AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 5: The Jacksonian Era—Democratic Rights/Free Speech/Congressional Debates on Free Speech and Slavery

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The Post-Office Controversy (expanded)

The first constitutional controversy over abolitionist speech arose when the American Anti-Slavery Society in 1835 mailed abolitionist pamphlets to prominent southern citizens. Amos Kendall (1789–1869), the postmaster general, informed local postmasters that they had no obligation to deliver abolitionist literature, even though no law existed on the subject. Both Kendall and President Jackson immediately urged Congress to pass a law legally banning anti-slavery literature from the mails.

Two controversies erupted when Jackson made that proposal. One controversy was over federalism. Senator John C. Calhoun (1782–1850) of South Carolina insisted that the federal government had no power to determine what literature could be mailed. He thought the federal government should prohibit only material that was banned in the recipient state. The other controversy was over free speech. Representative Hiland Hall (1795–1885) claimed that Congress could not constitutionally exclude anti-slavery speech from the mails. These legislative divisions prevented Congress from taking a clear stand on the controversy over abolitionist pamphlets. The Post Office Act of 1836 asserted that postmasters could not "unlawfully" refuse to deliver the mail, but did not specify what constituted an unlawful refusal. Many Jacksonian postmaster generals interpreted that law as prohibiting postmasters from delivering anti-slavery literature in states where that literature was prohibited.

Consider the relationship between the post office and free speech when reading the materials below. How did the participants in this debate conceptualize that relationship? Was the debate over whether the post office may refuse to deliver literature that is not protected by the First Amendment? Did the post office have to mail literature that is protected by the First Amendment? How did the various participants in the debate conceptualize the First Amendment?

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Amos Kendall, "Report of the Postmaster General"[1]

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A number of individuals have established an association in the northern and eastern States, and raised a large sum of money, for the purpose of effecting the immediate abolition of Slavery in the southern States. One of the means resorted to has been the printing of a large number of newspapers, pamphlets, tracts, and almanacs, containing exaggerated, and in some instances, false accounts of the treatment of slaves, illustrated with cuts calculated to operate on the passions of the colored men, and produce discontent, assassination, and servile war. These they attempted to disseminate throughout the slave-holding States by the agency of the public mails.

It is universally conceded that our States are united only for certain purposes. There are interests in relation to which they are believed to be as independent of each other as they were before the Constitution was formed. The interest which the people in some of the States have in slaves is one of them. No State obtained by the union any right whatsoever over slavery in any other State; nor did any State lose any of its power over them within its own borders. On this subject, therefore, if this view be

[1] *Congressional Globe,* 24th Congress, 1st Session, App. (1833), 8–9.

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correct, the States are still independent, and may fence round and protect their interest in slaves, by such laws and regulations as, in their sovereign will, they may deem expedient.

Nor have the people of one State any more right to interfere with this subject in another State, than they have to interfere with the internal regulations, rights of property, or domestic police of a foreign nation. . . . Whatever claim may be set up or maintained to a right of free discussion, within their own borders, of the institutions and laws of other communities over which they have no rightful control, few will maintain that they have a right, unless it be obtained by compact or treaty, to carry on such discussions within those communities, either orally or by the distribution of printed papers, particularly if it be in violation of their peculiar laws, and at the hazard of their peace and existence. . . . It is not easy, therefore, to perceive how the citizens of the northern States can possess or claim the privilege of carrying on discussions within the southern States, by the distribution of printed papers which the citizens of the latter are forbidden to circulate by their own laws.

. . . . In the exercise of their reserved rights and for the purpose of protecting this interest [in slavery] and insuring the safety of their people, some of the States have passed laws prohibiting, under heavy penalties, the printing or circulation of papers like those in question within their respective territories. It has never been alleged that those laws are incompatible with the Constitution and laws of the United States. Nor does it seem possible that they can be so, because they relate to a subject over which the United States cannot rightfully assume any control under that Constitution, either by law or otherwise. If these principles be sound, it will follow that the State laws on this subject are, within the scope of their jurisdiction, the supreme laws of the land, obligatory alike on all persons, whether private citizens, officers of the States, or functionaries of the General Government.

