AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 8: The New Deal/Great Society Era – Federalism

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

Constitutional restrictions over state power increased during the New Deal/Great Society Era. As constitutional inhibitions on federal power were reduced, state laws were increasingly scrutinized in order to determine whether they were preempted by federal laws or whether they unduly interfered with interstate commerce. In contrast to matters concerning national power, the justices were not invariably hostile to state power. Justices Black and Douglas in most commerce clause cases tended to side with state power. Justice, later Chief Justice Stone was more likely to strike down state powers. The best description of Supreme Court practice was that the decisions were not always "[clear], consistent or reconciliable."[1] *A generation of law students, for example, was forced to discern why South Carolina could adopt policies that prohibited the vast majority of the nation's trucks from traveling on state highways,*[2] *but Arizona could not prohibit railroad trains that had more than 14 passenger cars or 70 freight cars.*[3]

The Supreme Court was more inclined to invoke preemption and the dormant commerce clause when states sought to abridge what many liberals were fundamental rights. For both political and legal reasons, judicial majorities on the Stone, Vinson, and early Warren Courts were unwilling to take on McCarthyism or Jim Crow directly. Liberal justices were, however, willing to protect free speech and persons of color when they could do so indirectly, by reconceptualizing what would seem to be Fourteenth Amendment cases as federalism cases. In Pennsylvania v. Nelson, *the justices asserted that federal anti-communist laws had preempted all state anti-communist laws.* Morgan v. Virginia *(1946) was part of a series of cases in which the justices used the dormant commerce clause and statutory interpretation to practically prohibit segregation in interstate transportation.*

The Warren Court protections for the freedom of speech during the 1950s were less direct than its blunt command in Brown v. Board of Education *(1954) that segregated schools were unconstitutional. In some cases, judicial majorities interpreted (or, as they were often accused, misinterpreted) federal statutes as not sanctioning the speech or conduct before the Court. In other cases, the justices ruled that federal agencies had not followed statutorily mandated procedures before terminating a person suspected of communist sympathies. In* Watkins v. United States *(1956), the Justices ruled that a union organizer did not have to answer questions about his relationships with communists because Congress had not explicitly authorized the relevant committee to investigate that issue.*

Pennsylvania v. Nelson *is another example of the ways in which the Warren Court protected freedom of speech without ever discussing the First Amendment. Rather than explore whether state sedition laws were inconsistent with constitutional protections for political speech, the judicial majority ruled that the laws in 42 states had been preempted by congressional regulation, a ruling that came as a surprise to both the administration and most members of congress.*

CHIEF JUSTICE WARREN delivered the opinion of the Court.

The respondent Steve Nelson, an acknowledged member of the Communist Party, was convicted in the Court of Quarter Sessions of Allegheny County, Pennsylvania, of a violation of the Pennsylvania Sedition Act. . . .

. . . [A]ll that is before us for review, is that the Smith Act of 1940 . . . which prohibits the

[1] *Northwestern States Portland Cement v. Minnesota* (1959).
[2] *South Carolina State Highway Department v. Barnwell Bros.* (1938)
[3] *Southern Pacific Co. v. Arizona* (1945).

knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct.

It should be said at the outset that the decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct. . . .

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. . . "[t}he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." . . . The Congress determined in 1940 that it was necessary for it to re-enter the field of antisubversive legislation, which had been abandoned by it in 1921. In that year, it enacted the Smith Act which proscribes advocacy of the overthrow of any government -- federal, state or local -- by force and violence and organization of and knowing membership in a group which so advocates. Conspiracy to commit any of these acts is punishable under the general criminal conspiracy provisions in 18 U. S. C. § 371. The Internal Security Act of 1950 is aimed more directly at Communist organizations. It distinguishes between "Communist-action organizations" and "Communist-front organizations," requiring such organizations to register and to file annual reports with the Attorney General giving complete details as to their officers and funds. Members of Communist-action organizations who have not been registered by their organization must register as individuals. Failure to register in accordance with the requirements of Sections 786-787 is punishable by a fine of not more than $10,000 for an offending organization and by a fine of not more than $10,000 or imprisonment for not more than five years or both for an individual offender -- each day of failure to register constituting a separate offense. And the Act imposes certain sanctions upon both "action" and "front" organizations and their members. The Communist Control Act of 1954 declares "that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States" and that "its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States." It also contains a legislative finding that the Communist Party 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. It furthermore sets up a new classification of "Communist-infiltrated organizations" and provides for the imposition of sanctions against them.

We examine these Acts only to determine the congressional plan. Looking to all of them in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of sedition. Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law. . . .

. . . [T]he federal statutes "touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject." . . . Congress has devised an all-embracing program for resistance to the various forms of totalitarian aggression. Our external defenses have been strengthened, and a plan to protect against internal subversion has been made by it. It has appropriated vast sums, not only for our own protection, but also to strengthen freedom throughout the world. It has charged the Federal Bureau of Investigation and the Central Intelligence Agency with responsibility for intelligence concerning Communist seditious activities against our Government, and has denominated such activities as part of a world conspiracy. It accordingly proscribed sedition against all government in the nation -- national, state and local. Congress declared that these steps were taken "to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government. . . ." Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem.

