

Neither Snow nor Congress: Article I Implied Duties Exemplified by the Postal Clause

*Robert Rucker**

Article I, § 8 begins by stating that “[t]he Congress shall have power to.” These words serve as the introduction to the 18 clauses that constitute the full array of Congress’s enumerated powers. Since the time of ratification, Congress has exercised the breadth of powers granted to it by Article I, though it has often done so in different ways. However, while Congress has frequently changed the way in which it exercises its powers, it has yet to completely relinquish a power granted to it.

Based on its language, Article I, § 8 is seemingly discretionary in that it merely provides that Congress “shall have the power to” legislate. In framing Article I in this manner, it can thus be argued that Congress is not required to do anything at all; for if Article I, § 8 is purely discretionary, Congress could simply choose not to exercise any power. However, a situation in which Congress chooses to do nothing would be at odds with both the Constitution’s basic purpose as described in the Preamble and the understanding held by the Framers and ratifying public.

By taking an originalist approach to understanding one enumerated power, the Postal Power of Art. I, § 8, cl. 7 (the Postal Clause), this paper will explore the issue in more detail. Specifically, this paper will set forth a new, and likely controversial, conclusion as to the original understanding of certain Article I powers. By applying an originalist approach to the Postal Clause, this paper will demonstrate that Congress is required to maintain a minimum level of “post offices” and “post roads” in order to align to the original understanding of the Postal Clause.

In other words, the Framers and ratifying public understood that the Constitution imposes upon Congress a duty to discharge the Postal Power. In reaching this conclusion, this paper will not only look at prior Supreme Court precedent discussing constitutional duties, but will also explore the centuries of history that culminated in the Postal Clause at it exists today. In doing so, this paper will also provide a framework for analyzing whether Article I, § 8 imposes other such duties upon Congress beyond the Postal Clause.

* - A sincere thank you is owed to Prof. Harold Krent, Chicago-Kent College of Law, for his invaluable assistance throughout the drafting of this paper. The Chicago-Kent Honors Scholar Class of 2023 was also a tremendous source of feedback and inspiration.

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I. INTRODUCTION

The Great Compromise of 1787 involved both the idea that Congress would be bicameral, with different modes of representation in each chamber, and the idea that it would be a legislature of enumerated powers.¹ The product of intense debates during the Constitutional Convention, Article I, §8 of the Constitution begins by stating that “[t]he Congress shall have Power To,” which serves as the lead-in to the list of 18 enumerated powers that follows.² Within a short period following ratification, Congress exercised the breadth of these powers. For example, in 1789, the federal government borrowed money for the first time—a power afforded to it by Article I, § 8, cl. 2.³ In 1790, Congress founded Washington, D.C. to serve as the nation’s capital—a power afforded to it by Article I, § 8, cl. 17.⁴ And in 1791, Congress chartered the First Bank of the United States, a saga which culminated in the seminal case of *McCulloch v. Maryland*.⁵

Turning to Clause 7, it provides one of these enumerated powers—the power to “establish Post Offices and post Roads.”⁶ These six words constitute the entirety of the Postal Clause and Congress’s Postal Power. Following ratification of the Constitution, Congress authorized the federal post office under temporary legislation until 1792, when it firmly wove the post office into the nation’s fabric with the Postal Service Act.⁷ Two centuries later, the United States Postal Services (USPS)

¹ See *About the Senate & The U.S. Constitution: Equal State Representation*, U.S. SENATE, <https://www.senate.gov/about/origins-foundations/senate-and-constitution/equal-state-representation.htm> [<https://perma.cc/7ESL-9T45>] (last visited July 24, 2022, 2:01 PM).

² U.S. CONST. art. I, § 8.

³ *Alexander Hamilton Issues Orders to Implement the First Public Loan Taken By the Government of the United States, Which Financed the First U.S. Government Operations*, RAAB COLLECTION <https://www.raabcollection.com/american-history-autographs/alexander-hamilton-oct-1789> [<https://perma.cc/UKT8-PN83>] (last visited, Oct. 12, 2022); U.S. CONST. art. I, § 8, cl. 2; see John Steele Gordon, *Past & Present: Alexander Hamilton and the Start of the National Debt*, U.S. NEWS (Sept. 18, 2008), <https://www.usnews.com/opinion/articles/2008/09/18/past-present-alexander-hamilton-and-the-start-of-the-national-debt>.

⁴ Tessa Berenson, *Here’s Why Washington D.C. Isn’t a State*, TIME (Apr. 15, 2016), <https://time.com/4296175/washington-dc-statehood-history> [<https://perma.cc/2QGA-H7EF>].

⁵ See *The First Bank of the United States*, FED. RSRV. HIST., <https://www.federalreservehistory.org/essays/first-bank-of-the-us> [<https://perma.cc/8ZJ3-2CLK>] (last visited July 22, 2022); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

⁶ U.S. CONST. art. I, § 8, cl. 7.

⁷ NCC Staff, *A Big Day in the History of the United States Postal Service*, NAT’L CONST. CTR. (Feb. 20, 2019), <https://constitutioncenter.org/blog/a-big-day-in-the-history-of-the->

serves as the federal government's official mail service: it employs almost 500,000 workers, generates \$77 billion in revenue, moves 128.9 billion items through its network annually, and has its roots in these six words.⁸

The Constitution's grant of power to establish post offices and post roads, like all Article I powers, is seemingly permissive—one that affords Congress significant discretion. The Postal Clause lacks any language as to whether Congress has a duty to maintain a postal system or whether Congress has the power to completely abolish the post offices and post roads it creates. Due to the brevity of the clause, it must be asked whether Congress can, in theory, completely relinquish the power granted to it under Article I, § 8, cl. 7.

