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An Enquiry Whether the Act of Congress Entitled
"In Addition to the Act, Entitles An Act for the
Punishment of Certain Crimes Against the United
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Unconstitutional or Not

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Quare 53: 13:

James A. N. Bellon

ENQUIRY

WHETHER

THE ACT OF CONGRESS

“IN ADDITION TO THE ACT, ENTITLED AN ACT,

FOR THE

PUNISHMENT OF CERTAIN CRIMES

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IS


UNCONSTITUTIONAL OR NOT.

R I C H M O N D :

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A N
E N Q U I R Y, &c.



BEFORE the new government was formed the state governments existed. To shew what powers were intended to be *delegated* to the former, I shall first have recourse to cotemporaneous exposition, that is, to the opinions of those who delegated it, or rather of those who ratified the government, thinking myself justified in this mode of reasoning from its propriety, which will be acknowledged to receive additional weight from the example of the most conspicuous character that we have had amongst us, and one who has in general, as appears from his letter accepting the command of our army, approved the measures of government. It is reasonable that powers delegated should be decided by what was the intention of those who delegated them—the authority alluded to, when the house of representatives requested the papers relative to the British treaty to be laid before them, applied to the journal of the grand convention to prove the constitutional impropriety of this request.

In like manner, to ascertain what powers the state of Virginia designed to transfer to congress by the adoption, I shall enquire what was the opinion of a distinguished opponent to, and of a powerful advocate for, its adoption; which opinion, when I come to discuss the amendment naturally connected with the subject of this enquiry, as the amendment proposed by this state was adopted, may be considered to be ratified by the constitutional number of states as acceding in principle and the reason of the amendment, to the sense of the state of Virginia, which is indeed expressly acceded to by the terms of the adoption of the amendments by congress.

The great opponent to the adoption of the government, in treating of the clause in the constitution,* “by which the number of representatives,” it is declared “shall not exceed one for thirty thousand,” on the doctrine of implied powers, stated—“If we are to have one representative for every thirty thousand it must be by implication. The constitution does not positively secure it—Even say it is a natural implication, why not give us a right to that proportion in express terms, in language that could not admit of evasions or subterfuges? If they can use implication for us, they can use implication against us. We are giving power, they are getting power; judge then on which side the implication will be used. When we once put it in their option to assume *constructive* power, danger will follow. *Trial by jury* and *liberty of the press* are also on this foundation of implication. If they encroach on these rights, and you give your implication for a plea, you are cast; for they will be justified by the last part of it, which gives them full power “to make all laws which shall be necessary and proper to carry their powers into execution.” Implication is dangerous, because it is unbounded: If it be admitted at all, and no limits be prescribed, it admits of the utmost extension: They say that every thing not given is retained. The reverse of this proposition is true by implication. They do not carry this implication so far when they speak of the general welfare. No implication when the sweeping clause comes. Implication is only necessary when the existence of privileges is in dispute. The existence of powers is sufficient. If we trust our dearest rights to implication, we shall be in a very unhappy situation.

“Implication in England has been a source of dissention. There has been a war of implication between the king and people. For one hundred years did the mother country struggle under the uncertainty of implication. The people insisted their rights were implied: the monarch denied

* See Vol. 1st Virginia Debates, Page 153.

the doctrine. Their bill of rights in some degree terminated the dispute. By a bold implication, they said they had a right to bind us in all cases whatsoever. This constructive power we opposed and successfully. Thirteen or fourteen years ago the most important thing that could be thought of, was to exclude the possibility of construction and implication. These, sir, were deemed perilous. The first thing that was thought of, was a bill of rights. We were not satisfied with your constructive, argumentative rights.

Mr Henry then declared a bill of rights indispensably necessary; that a general *positive* provision should be inserted in the new system, securing to the states and the people, every right which was not conceded to the general government; and that every implication should be done away."

We have seen then the opinion of the most powerful opponent of the government on implied powers. His opinion evinces an apprehension that implied powers might be supposed to be contained in some parts of the constitution, and particularly the sweeping clause, as it was called. Let us turn our attention to those who advocated the system. They disdained every such doctrine.