The Constitution makes it the duty of the United States "to protect each of the States against invasion; and, on application of the Legislature, or of the Executive" . . ., against domestic violence. It is to obviate danger from this quarter, that many of the State laws, in relation to the circulation of incendiary papers, have been enacted. Without claiming for the General Government the power to pass laws prohibiting discussions of any sort, as a means of protecting States from domestic violence, it may safely be assumed, that the United States have no right, through their officers or departments, knowingly to be instrumental in producing, within the several States, the very mischief which the Constitution commands them to repress. It would be an extraordinary construction of the powers of the General Government, to maintain that they are bound to afford the agency of their mails and post offices, to counteract the laws of the States, in the circulation of papers calculated to produce domestic violence; when it could, at the same time, be one of their most important constitutional duties to protect the States against the natural, if not necessary consequences produced by that very agency.

The position assumed by this Department is believed to have produced the effect of withholding its agency, generally, in giving circulation to the obnoxious papers in the southern States. Whether it be necessary more effectually to prevent, by legislative enactments, the use of the mails, as a means of evading or violating the constitutional laws of the States in reference to this portion of their reserved rights, is a question which, it appears to the undersigned, may be submitted to Congress, upon a statement of the facts, and their own knowledge of the public necessities.

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Andrew Jackson, Seventh Annual Message

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. . .I must also invite your attention to the painful excitement produced in the South by attempts to circulate through the mails inflammatory appeals addressed to the passions of the slaves, in prints and in various sorts of publications, calculated to stimulate them to insurrection and to produce all the horrors of a servile war. There is doubtless no respectable portion of our countrymen who can be so far misled as to feel any other sentiment than that of indignant regret at conduct so destructive of the harmony and peace of the country, and so repugnant to the principles of our national compact and to the dictates of humanity and religion. Our happiness and prosperity essentially depend upon peace without our borders, and peace depends upon the maintenance in good faith of those compromises of the

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Constitution upon which the Union is founded. It is fortunate for the country that the good sense, the generous feeling, and the deep-rooted attachment of the people of the nonslaveholding States of the Union and to their fellow-citizens of the same blood in the South have given so strong and impressive a tone to the sentiments entertained against the proceedings of the misguided persons who have engaged in these unconstitutional and wicked attempts . . . as to authorize the hope that those attempts will no longer be persisted in. But if these expressions of the public will shall not be sufficient to effect so desirable a result, not a doubt can be entertained that the nonslaveholding States, so far from countenancing the slightest interference with the constitutional rights of the South, will be prompt to exercise their authority in suppressing so far as in them lies whatever is calculated to produce this evil.

In leaving the care of other branches of this interesting subject to the State authorities, to whom they properly belong, it is nevertheless proper for Congress to take such measures as will prevent the Post-Office Department, which was designed to foster an amicable intercourse and correspondence between all the members of the Confederacy, from being used as an instrument of an opposite character. The General Government, to which the great trust is confided of preserving inviolate the relations created among the States by the Constitution, is especially bound to avoid in its own action anything that may disturb them. I would therefore call the special attention of Congress to the subject, and respectfully suggest the propriety of passing such a law as will prohibit, under severe penalties, the circulation in the Southern States, through the mail, of incendiary publications intended to instigate the slaves to insurrection.

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Report from the Select Committee on the Circulation of Incendiary Publications[2]

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The Select Committee fully concur with the President . . . as to the character and tendency of the papers, which have been attempted to be circulated in the South, through the mail, and participate with him in the indignant regret, which he expresses at conduct so destructive of the peace and harmony of the country, and repugnant to the Constitution, and the dictates of humanity and religion. They also concur in the hope that, if the strong tone of disapprobation which these unconstitutional and wicked attempts have called forth, does not arrest them, the non-slaveholding States will be prompt to exercise their power to suppress them, as far as their authority extends. But while they agree with the President as to the evil and its highly dangerous tendency, and the necessity of arresting it, they have not been able to assent to the measure of redress which he recommends; that Congress should pass a law prohibiting under severe penalty the transmission of incendiary publications, though the mail, intended to instigate the slaves to insurrection.