Throughout the entirety of the nation's existence, as will be explained, the provision of a postal service by the federal government appears to have been assumed, and the federal postal service has existed for over two centuries without legislative interruption. However, the story of the American post office is complicated. On the eve of the revolution, the Continental Congress displaced the imperial system in the colonies with its own services, but largely coopted British mechanics.⁹ Immediately after the revolution, under the Articles of Confederation, and even in the first years of the Constitution, the fledgling nation simply maintained the very same system of post offices and post roads extant at the time.¹⁰ Essentially, the new republic implemented a “lift and shift” of the British postal service that preceded it.¹¹

But, to say that the United States merely sought to copy the entirety of the British system because the two relied on the same understanding of “post offices” and “post roads” ignores critical developments that occurred before, during, and immediately after the revolution. These

united-states-postal-service [<https://perma.cc/7MRD-E43A>].

⁸ *A Decade of Facts & Figures*, U.S. POSTAL SERV., <https://facts.usps.com/table-facts> [<https://perma.cc/JM6V-PSJP>] (last visited Jan. 6, 2022, 10:33 AM).

⁹ See Robert G. Natelson, *Founding-Era Socialism: The Original Meaning of the Constitution's Postal Clause*, 7 *BRIT. J. AM. L. STUD.* 1, 6 (2018) [hereinafter *Founding-Era Socialism*]. Note that while this source sets forth an interpretation of the Postal Clause, it is limited to an analysis of the revenue motive and the scope of Congress's Postal Power (*i.e.*, the outer limits of what Congress can *establish* under the clause). While this paper relies on some of the same underlying evidence, the core analysis herein begins nearly a century earlier and relies on additional evidence to show the intent behind the Postal Clause. Further, this paper focuses on the inverse of the conclusion presented therein – whether Congress could choose to fully dispense with the power granted to it under the Postal Clause.

¹⁰ *Id.*

¹¹ *Id.*

developments underscore that, while resting on the traditional language of “post offices” and “post roads,” there was a uniquely American understanding of postal services that underpinned the Postal Clause. Ultimately, this understanding leads to the inescapable conclusion that the Postal Clause is not a grant of complete, unfettered discretion to Congress. Instead, the original understanding of the Clause shows that the Constitution imposes a duty on Congress whereby it must exercise certain powers—including maintaining a minimum level of “post offices” and “post roads” under Article I, §8, cl. 7. In other words, to weigh in on a modern controversy, complete privatization of the USPS would be contrary to the original understanding of the Postal Clause.

In support of this conclusion, Part II will set forth this paper’s analytical framework, explore the scant case law on the issue, and summarize analogous issues in the Constitution. Then in applying that framework, Part III will briefly explore the first government postal systems, beginning with the earliest of human civilizations. Part IV will explore the establishment, purpose, and growth of the Royal Mail, and the implementation of the British model of postal services during the colonial period. Part V will then look at the emergence of the American understanding of the government’s role in postal services and at general postal theory during the revolutionary era. Part VI will explore how these earlier historical eras culminated in the Post Clause as written in the Constitution and how the Framers and ratifying public understood the clause. Finally, Part VII will set forth the implied duty contained in the Postal Clause and explain the limitations of Congress’s Postal Power while demonstrating the importance of this approach to constitutional interpretation.

II. ANALYTICAL FRAMEWORK

As noted, this paper seeks to analyze the original understanding of the Postal Clause and its relationship to the Constitution more broadly. Overall, with any type of originalist inquiry, the focus is on determining the generally accepted meaning of a constitutional provision during the ratification era.¹² This approach harkens back to *Gibbons v. Ogden*, where Chief Justice Marshall explained that,

¹² See *Originalism*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding”).

[i]f from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction.¹³

In *District of Columbia v. Heller*, Justice Scalia expanded on this foundation, explaining that the review of legal and other sources immediately after the Constitution's enactment to determine original understanding "is a critical tool of constitutional interpretation."¹⁴ In fact, *Heller* relied on the earlier case of *United States v. Sprague*, which held that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."¹⁵

Too often, an originalist approach excludes any evidence of meaning from after the date on which text was placed onto parchment, despite its recognized value as explained in *Heller*.¹⁶ In following the holding of *Heller* and the cases upon which it relies, this paper considers the actions of the Framers, the newly organized federal government, and the general public in the period immediately following ratification to be valid and crucial evidence of the Postal Clause's original meaning. In similar vein to the Necessary and Proper Clause, Article I powers, including the Postal Power, can only be understood by examining both the history leading to their creation and their implementation immediately following ratification during the first sessions of Congress.¹⁷

¹³ *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, 188–89 (1824).

¹⁴ *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

¹⁵ *United States v. Sprague*, 282 U.S. 716, 731 (1931).

¹⁶ See, e.g., *Founding-Era Socialism*, *supra* note 10, at 7 (discussing the exclusion of post-ratification evidence).