A zealous advocate for the adoption, (a member from Westmoreland) declared that "our privileges are not in danger: They are better secured than any bill of rights could have secured them, I say that this new system shews in stronger terms than words could declare, that the liberties of the people are secure. It goes on the principle that all power is in the people, and that the rulers have no powers but what are enumerated in that paper. When a question arises with respect to the legality of any power, exercised or assumed by congress, it is plain on the side of the governed. Is it enumerated in the constitution? If it be, it is legal and just. It is otherwise arbitrary and unconstitutional. Candour must confess it is infinitely more

“attentive to the liberties of the people than any state go-
 “government.

“Mr Lee then said, that under the *state* governments, the
 “people reserved to themselves certain enumerated rights,
 “and that the rest were vested in their rulers. That con-
 “sequently the powers reserved to the people were but an
 “inconsiderable exception from what was given to their ru-
 “lers. But that in the *federal* government the rulers of the
 “people were vested with certain *defined* powers, and *what*
 “*was not delegated to those rulers were retained* by the *people*.
 “The consequence of this, he said, was, that the *limited*
 “powers were only an exception to those which still rested
 “in the people, that the people therefore knew what they
 “had given up, and could be in no danger. He exempli-
 “fied the proposition in a familiar manner. He observed
 “that if a man delegated certain powers to an agent, it
 “would be an *insult upon common sense*, to suppose, that the
 “agent could legally transact any business for his principal,
 “which was not contained in the commission whereby the
 “powers were delegated. But that if a man empowered his
 “*representative or agent* to transact all his business except
 “certain enumerated parts, the clear result was, that the a-
 “gent could lawfully transact every possible part of his prin-
 “cipal’s business except enumerated parts—He added those
 “who are to go to congress will be the servants of the peo-
 “ple. They are created and deputed by us, and remove-
 “able by us. Is there a greater security than this in our
 “state government? To fortify this security *is there not a con-*
 “*stitutional remedy* in the government, to reform any errors
 “which shall be found inconvenient?”

I take it for granted then, that those who opposed the
 adoption were apprehensive of the doctrine of implication of
 powers, which the advocates of the system said was inadmissi-
 ble from the nature of the subject. The apprehension, how-
 ever, that such an idea might be contended for, induced the
 amendments, to which I shall attend in the course of this in-
 vestigation. Having stated the extraneous opinions on this

point, I shall next enquire whether such a power does exist in the plan of the constitution, as originally adopted—an even if it is impliedly or expressly given, whether it is not taken away by the amendments.

The inducements to the government and its principal objects were to lay such taxes on commerce, that there might be produced a sufficient revenue to pay the debt of the United States in a mode in which some states might not injure others, as happened in the case of the impost under the state laws between Maryland and Virginia—to regulate our intercourse with foreign powers, defending us from them—and prevent disputes amongst different states. The objects designated in the preamble are, “to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the *blessings of liberty.*” These are the objects, and to attain them the people *establish* the constitution—these are the ends, but the constitution is the means—they are to be attained only by the mode pointed out and enumerated in the constitution.

The constitution after the preamble of “We the people,” &c. declares (1st article) “All legislative powers herein *granted*, shall be vested in congress;” Here then let it be remarked—whatever powers congress holds, it holds as a *grant* in this constitution, and as a grant *from the people*—Whatever is not granted, the people still retain as conceded by its advocates at the time of its adoption—Is the power in question *granted* then?

It is unnecessary to recite the clauses usually enumerated as defining the powers of congress: I will merely take notice of those in this and other parts of the constitution which may bear some affinity to the subject, and amongst them, of those too apparently most strong in favor of the power: With this view it is conceded that “congress shall have *power* to lay and collect taxes, &c. to provide for the punishment of counterfeiting the securities and coin of the United States; to constitute tribunals inferior to the supreme court; to *define*

and punish piracies; to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Art. 3. Sec. 2. The judicial power shall extend to all cases of law and equity arising under this constitution, the laws of the United States, and treaties made under their authority;

2^d. To all cases affecting ambassadors, other public ministers and consuls;

3^d. To cases of admiralty, &c.

