AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 4: The Early National Era – Federalism

Virginia Report of 1799[1]

The Alien and Sedition Acts of 1798 were deeply controversial. The Jeffersonians reacted with alarm to the Federalist measure. The Sedition Act created a federal criminal offense of seditious libel, which threatened fines and imprisonment for anyone who said or published anything that tended to bring the federal government or its officers into disrepute. Similar offenses existed in England, and several of the states recognized such a crime after the Revolution. The Sedition Act was not only partisan in its motivations and application, however; it was also seen as running afoul of both the enumeration of powers and the First Amendment. The Jeffersonian Republicans made use of the political institutions available to them to protest the Act. Those protests included resolutions passed by the Virginia and Kentucky legislatures declaring the acts to be unconstitutional and beyond the scope of federal power. Other states and Congress itself responded to the Resolutions of 1798 by defending the statutes and denouncing Virginia and Kentucky for questioning the constitutionality of a federal law. James Madison, who had secretly authored the Virginia Resolution, resigned his seat in the U.S. House of Representatives in order to stand for election to the Virginia legislature. From that outpost, he wrote a legislative report further explaining why the Alien and Sedition Acts were unconstitutional and why the states had the authority to make such pronouncements. The Virginia Report of 1799 was published separately by the legislature and widely circulated during the electoral campaigns of 1800. The Jeffersonians won the elections of 1800 and allowed the laws to go unenforced and expire without renewal. How does Madison understand congressional power? How does he understand the freedom of the press? Could Congress rely on the states to protect the nation and the federal government from dangerous speech?

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Is there any express power, for executing which [the Sedition Act] is a necessary and proper power?

The power which has been selected, as the least remote, in answer to this question, is that of "suppressing insurrections;" which is said to imply a power to *prevent* insurrections, by punishing whatever may *lead* or *tend* to them. . . .

Has the Federal Government no power, then, to prevent as well to punish resistance to the laws?

They have the power, which the Constitution deemed most proper, in their hands for the purpose. The Congress has the power before it happens, to pass laws for punishing it; and the executive and the judiciary have the power to enforce those laws when it does happen.

. . . [T]he construction here put on the terms "necessary and proper," is precisely the construction which prevailed during the discussions and ratifications of the Constitution. It may be added, and cannot too often be repeated, that is a construction absolutely necessary to maintain their consistency with the peculiar character of the government, as possessed of particular and defined powers only; not of the general and indefinite powers vested in ordinary governments. . . . [I]t must be wholly immaterial, whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers.

This branch of the subject will be closed with a reflection which must have weight . . . especially with those who place peculiar reliance on the judicial exposition of the Constitution, as the bulwark provided against undue extensions of the legislative power. If it be understood that the powers implied

[1] Excerpt taken from *The Virginia Report of 1799–1800, touching the Alien and Sedition Laws* (Richmond: J.W. Randolph, 1850), 210–227.

in the specified powers, have an immediate and appropriate relation to them, as means, necessary and proper for carrying them into execution, questions of the constitutionality of laws passed for this purpose, will be of a nature sufficiently precise and determinate for judicial cognizance and control! If, on the other hand, Congress are not limited in the choice of means by any such appropriate relation of them to the specified powers; but may employ all such means as they deem fit to *prevent*, as well as to *punish*, crimes subjected to their authority . . . everyone must perceive, that questions relating to means of this sort, must be questions of mere policy and expedience, on which legislative discretion alone can decide, and from which the judicial interposition and control are completely excluded.

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The freedom of the press under the common law; is, in the defenses of the sedition-act, made to consist in an exemption from all *previous* restraint on printed publications, by persons authorized to inspect and prohibit them. It appears to the committee, that this idea of the freedom of the press, can never be admitted to be the American idea of it: since a law inflicting penalties on printed publications, would have a similar effect with a law authorizing a previous restraint on them. . . .

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The nature of governments elective, limited, and responsible, in all their branches, may well be supposed to require a greater freedom of animadversion than might be tolerated by the genius of such a government as that of Great Britain. In the latter, it is a maxim, that the king . . . can do no wrong. . . . In the United States, the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both being elective, are both responsible. Is it not natural and necessary, under such different circumstances, that a different degree of freedom, in the use of the press, should be contemplated?

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The practice of America must be entitled to much more respect. In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing, the freedom of the press has stood; on this footing it yet stands. . . .

. . . . Had "sedition-acts," forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day, under the infirmities of a sickly confederation? Might they not possibly be miserable colonies, groaning under a foreign yoke?

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Is then the federal government, it will be asked, destitute of every authority for restraining the licentiousness of the press, and for shielding itself against the libelous attacks which may be made on those who administer it?

The Constitution alone can answer the question. If no such power be expressly delegated, and it be not both necessary and proper to carry into execution an express power; above all, if it be expressly forbidden by a declaratory amendment to the Constitution, the answer must be, that the federal government is destitute of all such authority.

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Let it be recollected, lastly, that the right of electing members of the government, constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right, depends on the knowledge of the comparative merits and demerits of the candidates for public trust; and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively. . . . [W]ill not those in power derive an undue advantage for continuing themselves in it; which by impairing the right of election, endangers the blessings of the government founded on it?