¹⁷ Both Madison and Jefferson expressed repeated concerns about interpreting the Necessary and Proper Clause broadly, including during the debates over whether to charter the First Bank of the United States. Yet, during the administrations of both, it appears that they accepted the interpretation set forth in *McCulloch v. Maryland*, which aligned with the Hamilton view of federalism. For example, see the controversy surrounding the Louisiana Purchase and Jefferson's assertion of its constitutionality. See, e.g., Eberhard P. Deutsch, *The Constitutional Controversy Over the Louisiana Purchase*, 53 AM. BAR ASSN. J. 50 (1967) (discussing the constitutional questions surrounding the Louisiana Purchase).

A. Existing Case Law on the Postal Clause

To date, cases on the Postal Clause and the Postal Power are sparse and there has yet to be a case arguing that Article I contains any semblance of an implied duty or that Congress is required to ensure the availability of postal services. Ultimately, this may be because Congress has yet to completely privatize the postal system in the United States, thus making the need to analyze this issue moot. However, from the few major cases that have been decided, the Postal Clause has generally been understood as a grant of broad power. For example, in *Kohl v. United States*, the Supreme Court applied several pieces of the Constitution when it affirmed Congress's ability to exercise eminent domain powers to establish post offices.¹⁸

Similarly, *Ex parte Jackson* embraced the general understanding of a broad power, though one that is inherently limited by other constitutional provisions.¹⁹ *Jackson* involved a challenge to a statute that prohibited certain types of materials from being transported through the postal system; those deemed to be "defrauding" the public.²⁰ As stated by the Court:

The power vested in Congress "to establish post-offices and post-roads" has been practically construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents.²¹

While the Court upheld the statute at issue, it nonetheless noted the general framework of the Constitution and the Postal Clause's relationship to other constitutional provisions.

More importantly, the *Jackson* Court set forth a basic principle that the First Amendment serves as a check on Congress's power, as "[n]or can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing."²² The Court went on to note that

¹⁸ *Kohl v. United States*, 91 U.S. 367, 372 (1875).

¹⁹ *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

²⁰ *Id.* at 728–29.

²¹ *Id.* at 728.

²² *Id.* at 733.

the Fourth Amendment also serves as a safeguard of the mail, stating: “[w]hilst regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation, in the search for prohibited matter.”²³ The Court’s analysis thus sets forth a constitutional rejection of the practice of letter opening for purposes of monitoring the public discourse. That practice, while a feature of the pre-revolution British postal service, was formally rejected by the United States with the ratification of the Constitution.²⁴

Furthermore, there have only been a handful of cases at the district court level involving arguments for a constitutional right to postal services. Such cases generally involved a disgruntled resident who was dissatisfied with their local mail service. For example, in *Ledin v. United States Postal Serv.*, after a series of issues with his local post office, the plaintiff sued, arguing that he possessed a right to free, at-home delivery.²⁵ His claim was that the post office’s failure to deliver his mail violated this right.²⁶ Similar facts and arguments were present in *Yellen v. United States Postal Serv.* just a few years earlier.²⁷ Despite the various ways in which plaintiffs made these arguments, in such cases, courts have continuously rejected the notion of a right to free, at-home delivery or other service.²⁸ In fact, the narrow scope of these cases is critical—courts have typically only been confronted with the discrete issues of cost and quality of service.

There are, however, two noteworthy cases contemplating the broader constitutional implications of the government’s postal service. First, *Lamont v. Postmaster General of the United States* wrestled with a statute aimed at eliminating communist propaganda in the mail.²⁹ Justice Brennan’s concurring opinion sets forth a series of crucial statements that

²³ *Id.* at 735.

²⁴ “Letter opening” refers to the Crown’s assertion that any item sent through the postal service was subject to inspection by the government at any time, and for any reason. See George L. Priest, *The History of the Postal Monopoly in the United States*, 18 J. L. & ECON. 33, 35 (1975). The practice of letter opening will be described in more detail in Part IV and Part VI.

²⁵ *Ledin v. U.S. Postal Serv.*, No. 4:18-CV-00276-SRB, 2018 WL 11242022, at *1 (W.D. Mo. July 16, 2018).

²⁶ *Id.*

²⁷ *Yellen v. U.S. Postal Serv.*, No. CIV. 12-00519 SOM-KSC, 2012 WL 5386903, at *1 (D. Haw. Oct. 31, 2012).

²⁸ See *Ledin*, 2018 WL 11242022, at *3 and *Yellen*, 2012 WL 5386903, at *3 (exemplifying the narrow scope of such cases).

²⁹ *Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301, 302–03 (1965).

are still cited today.³⁰ Specifically, Justice Brennan states “the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. I think the right to receive publications is such a fundamental right.”³¹

Despite *Lamont* not having to actually wrestle with this “fundamental right,” the much later case of *Currier v. Henderson* reflected on Brennan’s views.³² While *Currier* involved a plaintiff arguing the right to receive a free post office box and a litany of claims under the Equal Protection Clause and the Administrative Procedures Act, the court in dicta states: “[it] agrees with the plaintiffs that the right to receive mail is a fundamental right. . . . However, it is also true that there is no right to receive mail at the most convenient location; nor is there a right to receive a no-fee mailbox in which to receive mail.”³³ Thus, while the plaintiff ultimately lost on his claims, claims that were similar to those presented in *Ledin* and *Yellen*, the court nonetheless spoke generally as to the idea of a constitutional right to receive mail.³⁴

At the same time, courts have consistently precluded states from interfering with Congress’s exercise of power under the Postal Clause. For example, *Pensacola Tel. Co. v. Western Union Tel. Co.* held that states could not intrude upon the federal government’s statutory monopoly.³⁵ In other cases, such as *Illinois Cent. R.R. v. Illinois* and *Johnson v. Maryland*, the Supreme Court held that states could not interfere with the federal government’s postal roads by requiring route detours, or by imposing state-level licensing requirements on federal couriers.³⁶

Each of the aforementioned cases only address a narrow, specific issue before the court. American jurisprudence today lacks grand holdings related to the meaning of the Postal Clause and how it should be interpreted. If anything, the cases decided, including those discussed above, seemingly rest on a presumption that the federal government is to provide postal services, without

³⁰ See, e.g., *Currier v. Henderson*, 190 F. Supp. 2d 1221, 1230 (W.D. Wash. 2002), (stating “the right to receive mail is a fundamental right. See, e.g., *Lamont v. Postmaster General*.”).