4th. To controversies in which the U. States are a party,

5th. To controversies between two or more states;

6th. Between a state and citizens of another state;

7th. Between citizens of different states;

8th. Between citizens of the same state, claiming lands under grants of different states; and,

9th. Between a state or the citizens thereof, and foreign states, citizens or subjects.

Sec. 3^d. Treason against the United States is defined; and "The congress shall have power to declare the punishment of treason."

Art. 5th Provides the mode of amendment; and

6th, Declares this constitution and the laws of the United States which shall be made in pursuance thereof. & treaties made under the authority of the United States, shall be the supreme law of the land: and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

The 8th Section designating the power of congress declares that the congress shall have power—to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States.

I believe it has been contended that this clause means that congress shall lay taxes to pay debts and provide for the general welfare—that is, that they are to raise this fund for that purpose, or that this purpose is to be answered out of that

fund; but that it did not give congress a power to pass whatever laws they thought conducive to the general welfare. We have seen that the general welfare was one of the objects. It is untenable under such a constitution to say that to promote the general welfare congress may do whatever they please conducive to this end. — If so, such a definite constitution was unnecessary; for one line declaring that “they should provide for the general welfare” would be exactly such a constitution and would give exactly such a discretionary power, and the long enumeration of powers was unnecessary — Welfare then is the object, and taxes, &c. commercial regulations, &c. are the means, as the quelling insurrections is the means of ensuring domestic tranquility, or by Sec. 4th. Art. 4th. the United States is on application of the legislature, or executive (when the legislature cannot be convened) to protect every state against domestic violence.

Let us next examine the clause about the judicial power. By Art. 3d. Sec. 2nd, this is declared to extend first to all cases *in law and equity arising under this constitution, &c.* as above recited.

What then are the cases *in law*, arising under this constitution? As far as offences are concerned, they are of persons who do not conform to the different tax laws (see sec. 8 art. 1) to the regulation of commerce, to laws as to naturalization, of bankruptcy, counterfeiters of the securities and coin of the United States, for which *they are to provide*; of persons offending against post-office laws; infringers of patent rights; piracies and felonies on the high seas, and offences against the law of nations; captures, concerning which rules are to be made, as well as for the army & navy; opposers to the execution of the laws of the union; also opposers to the suppression of insurrection; and likewise offenders within the ten miles square; and under 2d sec. 3d art. offenders against treaties, or against ambassadors, &c. and under the 3d section, persons guilty of treason, which is *defined*, and of which they are to *declare the punishment*. — So far this clause

may refer to offenders. As to *civil* disputes, a case in law and equity, particularly under the 2d sec 3d art. may be—a dispute with ambassadors, &c.—in the admiralty—with the United States—between states—or citizens, as there described.

If the case in question could be considered as a *case in law, arising under the constitution*, so as to bring it under the clause concerning the judiciary, it must be by virtue of the sweeping clause, which declares that congress shall “have power to make all laws necessary and proper for carrying into execution the foregoing power and all other powers vested by this constitution in the government;”—It must be a power foregoing or vested by the constitution.

A right to restrain writing or publishing relative to the government or its officers, is not *expressly given*, & to prevent any *implied* powers from being *constructively* vested, was the object of the amendment retaining all the powers not delegated, as particularly an apprehension as to the freedom of speech and of the press was the cause of the third amendment: If it be said that the right was *impliedly* delegated, and therefore is not retained, this would be an unfair construction, and would defeat the end of the amendment: The case in question, therefore, *does not arise under the constitution*, and it will not be said that the section concerning the judicial power, by a side-wind adopts the common law of England in cases of offences *not arising* under the constitution. But for the sake of argument, for a moment, let it be supposed that it does arise under the constitution; the clause does not adopt the *criminal* law of England, independent of the difference in the nature of the two governments to be hereafter discussed. It was never so understood when it was intended to organize the judiciary; for the section 11th of the act to establish the judicial courts of the United States (20th chapter of the 1st session) enacts that “the circuit courts shall have original cognizance, concurrent with the courts of the several states of all suits of a *civil* nature at *common law*,” &c. and in the next section when the mind of the legislature must have been turned to the

