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# Constitutional Law - Preemption of State Subversive Activities Law by Federal Law

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arated from his wife, failed to prove in the divorce suit that he had grounds for separation under Article 138. Of course, if the parties separated by mutual consent, neither having grounds for separation under Article 138, then it would appear that fault would exist as to neither, and alimony should be awarded.

The majority in the instant case found the wife not to be at fault, but it did not reveal the method used in determining this. Applying the facts in this case to the suggested approach would put the wife in the position of proving that when she left her husband she had legal cause to do so, if she were to receive alimony. Whether or not she would have received the award is questionable because the court may or may not have considered the actions of the husband to have been cruelty within the contemplation of Article 138(3),[12] thus giving her a legal cause to leave. But in any event, by use of this approach there would be less danger to the stability of marriage which could result from awarding alimony to an abandoning wife whose husband did not give her legal cause for divorce or separation.[13]

*Peyton Moore*

## CONSTITUTIONAL LAW — PREEMPTION OF STATE SUBVERSIVE ACTIVITIES LAW BY FEDERAL LAW

Defendant was charged with a violation of the Louisiana Subversive Activities Law[1] in that she was a member of the Communist Party, which she knew to be a subversive organization. Her motion to quash the bill of information was based, in part, on the contention that the subject matter of subversive activities had been preempted by federal legislation. The trial court sustained the motion. On appeal to the Louisiana Supreme Court, the state argued that only sedition against the United States had been preempted and that states could prosecute for seditious activities against local or state governments. *Held,*

12. In Adams v. Adams, 196 La. 464, 199 So. 392 (1940), the court did not decide whether the very acts complained of here would have allowed a separation on the grounds of cruelty because they were not proved.

13. This does not, however, preclude the danger which could arise from indiscriminately awarding alimony to the wife who obtains a divorce after a two-year separation in fact, whether or not she was at fault. But where this situation presented itself in McKnight v. Irwin, 228 La. 1088, 85 So.2d 1 (1956), the court inferred that if the wife had claimed alimony, the fault issue would have been raised, and the award made only if she was not at fault.

1. La. Acts 1954, No. 603, now LA. R.S. 14:366-380 (Supp. 1958).

affirmed. A charge of subversion through membership in the Communist Party necessarily includes acts of sedition against the United States and is within the exclusive jurisdiction of the federal government to prosecute under the Smith Act.[2] *State v. Jenkins*, 107 So.2d 648 (La. 1958).

The supremacy clause of the United States Constitution requires that in conflicts between state and federal laws, the state law must yield.[3] If no clear conflict exists,[4] or if Congress has failed to legislate on the subject,[5] it is necessary to determine if the federal power is exclusive or concurrent. The answer in each case lies in judicial interpretation of congressional intent.[6] If Congress has not expressly indicated its intention, the court determines that intent according to the nature of the subject matter.[7] Where the subject matter is national in scope, requiring uniform regulation,[8] congressional silence has been interpreted to require exclusive federal jurisdiction.[9] Where the subject matter is local in nature, not requiring uniform regulation, the states may exercise control until Congress legislates on the particular subject involved.[10]

When Congress enacts a comprehensive scheme of legislation regulating a particular area of law, the court may regard the legislation as evidence of an intent to "occupy the field" to the exclusion of state regulation.[11] Even the interstitial gaps in the