³¹ *Lamont*, 381 U.S. at 308.

³² *Currier*, 190 F. Supp. 2d at 1230.

³³ *Id.*

³⁴ See *Ledin*, 2018 WL 11242022 at *1; *Yellen*, 2012 WL 5386903 at *1).

³⁵ *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 11 (1877).

³⁶ See *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 469–70, 476 (1892); *Johnson v. Maryland*, 254 U.S. 51, 55–57 (1920).

explaining how or why that it is the case.³⁷ If “mail,” in some sense of the word, is a “fundamental right” or “cornerstone of democratic government,” it must be because the Constitution codifies it as such.³⁸

While we know from cases such as *Ledin* and *Yellen* that the right under discussion does not include free at-home delivery or a free post office box, the post office is far more than just these two aspects. By taking an originalist approach to the Postal Clause, this paper will argue the Clause should be understood as containing an implied restriction on the power of Congress to completely divest itself from providing postal services. Since the original understanding of the Constitution’s Postal Clause is that the federal government’s duty is to, at a minimum, maintain the same postal system that the public grew accustomed to prior to and during the revolutionary era. If *Currier* is correct in stating that “the right to receive mail is a fundamental right”—one that should be seen as “deeply rooted in the nation’s history or tradition”—the Postal Clause must be more than a discretionary grant of power to be used *carte blanche*.³⁹

B. Analogous Issues in the Constitution

The idea that the Constitution imposes an implicit duty upon Congress may seem controversial at first. However, one of the earliest landmark cases involving the role of the federal judiciary addresses this very topic. In *Martin v. Hunter’s Lessee*, the Court of Appeals of Virginia asserted that the Supreme Court of the United States lacked jurisdiction to hear appeals arising from state courts.⁴⁰ As part of the

³⁷ For example, while *Currier* sets forth the idea that mail is a “fundamental right,” this court does not explain the basis for this assertion. See *Currier*, 190 F. Supp. 2d at 1230.

³⁸ *Mercatus Grp. v. Lake Forest Hosp.*, 641 F.3d 834, 846 (7th Cir. 2011). Courts have long considered those rights protected by the Constitution and the Bill of Rights to be those that are “cornerstone[s] of democratic government,” meaning that they are of paramount importance. See, e.g., *id.* (citing *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967)). As explained by Justice Brennan in *Lamont*, he believed that the Constitution establishes that “the right to receive [mail]” is among those fundamental rights upon which our democratic system relies. *Lamont*, 381 U.S. at 308 (Brennan, J., concurring). For, as Brennan states, “[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them.” *Id.* (Brennan, J., concurring).

³⁹ *Currier*, 190 F. Supp. 2d at 1230; for cases where the Court argues that the Constitution protects those rights “deeply rooted in th[e] Nation’s history and tradition” as fundamental rights; see *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *Griswold v. Connecticut*, 381 U.S. 479, 499–502 (1965) (Harlan, J., concurring).

⁴⁰ *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 323 (1816).

Supreme Court's subsequent analysis into the power and role of the federal judiciary, Justice Story confronted the issue of the Constitution's vagueness, as the Supreme Court's mandate was not entirely clear from the text of Article III.⁴¹ In his opinion, Justice Story explains that the Constitution is intentionally vague because it serves as a perpetual endowment of power to the government by the people.⁴² As he states, this understanding must underpin any Constitutional analysis, for:

The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms.⁴³

After applying this baseline understanding, the Court ultimately concludes that Article III imposes a mandatory obligation on Congress to establish a Supreme Court that is vested with the judicial power of the United States.⁴⁴

Yet, before even beginning the analysis, the Court states, “[t]he language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation.”⁴⁵ To reach its conclusion of a constitutional duty, the Court thoroughly analyzed the text of the Constitution, with focus on the use of the imperative “shall” throughout Article III.⁴⁶ By reviewing the text, structure, and logic of the Constitution, coupled with an understanding of the very purpose for its existence, the Court concludes that under Article III:

The judicial power must, therefore, be vested in some court, by congress; and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose that, under the

⁴¹ *Id.* at 325.

⁴² *See id.* at 326–27.

⁴³ *Id.* at 326.

⁴⁴ *Id.* at 329.

⁴⁵ *Id.* at 328.

