AN

ENQUIRY

WHETHER

THE ACT OF CONGRESS

"IN ADDITION TO THE ACT, ENTITLED AN ACT,

FOR THE

PUNISHMENT OF CERTAIN CRIMES

AGAINST THE

UNITED STATES,"

GENERALLY CALLED THE

SEDITION BILL,

IS

CONSTITUTIONAL OR NOT.

By Judge Nelson.

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1798.

ENQUIRY, &c.

RE the new government was formed the state-
rnments existed. To shew what powers were in
be *delegated* to the former, I shall first have re-
contemporaneous exposition, that is, to the opinions
ho delegated it, or rather of those who ratified the
r, thinking myself justified in this mode of rea-
m its propriety, which will be acknowledged to
ditional weight from the example of the most con-
haracter that we have had amongst us, and one
n general, as appears from his letter accepting the
of our army, approved the measures of govern-
is reasonable that powers delegated should be de-
what was the intention of those who delegated them
hority alluded to, when the house of representatives
the papers relative to the British treaty to be laid
m, applied to the journal of the grand convention
the constitutional impropriety of this request.
manner, to ascertain what powers the state of Vir-
ned to transfer to congress by the adoption, I shall
what was the opinion of a distinguished opponent
a powerful advocate for, its adoption; which o-
hen I come to discuss the amendment naturally
with the subject of this enquiry, as the amend-
posed by this state was adopted, may be consider-
ratified by the constitutional number of states as
in principle and the reason of the amendment, to
of the state of Virginia, which is indeed expressly
o by the terms of the adoption of the amendments
ess,

accepted

The great opponent to the adoption of the governmen
in treating of the clause in the constitution,* " by whi
number of representatives," it is declared " *shall not exce*
one for thirty thousand," on the doctrine of implied po
" ers, stated—" If we are to have one representative for
" very thirty thousand it must be by implication. The co
" stitution does not positively secure it—Even say it is
" tural implication, why not give us
" tion in express terms, in language th
" evasions or subterfuges? If they c
" us, they can use implication *against* us. We are
" power, they are *getting* power; judge then on which
" the implication will be safest. When we once put
" their option to assume *constructive* power, danger will fo
" low. *Trial by jury* and *liberty of the press* are also on
" foundation of implication. If they encroach on the
" rights, and you give your implication for a plea, you
" cast; for they will be just fit by the last part of it, whi
" gives them full power *to make all laws which shall be nec*
" *sary and proper to carry their powers into execution.*" Th
" cation is dangerous, because it is unbounded: If *it be a*
" *mitted at all*, and no limits be prescribed, it admits of
" the utmost extension. They say that every thing not
" en is retained. The reverse of this proposition is tru
" implication. They do not carry this implication to
" when they speak of the general welfare. No implica
" when the sweeping clause comes. Implication is only
" cessary when the existence of privileges is in dispute.
" existence of powers is sufficient. If we trust our d
" rights to implication, we shall be in a very unhappy situa

" Implication in England has been a source of differen
" There has been a war of implication between the king a
" people. For one hundred years did the mother countr
" struggle under the uncertainty of implication. The peo
" ple insisted their rights were implied: the monarch deni

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

doctrine. Their bill of rights in some degree termin-
the dispute. By a bold implication, they said they
a right to bind us in all cases whatsoever. This con-
uctive power we opposed and successfully. Thirteen
ourteen years ago the most important thing that could
thought of, was to exclude the possibility of construc-
and implication. These, sir, were deemed perilous.
first thing that was thought of, was a bill of rights.
were not satisfied with your constructive, argumenta.
ights.

Mr. Henry then declared a bill of rights indispensably
ecessary; that a general *positive* provision should be insert-
in the new system, securing to the states and the peo-
every right which was not conceded to the general
ernment; and that every implication should be done

ave seen then the opinion of the most powerful op-
of the government on implied powers. His opini-
an apprehension that implied powers might be
to be contained in some parts of the constitution,
ularly the sweeping clause, as it was called. Let us
attention to those who advocated the system. They
every such doctrine.

us advocate for the adoption, (a member from
land) declared that "our privileges are not in
They are better secured than any bill of rights
ave secured them, I say that this new sys-
ws in stronger terms than words could de-
that the liberties of the people are secure. It goes
principle that all power is in the people, and that
s have no power, but what are enumerated in that pa-
When a question arises with respect to the legality any
exercised or attempted by congress, let us place it
the governed. *Is it enumerated in the constitution?*
it is legal and just. If not, it is *arbitrary* and
itutional. Candour must confess it is infinitely more

" attentive to the liberties of the people than any state
" government.

" Mr Lee then said, that under the *state* government
" people reserved to themselves certain enumerated
" and that the rest were vested in their rulers. Th
" fequently the powers referved to the people were
" inconfiderable exception from what was given to
" lers. But that in the *federal* government the rulers
" people were vefted with certain *defined* powers, an
" *was not delegated to thefe rulers were retained* by th
" The confequence of this, he faid, was, that the
" powers were only an exception to thofe which ft
" in the people, that the people thetefore knew w
" had given up, and could be in no danger. He
" fied the propofition in a familiar manner. He
" that if a man delegated certain powers to an
" would be an *infult upon common fenfe*, to fuppofe,
" agent could legally tranfact any bufinefs for his p
" which was not contained in the commiffion whe
" powers were delegated. But that if a man empow
" *reprefentative* or *agent* to tranfact all his bufinef
" certain enumerated parts, the clear refult was, tha
" gent could lawfully tranfact every poffible part of h
" cipal's bufinefs except enumerated parts—He add
" who are to go to congrefs will be the fervants of
" ple. They are created and depured by us, and
" able by us. Is there a greater fecurity than thi
" ftate government? To fer ify this fecurity *is there*
" *ftitutional remedy* in the government, to reform a
" which fhall be found inconvenient?"

I take it for granted then, that thofe who opp
adoption were apprehenfive of the doctrine of impli
powers, which the advocates of the fyftem faid was i
ble from the nature of the fubject. The apprehenfi
ever, that fuch an idea might be contended for, ind
amendments, to which I fhall attend in the courfe
veftigation. Having ftated the extraneous opinio

point, I shall next enquire whether such a power does exist in the plan of the constitution, as originally adopted—and 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 in *law* and equity *arising under* this *constitution*, the *laws of the United States*, and treaties made under their authority;

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

3d. 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. 3d. 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 the

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. 3 art. offenders against treaties, or against ambassadors, &c. and under the 3 section, persons guilty of treason, which is *defined*, and of which they are to *declare* the *punishment*.—So far this clau

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 organise 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 no *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 *implied 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 ſeperate body or 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 *purſuance* of it, ſhall be the ſupreme law of the land," &c. The queſtion now on the carpet is whether this act be in *purſuance* 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 *purſuance* of the conſtitution, though it is of no conſequence how

this point is decided, as the amendments expresly 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 "Federalist," 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 expresly 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 officres 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.