After the most careful and deliberate investigation, they have been constrained to adopt the conclusion that Congress has not the power to pass such a law: that it would be a violation of one of the most sacred provisions of the Constitution, and subversive of reserved powers essential to the preservation of the domestic institutions of the slaveholding states. . . .

. . . [The Committee] refer to the amended Article of the Constitution which . . . provides that Congress shall pass no law, which shall abridge the liberty of the press, a provision, which interposes . . . an insuperable objection to the measure recommended by the President. . . .

. . . Madison, in his celebrated report to the Virginia Legislature in 1799, against the Alien and Sedition Law, . . . conclusively settled the principle that Congress has no right, in any form, or in any manner, to interfere with the freedom of the press. . . .

. . . Assuming [the Sedition Act] to be unconstitutional . . . which no one now doubts, it will not be difficult to show that if, instead of inflicting punishment for publishing, the act had inflicted punishment for circulating through the mail, for the same offense, it would have been equally unconstitutional. The one would have abridged the freedom of the press as effectually as the other. The

[2] Sen. Doc. 118, 24th Cong., 1st Sess. (1836), reprinted in *The Papers of John C. Calhoun* , ed. Clyde N. Wilson, vol. XIII (Columbia: University of South Carolina Press, 1980), 53–60.

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object of publishing is circulation, and to prohibit circulation is, in effect, to prohibit publication. They have both a common object. The communication of sentiments and opinions to the public, and the prohibition of one may as effectually suppress such communication, as the prohibition of the other, and, of course, would as effectually interfere with the freedom of the press, and be equally unconstitutional.

. . . [I]f it be admitted, that Congress has the right to discriminate in reference to their character, what papers shall, or what shall not be transmitted by the mail, [that] would subject the freedom of the press, on all subjects, political, moral, and religious, completely to its will and pleasure. . . .

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. . . The principle on which the Sedition Act was condemned, as unconstitutional, was a general one, and not limited to its application, to that act. It withdraws from Congress all right of interference with the press, in any form, or shape whatever; and the Sedition Law was put down, as unconstitutional, not because it prohibited publications against the Government, but because it interfered, at all, with the press. The prohibition of any publication on the ground of its being immoral, irreligious, or intended to excite rebellion, or insurrection, would have been equally unconstitutional; and from parity of reason, the suppression of their circulation, through the mail, would be no less so.

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. . . Nothing is more clear, than that the admission of the right on the part of Congress to determine what papers are incendiary, and as such to prohibit their circulation through the mail, necessarily involves the right to determine, what are not incendiary and to enforce their circulation. Nor is it less certain, that to admit such a right would be virtually to clothe Congress with the power to abolish slavery, by giving it the means of breaking down all the barriers which the slave holding States have erected for the protection of their lives and property. It would give Congress without regard to the prohibitory laws of the States the authority to open the gates to the flood of incendiary publications, which are ready to break into those States, and to punish all, who dare resist, as criminals. Fortunately, Congress has no such right. The internal peace and security of the States are under the protection of the States themselves, to the entire exclusion of all authority and control on the part of Congress. It belongs to them, and not to Congress, to determine what is, or is not, calculated to disturb their peace and security, and of course in the case under consideration, it belongs to the Slave holding States to determine, what is incendiary and intended to incite to insurrection, and to adopt such defensive measures, as may be necessary for their security, with unlimited means of carrying them into effect, except such as may be expressly inhibited to the States by the Constitution.

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If, consequently, the right to protect her internal peace and security belongs to a State, the general Government is bound to respect the measures adopted by her for that purpose, and to cooperate in their execution, as far as its delegated powers may admit, or the measure may require. Thus, in the present case, the slave-holding States having the unquestionable right to pass all such laws as may be necessary to maintain the existing relation between master and slave, in those States, their right, of course, to prohibit the circulation of any publication, or any intercourse, calculated to disturb or destroy that relation is incontrovertible. In the execution of the measures, which may be adopted by the States for this purpose, the powers of Congress over the mail, and of regulating commerce with foreign nations and between the States, may require cooperation on the part of the general Government; and it is bound, in conformity with the principle established, to respect the laws of the State in their exercise, and so to modify its acts, as not only not to violate those of the States, but, as far as practicable, to cooperate in their execution.