⁴⁶ *See Martin*, 14 U.S. (1 Wheat.) at 328.

sanction of the constitution, they might defeat the constitution itself; a construction which would lead to such a result cannot be sound.⁴⁷

Thus, *Martin* demonstrates that the Constitution can, and does, impose implied duties on Congress. As the Court states, Congress has the explicit duty to create the Supreme Court and vest it with the judicial power of the United States.⁴⁸ Further, Justice Story's opinion serves as a guidepost for future cases involving matters of constitutional interpretation. As he states, "[i]t will be found that whenever a particular object is to be effected, the language of the constitution is always imperative, and cannot be disregarded without violating the first principles of public duty."⁴⁹

Overall, *Martin* represents the rarest of constitutional analyses by the Court and, just like the federal postal system, the Supreme Court has existed since the time of ratification and there has been no serious attempt to abolish it.⁵⁰ Yet, *Martin* leaves open the question of constitutional duties elsewhere, explicitly noting that legislative powers are often discretionary.⁵¹ However, by engaging in a similar analysis related to Article I, this paper will ultimately conclude that not all of the enumerated powers contained therein can be understood as affording Congress complete and voluntary discretion. In fact, if a federal legislature is to exist at all, it must have some duties to discharge.⁵²

Because Article I pertains to the federal government's legislative power, the reasons for Congress's existence must be contained therein. Article

⁴⁷ *Id.* at 329.

⁴⁸ *Id.*

⁴⁹ *Id.* at 333.

⁵⁰ The Supreme Court was established following passage of the Judiciary Act of 1789 and has existed without interruption since then. See *History and Traditions*, SUP. CT. U.S., <https://www.supremecourt.gov/about/historyandtraditions.aspx> [<https://perma.cc/HT33-KEQ5>] (last visited July 23, 2022, 2:56 PM).

⁵¹ See *Martin*, 14 U.S. (1 Wheat.) at 333.

⁵² As the product of Enlightenment, the Constitution was heavily influenced by thinkers such as Locke, Montesquieu, and Rousseau. See Jack P. Greene, *Moderation and Liberty: Montesquieu and the American Founding*, 17 REVS. AM. HIST. 535, 535–36 (1989) (discussing the influence of Enlightenment thinkers on the Framers in the context of a scholarly review). In fact, Alexander Hamilton cited such thinkers in *The Federalist Papers*. Specifically, in *The Federalist No. 9*, he cites to Montesquieu's *Spirit of Laws*. THE FEDERALIST NO. 9 (Alexander Hamilton). This work sets forth a philosophical understanding of the necessity of laws and the need for separation of powers. As Montesquieu argues in the work, law is the mechanism by which society is managed. Thus, it would be an underlying function of Congress, *i.e.*, its duty, to manage the affairs of the nation in its role as legislature. See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 1, 8 (1748) (discussing the philosophical purpose of a legislature).

I, §§ 1–7 all relate to the rules of Congress’s internal operations; these sections state how a bill becomes a law and how Congress is to be elected, compensated, convened, etc.⁵³ Separately, § 9 imposes certain restrictions upon Congress’s powers, and § 10 imposes restrictions upon the states.⁵⁴ Nothing in these sections provides any sort of overall purpose for Congress’s existence, nor sets forth any duty it has to the people under the Constitution. Thus, by process of elimination, if Congress has any type of duty with respect to its Article I, *i.e.*, if there is a reason for its existence beyond voluntarily choosing to exercise its powers, it must be contained in § 8.

But, as was discussed earlier, Article I, § 8 simply states that “[t]he Congress shall have Power To.”⁵⁵ If we interpret this language to mean that all of § 8 is discretionary, Congress has no duties at all—it frankly would not have to do anything unless and until it chooses to exercise an enumerated power for some purpose. In the end, however, it is counterintuitive to argue that Congress does not exist to discharge any particular duties, as a purposeless legislature conflicts with the philosophical propositions that underpin the Constitution.⁵⁶ Therefore, § 8 must be more than a permissive grant of power—it must also impose some duty, or duties, upon Congress. For purposes of framing the implied duty contained in the Postal Clause, we can briefly look to other § 8 clauses. Specifically, both the Coinage Clause and the Naturalization Clause are suitable analogies.⁵⁷

i. Money and the Constitution

Starting with the Coinage Clause, Article I, § 8, cl. 5 provides that Congress has the power “[t]o coin Money, [and] regulate the Value thereof.”⁵⁸ Overall, this clause marks a stark contrast with the Articles of Confederation, under which states were authorized to mint their own currencies.⁵⁹ After ratification of the Constitution, on April 2,

⁵³ See U.S. CONST. art. I, §§ 1–7.

⁵⁴ *Id.* art. I, §§ 9–10.

⁵⁵ *Id.* art. I, § 8.

⁵⁶ See sources cited *supra* note 53. Independent of Enlightenment thought, the idea that the Framers created such a complex form of government only for it to be entirely discretionary would present a logical inconsistency by itself. As the old adage goes, “every creation has a purpose.”

⁵⁷ U.S. CONST. art. I, § 8, cl. 4, 5. This does not represent an exhaustive list of those powers that can be seen as imposing an implied duty, but rather, these represent a sampling of clauses for purposes of this academic exercise.

⁵⁸ *Id.* art. I, § 8, cl. 5.

⁵⁹ *History of the U.S. Mint*, U.S. MINT, <https://www.usmint.gov/learn/history/overview> [<https://perma.cc/NB2L-MEQS>] (Jan. 13, 2022).

1792, the Second Congress passed the Coinage Act, which established the national mint and the federal currency.⁶⁰ Since then, the federal government has minted coin and eventually paper money without interruption, making the U.S. Mint one of the oldest federal agencies.⁶¹

In reading the Constitution, the Coinage Clause is similar in structure to the Postal Clause. By combining the prelude in § 8 with the text of cl. 5, at first glance, Congress has the discretionary power to mint coin; the text itself does not state that Congress *must* mint coin or otherwise provide a currency.⁶² Instead, it merely states that Congress possesses the power to do so.⁶³ Thus, if we understand § 8 to be purely discretionary, it can be argued that Congress could choose to stop minting coin and could terminate the federal currency altogether at any time.