the subjects of common law, and of offences, and they come to declare the jurisdiction of offences, they say "and shall have exclusive cognizance of all crimes and offences *cognizable under the authority of the United State,*" &c. Their omitting to speak of *offences at common law* when they give the jurisdiction as to offences, when they had just before by express words declared the common law in *civil cases*, is the strongest admission that it was only considered as adopted in *civil cases*. Again, they give the circuit courts *exclusive jurisdiction over all offences cognizable under the authority of the United States*, after giving it concurrent with the state courts in the civil cases. Was it intended then to exclude the state courts of jurisdiction of the case under enquiry if they had cognizance? When the sedition bill passed, if the state courts had it, they could not exclude them according to the amendments hereafter to be spoken of; nor could the circuit court even take cognizance of it.

But let us consider the case (as it will be more fair in this part of the argument to do so) as if we were just at the first session, and prior to the adoption of the amendments.

It is probable that Congress, if they had the power, did not mean to exclude the state courts of jurisdiction in these cases, if the state courts possessed it before. They evidently thought that *crimes cognizable under the state courts*, were not cognizable under the authority of the United States, and *vice versa*.—Probably they reasoned thus. Here is a new class of crimes arising—*crimes cognizable under the authority of the United States*, else why make the crimes *cognizable under the authority of the United States* a *distinct* class of subjects for jurisdiction?—or rather they would not mean to exclude the state courts where they had jurisdiction before; for as the constitution was then paramount except in the clauses negative to congress, before the exceptions introduced to the amendments, they might have excluded the state courts, where the United States, or an alien, or a citizen of another state was a party. In these three cases the

state courts before had jurisdiction; but if they have left the state courts *concurrent* jurisdiction in them; which shews their design to let the jurisdiction remain *concurrent*, where the state courts had cognizance already; but in *new offences* they thought that the state courts had not jurisdiction. If so, the circuit court was to have *exclusive* jurisdiction only in the *new cases*, that is, in cases arising under the constitution. And if the state courts had not jurisdiction before of this kind of offences, what becomes of the argument that the law does not *abridge* the *freedom* because the state courts could punish the same offences before?

But the following is perhaps the more candid statement of this point.

It is evident that an offence against the government could not exist before its establishment, and what is meant by the argument I suppose is, that because offences of a similar nature were punishable in the states, that such against the U. States are equally so in the courts of the United States under the government; but this doctrine is inadmissible, as it should be a doctrine of implication. To this it may be replied and perhaps fairly, that it could not be supposed that the state governments should alone have power to punish such offences against the United government, and therefore this cannot be one of the rights retained to the States even this might be conceded; for the 12th article declares that the powers not *delegated* to the United States by the constitution, nor *prohibited* by it to the states, are reserved to the states respectively, or to the people. Is not then the right of speaking or writing relative to the government or its officers *expressly* retained by the 3d and 12th amendments taken together to the people? If the cognizance be not retained to the state courts, it is indisputably, unless *delegated* to the United States by the constitution, which cannot be the case, to prevent *implicit delegation* being the object of the amendments.

One word more as to the supposed adoption of the common law of England in criminal cases. It certainly has not

been expressly adopted by the constitution, and whether congress has a right to adopt it is a serious question, which would probably be decided in the negative. When America was first settled some were loyal, others republican— Amongst the former Virginia stood as forward as any,— Amongst the latter the New-England states, or some of them, were distinguished. Their ancestors actually fled during the reign of Charles I or after the restoration of Charles II. Dissatisfaction with that government drove them hither. In the name of common sense then, could *they* impliedly in their emigration have brought the common law in case of sedition, or crimes of the like nature? Whether they formally, declaratively and *actually* adopted it I know not. In this state, after we declared ourselves independent, a formal declaration to that effect was thought necessary. Supposing the system to be impliedly brought by *all* the states (for *one* not adopting it would *certainly* render the doctrine of implied admission by them when united as a separate body of government, inadmissible—) but suppose it was brought by *all*— when the United States declared themselves independent and formed the confederation, would not a positive adoption become necessary? I trust it would.

