by a state, must be committed within that state. For as the majority below itself observed elsewhere: "A state's jurisdiction of crime can extend only to acts committed within its borders" (R. 58). For this reason a seditious act or utterance occurring in one state could not be punished by another state merely because the offender chanced thereafter to place himself within the reach of that other state's

criminal process by his physical presence therein. Of course, if he committed acts of sedition in several states he would thereby subject himself to the possibility of punishment by each such state. But in this respect sedition is no different from other offenses, which, as the dissenting opinion below points out (R. 86), are punishable wherever and as often as they are committed.[28]

III

IF IT SHOULD EVER APPEAR THAT THE STATE STATUTES, AS ADMINISTERED BY THE STATES, IN FACT STAND AS OBSTACLES TO THE ACCOMPLISHMENT OF THE FULL PURPOSES AND OBJECTIVES OF THE SMITH ACT, CONGRESS IS FREE TO ENACT LEGISLATION TO ELIMINATE SUCH CONFLICT

Much has been written with respect to the wisdom of state sedition laws, and there has been speculation as to possible developments in the enforcement of such laws which could be inconsistent with the standards of personal freedom and

[28] The majority below also stated: "Unlike the Smith Act, which can be administered only by federal officers acting in their official capacities, indictment for sedition under the Pennsylvania statute can be initiated upon an information made by a private individual. The opportunity thus present for the indulgence of personal spite and hatred or for furthering some selfish advantage or ambition need only be mentioned to be appreciated" (R. 62). The provision of Pennsylvania law to which the majority refers, however, raises at most a question of procedural due process, with which this brief has no concern. It is irrelevant to the question of Pennsylvania's power in the light of the Smith Act to enact and enforce sedition legislation.

impartial justice which comprise our American traditions.[29] But these suggestions, whatever merit they may have, do not bear on the issue of preemption presented by this case. This Court has unequivocally established that both the states, at least in the absence of congressional action to the contrary, and the federal government may constitutionally proscribe and punish advocacy of the violent overthrow of established government. *Gitlow* v. *New York*, 268 U. S. 652; *Whitney* v. *California*, 274 U. S. 357; *Dennis* v. *United States*, 341 U. S. 494. And this Court has cautioned that it "will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the * * * States * * * ." *Allen-Bradley Local* v. *Board*, 315 U. S. 740, 749.

We have spelled out in this brief our reasons for concluding that Congress has not sought to displace state legislation proscribing advocacy of the violent overthrow of government. Doubts

[29] *E. g.*, Gellhorn, *The States and Subversion* (1952); Chafee, *Free Speech in the United States* (1941); Prendergast, *State Legislatures and Communism: The Current Scene*, 44 Am. Pol. Sci. Rev. 556 (1950); Note, *Effectiveness of State Anti-Subversive Legislation*, 28 Ind. L. J. 492 (1953); Hunt, *Federal Supremacy and State Anti-Subversive Legislation*, 53 Mich. L. Rev. 407 (1955); cf. O'Brian, *Civil Liberty in War Time*, Report of New York State Bar Ass'n, Vol. 42, reprinted as S. Doc. 434, 65th Cong., 3d sess., pp. 12–15.

as to the wisdom of such legislation or the possibility that it might be abused in practice should not be permitted to obscure the fact that within an area, such as this, where both Congress and the states may act, it is for Congress and not the courts to determine, within the constitutional framework, the extent, if any, to which the traditional sovereignty of the states, must yield to the paramount federal power.[30] We have found no indication, express or by implication, that Congress has at any time considered it in the public interest to displace state sedition laws. Of course, should it at any time appear to Congress to be in the public interest to limit the

[30] There is no occasion here to examine the permissible scope of congressional action. In view of the vigor of petitioner's argument as to the inviolable nature of its right of self-preservation (Br. 24–33) and the necessity for state sedition statutes (Br. 28), however, it might be appropriate to state our view that since the Constitution endows Congress with the power to suppress seditious advocacy threatening the forcible overthrow of the United States Government (*Dennis* v. *United States*, 341 U. S. 494), this power necessarily includes the authority to take all steps required to make federal action in the premises effective and to protect it against unreasonable interference from any source. Cf. *Lichter* v. *United States*, 334 U. S. 742; *Hines* v. *Davidowitz*, 312 U. S. 52; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468. In view of the international nature of the Communist conspiracy and the fact that its activities in the United States are national in scope, it would be a proper exercise of federal power, if Congress found such action to be required in the public interest, to prohibit state enforcement activities under state sedition laws deemed by Congress to interfere with or obstruct the accomplishment of the full objectives of the federal enforcement program.

operation of such state laws, Congress is free to legislate to that end. The problem, if there be one, is a legislative problem to be dealt with by Congress.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Supreme Court of Pennsylvania should be reversed.

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APPENDIX

The Smith Act (Act of June 28, 1940, c. 439, 54 Stat. 670, 671, 18 U. S. C. 2385),[1] provides:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
>
> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> Whoever organizes or helps or attempts to organize any society, group, or assembly

[1] 18 U. S. C. 2385 is a consolidation without substantive change of Sections 2, 3, and 5 of the so-called Smith Act. The Act's official name, based on the provisions of Title III, is the "Alien Registration Act, 1940" (§ 41, 54 Stat. 676). However, particularly when its Title I (§§ 1–5) is referred to—this being the Title which contains the provisions proscribing advocacy of the violent overthrow of the Government, etc.—it has come to be designated popularly as the "Smith Act," after its author and sponsor, Representative Howard W. Smith of Virginia.

of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

Section 207 of the the Pennsylvania Penal Code of 1939, 18 Purd. Pa. Stat. Ann. 4207,[2] provides:

The word "sedition," as used in this section, shall mean:

Any writing, publication, printing, cut, cartoon, utterance, or conduct, either individually or in connection or combination with any other person, the intent of which is:

(a) To make or cause to be made any outbreak or demonstration of violence against this State or against the United States.

(b) To encourage any person to take any measures or engage in any conduct with a view of overthrowing or destroying or attempting to overthrow or destroy, by any force or show or threat of force, the Government of this State or of the United States.

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[2] The section is derived without material change from the Pennsylvania Act of June 26, 1919, P. L. 639, §§ 1, 2, as amended by the Act of May 10, 1921, P. L. 435, § 1. See "Historical Note" following 18 Purd. Pa. Stat. Ann. 4207.

(c) To incite or encourage any person to commit any overt act with a view to bringing the Government of this State or of the United States into hatred or contempt.

(d) To incite any person or persons to do or attempt to do personal injury or harm to any officer of this State or of the United States, or to damage or destroy any public property or the property of any public official because of his official position.

The word "sedition" shall also include:

(e) The actual damage to, or destruction of, any public property or the property of any public official, perpetrated because the owner or occupant is in official position.

(f) Any writing, publication, printing, cut, cartoon, or utterance which advocates or teaches the duty, necessity, or propriety of engaging in crime, violence, or any form of terrorism, as a means of accomplishing political reform or change in government.

(g) The sale, gift or distribution of any prints, publications, books, papers, documents, or written matter in any form, which advocates, furthers or teaches sedition as hereinbefore defined.

(h) Organizing or helping to organize or becoming a member of any assembly, society, or group, where any of the policies or purposes thereof are seditious as hereinbefore defined.

Sedition shall be a felony. Whoever is guilty of sedition shall, upon conviction thereof, be sentenced to pay a fine not exceeding ten thousand dollars ($10,000), or to undergo imprisonment not exceeding twenty (20) years, or both.

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