This contention, that Congress could whimsically choose to end the dollar, is not only startling, but also conflicts with the Constitution as a whole. Specifically, Article I, § 10 expressly prohibits states from coining their own money.⁶⁴ Thus, if Congress's power to mint coin is purely discretionary, in theory, the nation could then be left without a government currency. If Congress acted to abolish the currency today, given its status as the reserve currency and primary means of international exchange, the entire global economy could grind to a halt.⁶⁵ Nevertheless, viewing Article I, § 8 as purely discretionary could allow this result to occur. However, this position is contrary to evidence indicating that the Framers and Second Congress recognized the need for a single, federally-controlled currency.⁶⁶ It also ignores the plain language of the Constitution

⁶⁰ *Id.*

⁶¹ See *History*, U.S. MINT, <https://www.usmint.gov/learn/history> [<https://perma.cc/2548-LWS7>] (Feb. 1, 2022). Note that while the constitutional arguments surrounding the issuance of the first paper currency are intriguing, they are ultimately beyond the scope of this paper.

⁶² U.S. CONST. art. I, § 8, cl. 5.

⁶³ *Id.*

⁶⁴ *Id.* art. I, § 10.

⁶⁵ See, e.g., Mark Copelovitch, *Jack Dorsey Is Wrong. The Dollar Is Still a Global Reserve Currency.*, WASH. POST (June 2, 2022, 7:00 AM), <https://www.washingtonpost.com/politics/2022/06/02/usd-dollar-reserve-currency-economy/> [<https://perma.cc/FHV6-WKU6>]. For decades, the U.S. dollar has been the global reserve currency, and is critical to the global economy, financial markets, and trading. *Id.* Essentially, “the global economy runs on dollars” and if by some happenstance, the dollar was immediately terminated on a whim of the government, this system would no longer have a means of operating. *Id.* (discussing the importance of the United States dollar to the global financial system).

⁶⁶ See Edward Flaherty, *A Brief History of Central Banking in the United States: Money and the Constitution*, AM. HIST., <http://www.let.rug.nl/usa/essays/general/a-brief-history-of-central-banking/money-and-the-constitution.php> [<https://perma.cc/J653->

forbidding states from intruding in this area, which could leave a currency void if it were not an obligation on the part of the federal government to coin money.⁶⁷ But, more importantly, arguing that the Coinage Clause is a wholly discretionary power vested in Congress requires decoupling the Constitution from the necessities of the nation's approach to federalism.⁶⁸

ii. Naturalization and the Constitution

Article I also sets forth that Congress has the power “[t]o establish an uniform Rule of Naturalization.”⁶⁹ Naturalization, as defined by the Supreme Court, is “the act of adopting a foreigner, and clothing him with the privileges of a native citizen.”⁷⁰ Once again, the Constitution's grant of power appears permissive—Congress simply possesses the power to pass laws regarding naturalization.⁷¹ Seemingly, nothing in the Constitution's text requires that Congress pass such laws.⁷² Despite this, the Supreme Court has held that *only* Congress has the power to pass laws regarding naturalization—that even if a state law does not conflict with an act of Congress, the states have no power in this area and any such legislation is unconstitutional.⁷³

Given these understandings of the Naturalization Power, we would be left with a constitutional incongruence if we accept the proposition that all of Article I is discretionary. Specifically, if Congress has the exclusive power to pass laws regarding naturalization, and Congress has the absolute discretion to pass such laws, it would be possible to exist in a state where there are no laws regarding naturalization. While the rules of naturalization are within Congress's purview, for citizenship by “[n]

ZQTT] (last visited July 24, 2022, 2:40 PM).

⁶⁷ *See id.*

⁶⁸ *See* Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J. L. & PUB. POL'Y, 1017, 1051–52 (2008) (discussing how the Framers believed that “states were incompetent to handle the coinage power and that it should be lodged in the federal government.”).

⁶⁹ U.S. CONST. art. I, § 8, cl. 4.

⁷⁰ *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 162 (1892).

⁷¹ U.S. CONST. art. I, § 8, cl. 4.

⁷² Naturalization is only discussed in Art. I, § 8, cl. 4 and the Fourteenth Amendment, which simply provides that “persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.” U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment thus refers back to Article I's text that Congress “shall” have the power to pass such laws regarding naturalization. U.S. CONST. art. I, § 8, cl. 4.

⁷³ *See Chirac v. Lessee of Chirac*, 15 U.S. (2 Wheat.) 259, 269 (1817). *See also United States v. Wong Kim Ark*, 169 U.S. 649, 701 (1898).

aturalization is a privilege, to be given, qualified, or withheld as Congress may determine,” Congress must still act to set forth those rules.⁷⁴ So, while Congress could pass a law that denies naturalization altogether within the constraints of other constitutional provisions, it must nevertheless affirmatively act to do so by discharging its powers. Thus, it must be understood that Congress has the duty to exercise its powers under the Naturalization Clause, otherwise an impossible void with respect to naturalization would exist. In fact, this power was immediately exercised by the First Congress with the passage of the Naturalization Act of 1790, which created a path to citizenship for certain “alien[s].”⁷⁵

Overall, the Preamble provides that the Constitution is to “establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”⁷⁶ If this text means anything, it must entail the idea that Congress has affirmative duties and an active role to play in promoting the Constitution’s principles. As argued by the preceding discussion, understanding all Art. I, § 8 powers to be absolutely discretionary leads to results that inherently conflict with the Constitution as a whole. Therefore, § 8 cannot be completely discretionary and some, if not all, of Congress’s enumerated powers must entail implied duties.