2. 54 STAT. 670 (1940), as amended, 18 U.S.C. § 2385 (1952).
3. *E.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
4. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Hines v. Davidowitz, 312 U.S. 52 (1941).
5. Hood & Sons v. DuMond, 336 U.S. 525 (1949); Halter v. Nebraska, 205 U.S. 34 (1907).
6. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).
7. *Ibid.*
8. *Ibid.*
9. *Ibid.*
10. See Minnesota Rate Cases, 230 U.S. 352 (1913); Southern Ry. v. Reid, 222 U.S. 424 (1913); Northern Pacific Ry. v. Washington, 222 U.S. 370 (1913); Gulf, Colorado & Santa Fe Ry. v. Hefley, 158 U.S. 98 (1895); Bowman v. Chicago & Northwestern Ry., 125 U.S. 465 (1888); Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196 (1885); County of Mobile v. Kimball, 102 U.S. 691 (1880); Welton v. Missouri, 91 U.S. 275 (1875); *Ex parte* McNeil, 80 U.S. (13 Wall.) 236 (1871); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).
11. See Hines v. Davidowitz, 312 U.S. 52 (1941); Lindgren v. United States, 281 U.S. 38 (1930); International Shoe Co. v. Pinkus, 278 U.S. 261 (1929); Oregon-Washington Ry. & Nav. Co. v. Washington, 270 U.S. 87 (1926); New York Central Ry. v. Winfield, 244 U.S. 147 (1917); Erie Ry. v. New York, 233 U.S. 671 (1914); New York Central & Hudson River Ry. v. Hudson County, 227 U.S. 248 (1913); Adams Express Co. v. Croninger, 226 U.S. 491 (1913); Second Employers Liability Cases, 223 U.S. 1 (1912); Northern Pacific Ry. v. Washington, 222 U.S. 370 (1912); Easton v. Iowa, 188 U.S. 220 (1903); Reid v. Colorado. 187 U.S. 137 (1903); People v. Compagnie Générale Transatlantique, 107 U.S. 59 (1882).

federal scheme are sometimes presumed to be intentional and state legislation in these areas may be held invalid as an attempted regulation of that which Congress desired to leave unregulated.[12] If the court finds that Congress intended concurrent jurisdiction, the state laws are valid unless there is an actual conflict.[13]

In *Pennsylvania v. Nelson*,[14] the leading case on preemption in the field of subversive activities, the principal issue was whether a state could prosecute for subversive activities directed against the United States.[15] The court held that the Pennsylvania sedition statute had been superseded by a comprehensive scheme of federal legislation. The court found that the congressional intent in enacting the Smith Act,[16] the Internal Security Act,[17] and the Communist Control Act[18] was to establish exclusive federal jurisdiction in the regulation of sedition.[19] Since the case, as reviewed by the court, involved only sedition against the

12. See, *e.g.*, Garner v. Teamsters' Union, 346 U.S. 485 (1953); Pennsylvania R.R. v. Public Service Commission, 250 U.S. 566 (1919); Leisy v. Hardin, 135 U.S. 100 (1890). *But see* International Association of Machinists v. Gonzales, 356 U.S. 617 (1958); United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954); Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301 (1949); International Union v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949); Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942).

13. See Kelly v. Washington, 302 U.S. 1 (1938); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865); Wilson v. The Blackbird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829). In Kelly v. Washington, *supra* at 10, Mr. Chief Justice Hughes said: "When Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced."

14. 350 U.S. 497 (1956).

15. *Id.* at 499. Mr. Chief Justice Warren, speaking for the majority, quoted with approval the language of the lower court: "'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.'" He continued: "The precise holding of the court, and all that is before us for review is that the Smith Act of 1940, as amended in 1948, which prohibits the 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."

16. 54 STAT. 670 (1940), as amended, 18 U.S.C. § 2385 (1956).

17. 64 STAT. 987 (1950), 50 U.S.C. § 781 *et seq.* (1952).

18. 68 STAT. 775 (1954), 50 U.S.C. § 841 (1956).

19. "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." 350 U.S. 497, 504 (1956).

United States,[20] there arose a question of whether a state could prosecute for Communist activity directed toward state or local government. Subsequent state court decisions in other jurisdictions have uniformly held that the states could not conduct such prosecutions.[21]

In the instant case the state argued that the court should strictly construe the *Nelson* opinion.[22] Such a construction, it was contended, would permit state prosecution where communist activity against the state government, as well as the United States, was alleged.[23] The Supreme Court, in rejecting this argument, stated that "communism in any form, even though directed against a local government, necessarily violates the Smith Act."[24] Although the court extended the holding in *Nelson* to cover the situation presented, it appears, in view of the language of *Nelson*[25] and the recent decisions in other jurisdictions, that the court's conclusion in the instant case is correct.