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Regarding [the above principle] as established . . . the Committee . . . have prepared a Bill . . . prohibiting under penalty of fine and dismissal from other, any Deputy Postmaster, in any State, Territory or District, from knowingly receiving and putting into the mail, any letter, packet, pamphlet, paper, or pictorial representation, directed to any Post office or person in a State, Territory or District, by the laws of which the circulation is forbidden. . . .

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Report of the Minority of Committee on Post Offices and Post Roads on the President's Message[3]

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. . . [T]he establishment of a censorship over all publications . . . must necessarily operate with extreme harshness. . . . In order to make the law effectual, a censor must be appointed in the vicinity of every printing press, whose duty it would be to examine every number of every periodical, and every edition of all other publications, for which a mail circulation was sought, and certify their fitness for such circulation to the postmasters. . . . One of the obvious legal effects of this mode of legislation would be to transfer the power of determining a publisher's right to circulate, and also his right of property in the publications, from a jury of his peers to the summary discretion of any one of many thousand individuals. The medium of mail circulation has become so useful and important to the press of the country, and would be so trammeled and obstructed by the previous submission of all matters to be transmitted to the tribunal of a licenser, that this species of censorship could be scarcely less exceptionable and oppressive than a censorship that should extend to the restraint of the actual printing of publications. On the whole, a law of this description would be in such direct opposition to all the preconceived opinions of the People of this country, so abhorrent to their notions of the principles of civil liberty, and so utterly destructive of the freedom of the press, that the undersigned will not permit themselves seriously to apprehend that, under any possible circumstances, such a law can ever find a place on our statute book. . . .

The second mode of legislation [is] prohibiting the circulation by mail of such publications as the States shall prohibit. . . . If one State has a right to call on Congress to enact laws to prevent the effect of a mail circulation of publications within its limits, any other State has the same right; and if the judgment of one State is to be received as evidence of the evil tendency of particular publications, the judgment of every other State must have the same force, and impose the same obligation on Congress. A statute, therefore, founded on this principle, would provide that it should be an offense against the United States for any person to send through the mail into any State any publication the circulation of which might be prohibited by the laws of such State. A statute of this description would not only punish the citizen of Massachusetts before the federal court in his State for sending publications by mail on the subject of slavery into Georgia, but would also punish the citizen of Georgia, before the federal court in his State, for sending a publication on any subject into Massachusetts, that subject, whatever it might be, having previously come under the interdict of the law of Massachusetts. . . . One State might prohibit the dissemination of the Catholic doctrine; another, that of the Protestant; one that of one political sentiment, and another that of its opposite. . . .

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We are then thrown back on the question of what authority Congress possesses over "incendiary publications," by the grants of power contained in the Constitution, under the restrictions on the exercise of those powers found in that instrument? . . . The mode which this species of legislation provides, for executing the judgment which the Government forms of the character of publications, is most exceptionable and alarming. It does not, like other statutes, provide for the trial and punishment of the actual offender, but for the manual seizure and destruction of the article which it judges to be offensive. It deprives the citizen of his right of trial by jury to determine the fact of the unlawfulness of the publication, and takes from him his property without any "process of law" whatever. In this respect it is a direct violation of the fifth article of the amendment to the constitution. It is a censorship of the Press, committed to this summary discretion of any single Post Master—a censorship exercised in secret and upon evidence which can only be reached by an inquisitorial scrutiny into the contents of the mails, which must at once destroy all confidence in this security for any purpose. It is believed that a law with such odious features could not long be tolerated by any free people.

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[3] *Register of Debates in Congress,* 24th Cong. 1st Sess. (1836), 2944. See Richard John, "Highland [Hiland] Hall's 'Report on Incendiary Publications,' A Forgotten Nineteenth Century Defense of the Freedom of the Press," *American Journal of Legal History* 41, no. 1 (1997): 94.