Of course, case law on this proposition is almost non-existent as Congress has yet to attempt to voluntarily relinquish a power afforded to it by Article I—bankruptcy laws, the armed forces, copyright law, etc. have been enduring features of the federal government for centuries.⁷⁷ Therefore, the issue explored by this paper is

⁷⁴ *United States v. Macintosh*, 283 U.S. 605, 615 (1931); see also *Naturalization Power: Overview*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-4/naturalization-power-overview#fn5art1> [https://perma.cc/83HJ-E4EF] (last visited Feb. 11, 2022, 4:18 PM).

⁷⁵ Andrew Glass, *U.S. Enacts First Immigration Law, March 26, 1790*, POLITICO (Mar. 26, 2012, 4:51 AM), <https://www.politico.com/story/2012/03/the-united-states-enacts-first-immigration-law-074438> [https://perma.cc/JB8B-T5M5].

⁷⁶ U.S. CONST. pmb1.

⁷⁷ Following two economic crashes in the decade following ratification, Congress passed the first national bankruptcy law with the Bankruptcy Act of 1800. See Robert Jacobvitz, *A Relatively Short History of the Bankruptcy Laws in the United States*, NAT’L CONF. BANKR. JUDGES (Feb. 27, 2019), <https://ncbjmeeting.org/2019blog/2019/02/27/a-relatively-short-history-of-the-bankruptcy-laws-in-the-united-states/> [https://perma.cc/UHP4-JP47]. In 1789, on the final day of its first session, Congress passed “an Act for ‘Establishment of the Troops,’” which formally recognized the United States Army. See NCC Staff, *On this day: Congress officially creates the U.S. Army*, NAT’L CONST. CTR. (Sept. 29, 2020), <https://constitutioncenter.org/blog/on-this-day-congress-officially-creates-the-u-s-army> [https://perma.cc/5KU9-RYN4]. In 1790, Congress passed the

entirely novel. It asks whether Congress could voluntarily and completely dispense with a power afforded to it under Article I, § 8.

In answering the question, this paper uses the Postal Clause to test the hypothesis that the Constitution imposes one or more duties on Congress in Article I. In order to determine whether the Postal Clause contains such an implied duty, this paper argues that we must look to the history of the Clause, its structure, and the understanding of it at the time of ratification—to the original understanding of the Postal Clause.

III. THE FIRST POSTAL SYSTEMS

Often, an originalist analysis of a constitutional provision begins in the seventeenth and eighteenth centuries. The same is true for most literature on the history of postal services, focusing on the Royal Mail's beginnings in the seventeenth century.⁷⁸ However, to truly understand the meaning of the Postal Clause, we must go back further; to the first government-run postal systems. As will be discussed, England's Royal Mail was not novel or unique—the Kingdom of England was far from the first to establish “post offices” and “post roads” as an arm of the government. Rather, the idea of a government-sponsored postal service dates back thousands of years, to the earliest civilizations and empires.⁷⁹

Seemingly, each great empire of millennia past maintained some form of an official postal service.⁸⁰ Archaeological records indicate that the ancient Egyptian empire of 2000 B.C.E. had a dedicated postal system, making it arguably the oldest confirmed system.⁸¹ The Assyrian Empire, dating from 900 B.C.E. to 600 B.C.E., also had an imperial postal system, as did the later Persian Empire, dating from 550 B.C.E. to 330

first Copyright Act. See Kevin R. Davis, *Copyright Act of 1790 (1790)*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1030/copyright-act-of-1790> [<https://perma.cc/JDH7-WJW8>].

⁷⁸ See, e.g., *Founding-Era Socialism*, *supra* note 10 (beginning the core of its analysis in the late seventeenth century, long after important historical developments with respect to the Royal Mail).

⁷⁹ See LOUIS MELIUS, *HISTORY OF THE POSTAL SERVICE FROM THE EARLIEST TIMES* 14 (2015).

⁸⁰ *Id.*; see also DEVIN LEONARD, *NEITHER SNOW NOR RAIN: A HISTORY OF THE UNITED STATES POSTAL SERVICE* 5–7 (2016).

⁸¹ Nour Eltigani, *The Egyptian Postal System: Oldest Postal System in the World*, EGYPTIAN STS. (Oct. 1, 2018), <https://egyptianstreets.com/2018/10/01/the-egyptian-postal-system-oldest-postal-system-in-the-world/> [<https://perma.cc/6SHP-HP37>]; Peter T. Struck, *Postal Service*, UNIV. PA., <https://www2.classics.upenn.edu/myth/php/tools/dictionary.php?method=did®exp=295&setcard=1&media=1&link=0> [<https://perma.cc/9VKH-R6C2>] (last visited Jan. 6, 2022, 11:39 AM).