. . . [E]nforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program. Since 1939, in order to avoid a hampering of uniform enforcement of its program by sporadic local prosecutions, the Federal Government has urged local authorities not to intervene in such matters, but to turn over to the federal authorities immediately and unevaluated all information concerning subversive activities. The President made such a request on September 6, 1939,

when he placed the Federal Bureau of Investigation in charge of investigation in this field.

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In his brief, the Solicitor General states that forty-two States plus Alaska and Hawaii have statutes which in some form prohibit advocacy of the violent overthrow of established government. These statutes are entitled anti-sedition statutes, criminal anarchy laws, criminal syndicalist laws, etc. Although all of them are primarily directed against the overthrow of the United States Government, they are in no sense uniform. And our attention has not been called to any case where the prosecution has been successfully directed against an attempt to destroy state or local government. Some of these Acts are studiously drawn and purport to protect fundamental rights by appropriate definitions, standards of proof and orderly procedures in keeping with the avowed congressional purpose "to protect freedom from those who would destroy it, without infringing upon the freedom of all our people." Others are vague and are almost wholly without such safeguards. Some even purport to punish mere membership in subversive organizations which the federal statutes do not punish where federal registration requirements have been fulfilled.

When we were confronted with a like situation in the field of labor-management relations, Mr. Justice Jackson wrote:

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

Should the States be permitted to exercise a concurrent jurisdiction in this area, federal enforcement would encounter not only the difficulties mentioned by Mr. Justice Jackson, but the added conflict engendered by different criteria of substantive offenses.

JUSTICE REED, with whom JUSTICE BURTON and JUSTICE MINTON join, dissenting.

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Congress has not, in any of its statutes relating to sedition, specifically barred the exercise of state power to punish the same Acts under state law. And, we read the majority opinion to assume for this case that, absent federal legislation, there is no constitutional bar to punishment of sedition against the United States by both a State and the Nation. . . .

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. . . . There is, consequently, no question as to whether some general congressional regulatory scheme might be upset by a coinciding state plan. In these circumstances the conflict should be clear and direct before this Court reads a congressional intent to void state legislation into the federal sedition acts. Chief Justice Marshall wrote:

> "To interfere with the penal laws of a State, where they . . . have for their sole object the internal government of the country, 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* (1821) . . .

Moreover, it is quite apparent that since 1940 Congress has been keenly aware of the magnitude of existing state legislation proscribing sedition. It may be validly assumed that in these circumstances this Court should not void state legislation without a clear mandate from Congress.

We cannot agree that the federal criminal sanctions against sedition directed at the United States are of such a pervasive character as to indicate an intention to void state action.

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We look upon the Smith Act as a provision for controlling incitements to overthrow by force and violence the Nation, or any State, or any political subdivision of either. Such an exercise of federal police power carries, we think, no such dominancy over similar state powers as might be attributed to continuing federal regulations concerning foreign affairs or coinage, for example. In the responsibility of

national and local governments to protect themselves against sedition, there is no "dominant interest."

We are citizens of the United States and of the State wherein we reside and are dependent upon the strength of both to preserve our rights and liberties. Both may enact criminal statutes for mutual protection unless Congress has otherwise provided. . . .

Thirdly, the Court finds ground for abrogating Pennsylvania's antisedition statute because, in the Court's view, the State's administration of the Act may hamper the enforcement of the federal law. Quotations are inserted from statements of President Roosevelt and Mr. Hoover, the Director of the Federal Bureau of Investigation, to support the Court's position. But a reading of the quotations leads us to conclude that their purpose was to gain prompt knowledge of evidence of subversive activities so that the federal agency could be fully advised. We find no suggestion from any official source that state officials should be less alert to ferret out or punish subversion. The Court's attitude as to interference seems to us quite contrary to that of the Legislative and Executive Departments. . . .

Mere fear by courts of possible difficulties does not seem to us in these circumstances a valid reason for ousting a State from exercise of its police power. Those are matters for legislative determination.

. . . . The Smith Act appears in Title 18 of the United States Code, which Title codifies the federal criminal laws. Section 3231 of that Title provides:

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

That declaration springs from the federal character of our Nation. It recognizes the fact that maintenance of order and fairness rests primarily with the States. The section was first enacted in 1825 and has appeared successively in the federal criminal laws since that time. This Court has interpreted the section to mean that States may provide concurrent legislation in the absence of explicit congressional intent to the contrary. . . . The majority's position in this case cannot be reconciled with that clear authorization of Congress.

The law stands against any advocacy of violence to change established governments. Freedom of speech allows full play to the processes of reason. The state and national legislative bodies have legislated within constitutional limits so as to allow the widest participation by the law enforcement officers of the respective governments. The individual States were not told that they are powerless to punish local acts of sedition, nominally directed against the United States. Courts should not interfere. We would reverse the judgment of the Supreme Court of Pennsylvania.