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. . . The minority have not been able to come to the conclusion that Congress possesses the constitutional power to restrain the mail circulation of the publications specified in the message. On the contrary, they believe that any legislation for that purpose would come in direct conflict with that clause in the Constitution which prohibits Congress from making any law "abridging the freedom of speech or of the press." . . . The meaning of the term abridge is not qualified in the Constitution by the specification of any particular degree beyond which the liberty of the press is not permitted to be diminished. The slightest contraction or lessening of that liberty is forbidden. Nor does the Constitution point out any particular mode by which the freedom of the press may not be abridged. All modes of abridgment whatever are excluded, whether by the establishment of a censorship, the imposition of punishments, a tax on the promulgation of obnoxious opinions, or by any other means which can be devised to give a legislative preference, either in publication or circulation, to one sentiment emanating from the press, over that of another. Otherwise, the clause, by being susceptible of evasion, would be nugatory and useless. It was not against particular forms of legislation but to secure the substance of the freedom of the press, that the clause was made a part of the Constitution. The object of publication is circulation. The mere power to print, without the liberty to circulate, would be utterly valueless. The Post Office power, which belongs to the General Government, is an exclusive power. Under that power Congress has the entire control of the whole regular circulation of the country. Neither a State nor individuals, in opposition to the will of Congress, can establish or carry on the business of such circulation. A power, therefore, in Congress to judge of the moral, religious, political, or physical tendency of publications, and to deny the medium of mail circulation to those it deemed of an obnoxious character, would not only enable Congress to abridge the freedom of the press, but absolutely and completely to destroy it. . . .

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Those who denied the constitutionality of the sedition act, and among them Mr. Madison, in his elaborate and able report, made to the Virginia House of Delegates in 1799, contended that the clause of the Constitution which provides that Congress shall make no law "abridging the freedom of speech, or of the press," was to be understood as a clear prohibition of all power in Congress over the subject of the press, and that consequently Congress could make no law in any manner affecting it, or in other words, could express no legislative opinion of the character and tendency of its productions. This doctrine is believed to have obtained the almost universal assent of the People of the United States, and especially of that portion of the People of the Union for whose peculiar benefit the proposed legislation is intended. In this doctrine the undersigned concur; and if it be admitted as the true doctrine, if it be admitted that Congress can make no law in any manner affecting the press, they cannot conceive what possible ground remains for argument, in favor of the constitutionality of the legislation now in contemplation. . . . It will be readily conceded that Congress, under the post office power, may make any law which is necessary and proper to secure the safe, convenient, and expeditious transportation of the mail. . . . Nor will the undersigned undertake to say that Congress could not, under its post office power, prohibit the use of the mail for transportation of articles calculated to produce mischief or crime, in cases where its legislation would not come in conflict with any of the prohibitory clauses of the Constitution. The sending through the mail of forged papers, as checks, drafts, or bank bills, might present a strong case to the consideration of Congress. . . . [Nevertheless], They hold that the prohibitory clauses of the Constitution are co-extensive with the whole instrument; that they restrain, absolutely and completely, the conferred powers, and that they cannot, under any presence, be violated without a violation of the Constitution. . . . The prohibition of "incendiary publications" from mail circulation is not within the legitimate scope of the post office power; the power of proscribing them not being at all necessary to the safe, convenient, or expeditious transportation of the mail. . . . A law to prevent their circulation would be founded in erroneous and unconstitutional principles. Under color of providing for the convenient transportation of the mail, and of preventing its use for evil purposes, it would assume a power in Congress to judge of the tendency of opinions emanating from the press; a power to discriminate between packages, not in reference to their bulk or form, but in relation to the sentiments they might be designed to inculcate. One class of opinions, meeting the approbation of Congress, is permitted a free circulation; another class of opinions, which Congress denominate "dangerous, seditious, and incendiary," is prohibited. . . . The People of the United States never intended that the Government of the Union should exercise over the

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press the power of discriminating between true and erroneous opinions, of determining that this sentiment was patriotic, that seditious and incendiary, and therefore wisely prohibited Congress all power over the subject. The minority of the committee respectfully submit to the House that Congress does not possess the constitutional power to distinguish from other publications, of like size and form, the "incendiary publications" specified in the Message of the President, or in any way to restrain their mail circulation.

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