Let us next attend to the 3d sec, 3d art. which treats of treason. It *defines* treason, and declares that “congress *shall* have power to declare the punishment of treason”

Why is treason *defined* in the constitution, if it was not to prevent constructive treason or other cases to be declared to be treason, as had been done in England, & the punishment of actions which might be supposed to approach its limits?

But by the 6th article, “This constitution and the laws of the United States in *purjuance* of it, shall be the supreme law of the land,” &c. The question now on the carpet is whether this act be in *purjuance* of the constitution; therefore the decision of the application of this article must await the event on this main point of its being or not in *purjuance* of the constitution, though it is of no consequence how

this point is decided, as the amendments expressly prevent the operation on the subject, as has been contended.

But by the 2d article section 3d, "The executive shall take care that the laws be faithfully executed." The president is also by his oath (section 1st of article 2d) to swear that he will to the best of his ability, *preserve, protect and defend the constitution*. If the bill be constitutional—he is to execute it; otherwise, not; and it has been decided in the circuit courts in a controversy for land under two different states, and when an unconstitutional duty was imposed on the members of that court, and in all the state courts (as far as I am informed) and proved by the "Federationist," an extremely able political writer, at the time the government was under consideration, and might be again proved if requisite, under the constitution, that an act *against it* is a nullity—and the executive cannot be required to execute a nullity, if this be one.

Perhaps other observations might be added to shew even if the common law is adopted in civil cases by the constitution, as it is expressly in the judiciary bill (where as to offences *under the constitution*, it is impliedly omitted as above stated) that the common law relative to *offences* of this nature could not be adopted consistently with the nature of a government which supposes officers to be temporarily elected, and provides for the mode of amendment; for if the people have ever a right to choose a new person for an officer, or the legislatures, or congress to propose amendments, or the people to assemble and petition for the redress of grievances, unless it be allowed to write that a public officer or department grasps at power or other words, which may bring an officer or department into disrepute, an individual becomes an officer for life, one branch may encroach on another and destroy the government, (as some individuals supposed and published, I believe, the house of representatives were attempting, when they decided that they had a right to refuse appropriations) and this was never considered as libellous, the rights above enumerated, will be practically

as nugatory to the people, as such rights would be were their tongues cut out and their hands cut off.

In this state it has been doubted whether the right of courts to imprison for misdemeanors is not impliedly taken away by our law giving the jury a right to assess the fine: If so, and the right to imprison remains with the judges, under the act, it cannot leave us as free as before, and consequently, the act *abridges* the *freedom* of the press, if the state courts *had* jurisdiction of such an offence. If indeed the law of congress adopting the proceedings of state courts, gives the jury a right to assess the fine, it may be a point of importance in the execution of the act in this state.

The state of Virginia in her ratification of the constitution declares, "that among other essential rights the liberty of conscience and of the press cannot be cancelled, abridged, restrained, or *modified* by any authority of the United States;" and

Congress in the preamble to the amendments uses the following terms:—"The convention of a number of states having at *the time of their adopting the constitution*, expressed a desire, in order to prevent *misconstruction* or abuse of its powers, that further *declaratory* and *restrictive* clauses should be added; and as *extending* the ground of public confidence in the government, will best ensure the beneficent ends of its institution, Resolved," &c. and then follow the amendments, and amongst them one declaring that congress shall make no law abridging the freedom of speech or of the press,—another,—"That the powers not delegated are reserved to the states or the people."

Considering the design then, with which the amendments were proposed, and with which congress declare them,—Is it possible that congress could have a right to act upon the subject in question?

PHILODEMOS.