Although the United States Supreme Court in the *Nelson* case employed an "occupation of the field" rationale in holding that state sedition statutes have been superseded,[26] the scope of the field which has been occupied has not been established conclusively. A strong argument may be made that the *Nelson* case and the instant case support the contention that all internal security measures are within the field of law which has been preempted by federal legislation.[27] However, in its operation in other fields, the preemption doctrine is sometimes selectively

20. See note 15 *supra*.

21. Braden v. Commonwealth, 291 S.W.2d 843 (Ky. App. 1956); Commonwealth v. Gilbert, 334 Mass. 71, 134 N.E.2d 13 (1956); Albertson v. Millard, 345 Mich. 519, 77 N.W.2d 104 (1956); Commonwealth v. Dolson, 183 Pa. Super. 339, 132 A.2d 692 (1957).

22. 107 So.2d 648, 649 (La. 1958).

23. *Ibid.*

24. *Ibid.*

25. See note 19 *supra*. "[T]he 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.*" (Emphasis added.) 350 U.S. 497, 500 (1956).

26. The court used two other "tests" in reaching its decision, but it clearly stated, on the strength of the occupation test alone, that state action is precluded. *Id.* at 504.

27. The sweeping language of Nelson would appear to support such an argument. The court defines the "field" that has been occupied by federal legislation to be the entire area of sedition. *Id.* at 500. However, since the "congressional plan" deals primarily with Communist control, it is possible that it may be confined to Communist activities regulated by federal legislation. It is by no means settled that state prosecutions for seditious activities beyond the scope of the federal legislation are preempted.

applied.[28] Unless congressional action is taken,[29] it appears likely that the boundaries of state-federal jurisdiction in the control of subversion will be established only through the process of "elucidating litigation."[30]

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## CRIMINAL LAW — PROSECUTION FOR TWO CRIMES RESULTING FROM A SINGLE CRIMINAL ACT

Petitioner was convicted of assaulting two federal officers with a deadly weapon in violation of a federal statute which prohibited interference with federal officers engaged in official duties.[1] Evidence showed that petitioner had wounded the two

28. See, *e.g.*, International Association of Machinists v. Gonzales, 356 U.S. 617 (1958); United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954). In Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480 (1955), Mr. Justice Frankfurter said: "[T]he areas that have been preempted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. . . . [T]he Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much' . . . . [T]his penumbral area can be rendered progressively clear only by the course of litigation." In *International Association of Machinists v. Gonzales*, *supra*, Mr. Justice Frankfurter stated: "The statutory implications concerning what has been taken from the states and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidations." 356 U.S. 617, 619.

29. At the time of this writing, 24 bills to reverse the effect of the *Nelson* decision are pending congressional action. Typical of these proposed are S. 3 and H.R. 3, which propose to reinstate the jurisdiction of the states in dealing with control of subversion. The bills further provide that Congress' intent will not be interpreted as preempting state authority unless that intention is expressly indicated.

30. See note 28 *supra*. The *Nelson* case furnishes some indication of the policy factors which will influence the court in future litigation. "[T]he decision in this case does not . . . limit the jurisdiction of the States where the Constitution and Congress have specifically given them concurrent jurisdiction . . . [or] limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds. Nor does it prevent the State from prosecuting where the same act constitutes both a federal offense and a state offense under the police power." 350 U.S. 497, 500.

The majority seemed concerned over the possibility that state sedition statutes, if allowed to stand, might unjustly deny to defendants the protection of certain civil liberties. The court specifically mentioned the dangers inherent in a sedition statute which allows a prosecution to be initiated upon a bill of information made by a private individual. *Id.* at 507. The court was also concerned by the lack of protection of "fundamental rights" in several of the state sedition statutes. *Id.* at 508. The possibility of double jeopardy problems arising from concurrent prosecution was also discussed in the opinion. *Id.* at 509-10. These indications of the policy factors to be considered by the court seem to compel the conclusion that state prosecutions initiated as "elucidating litigation" must contain adequate safeguards for civil liberties. *Cf.* Bartkus v. Illinois, 27 U.S.L.W. 4233 (1959).

1. Former 18 U.S.C. § 254 (1940) provided: "Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person [a federal officer] designated in section 253 . . . while engaged in the performance of his official duties,