B.C.E.⁸² Emperor Augustus founded the intricate courier system of the Roman Empire in the first century, called the *cursus publicus*, or “public road.”⁸³ By the fourteenth century, the Ming dynasty in China possessed a complex postal system consisting of over 10,000 postal stations.⁸⁴

In many ways, these early postal systems resembled what we would expect to see. Dispatchers facilitated and oversaw the carrying of a letter or other type of communication from one place to another.⁸⁵ Egyptian pharaohs utilized horsemen carrying hieroglyphs to send messages to princes and generals.⁸⁶ Persian kings entrusted tablets to the system’s couriers, whose efficiency was revered by the Greeks.⁸⁷ Roman messengers spread the edicts of the empire across its territory.⁸⁸

A common element ran through the early postal systems in that they were not available to the general public.⁸⁹ Despite the efficiency of many of these systems, even merchants were typically excluded from utilizing imperial postal services.⁹⁰ Overall, the scholarly consensus is that a government postal system during these early civilizations was the product of necessity—with a large empire came the need for the ruling elite to correspond with its various constituent parts and to issue proclamations across vast territories.⁹¹ Essentially, a postal system was the natural outgrowth of effective government and provided the means of spreading information quickly and efficiently.

IV. THE ENGLISH (AND EVENTUALLY BRITISH) POST OFFICE

The premise that a postal system is a natural outgrowth of effective government is critical because the Royal Mail does not differentiate itself in this regard. After the fall of the Roman Empire in 476 A.D., much

⁸² MELIUS, *supra* note 80, at 14; *Assyrian Empire*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/assyrian-empire> [<https://perma.cc/BZU7-D2LJ>] (last visited July 22, 2022, 7:21 PM); *Persian Empire*, HIST. (Sept. 30, 2019), <https://www.history.com/topics/ancient-middle-east/persian-empire> [<https://perma.cc/QTP5-22X7>].

⁸³ *See* Struck, *supra* note 82. *See also* WINIFRED GALLAGHER, *HOW THE POST OFFICE CREATED AMERICA* 12 (2016).

⁸⁴ *See* MELIUS, *supra* note 80, at 14.

⁸⁵ *Id.*; *see also* LEONARD, *supra* note 81, at 5–7.

⁸⁶ LEONARD, *supra* note 81, at 5.

⁸⁷ *Id.* at 5–6.

⁸⁸ *See* Struck, *supra* note 82.

⁸⁹ *See* GALLAGHER, *supra* note 84, at 11–12.

⁹⁰ *See* LEONARD, *supra* note 81, at 5.

⁹¹ *See* MELIUS, *supra* note 80, at 14. *See also* GALLAGHER, *supra* note 84, at 11–13.

of Europe retreated into the Dark Ages.⁹² For nearly a millennium, the continent stagnated as the sprawling Roman Empire split into a web of smaller feudal kingdoms.⁹³ With the fracture of Rome, economic stagnation and increased illiteracy ensued, which led to a precipitous decline in the volume of communication traveling across the continent.⁹⁴ This inherently rendered the need for a complex postal system moot. Nevertheless, the idea of a postal service remained in Europe, as the University of Paris and monks across the continent maintained systems for their own limited uses.⁹⁵ Eventually, with the emergence of the Renaissance in the fourteenth century, European kingdoms stabilized and formal government-sponsored postal systems began to make their reappearance, led by the Holy Roman Empire in 1486.⁹⁶

A. *Creation of the Royal Mail*

In 1516, the Kingdom of England followed the trend when Henry VIII established the position of “Master of the Posts,” which was tasked with overseeing the “King’s Post.”⁹⁷ As the name suggests, this postal service was the Crown’s—nothing utilized its resources without the King’s sanction.⁹⁸ In 1619, as England grew in size and entered the height of the colonial era, additional postmaster generals were appointed for the country’s foreign lands.⁹⁹ Nonetheless, this system appears to have been no different than the systems noted before—during this period, the King’s Post existed to serve the Crown and to facilitate the movement and distribution of government correspondence across the territory.¹⁰⁰

For the next century, the Royal Mail existed as the Crown’s communication system, but by the beginning of the seventeenth century,

⁹² *Migration Period*, BRITANNICA, <https://www.britannica.com/event/Dark-Ages> [<https://perma.cc/A6LE-AARY>] (last visited Jan. 6, 2022, 11:46 AM); Evan Andrews, *8 Reasons Why Rome Fell*, HISTORY, <https://www.history.com/news/8-reasons-why-rome-fell> [<https://perma.cc/TJ3R-TQL5>] (Jan. 29, 2019).

⁹³ See *Migration Period*, *supra* note 93.

⁹⁴ LEONARD, *supra* note 81, at 6.

⁹⁵ *Id.* at 6–7.

⁹⁶ *Postal System*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/modern-europe/ancient-history-middle-ages-and-feudalism/postal-system> [<https://perma.cc/S2S2-5DY5>] (May 8, 2018).

⁹⁷ *King’s Posts*, ROYAL MAIL GROUP, <http://500years.royalmailgroup.com/gallery/kings-posts/> [<https://perma.cc/9PKW-MSFP>] (last visited Jan. 6, 2022, 11:52 AM).

⁹⁸ See *id.*; LEONARD, *supra* note 81, at 8.

⁹⁹ MELIUS, *supra* note 80, at 15.

¹⁰⁰ See *King’s Posts*, *supra* note 98.

England was on the verge of upheaval and great change.¹⁰¹ The kingdom quickly became more intertwined with Scotland, making postal services even more crucial to operations, and the need for revenue to fund the system's expansion was apparent.¹⁰² In 1635, these factors led to the opening of the Royal Mail to the general public, decades later than systems in mainland Europe.¹⁰³ Much has been written about this period in postal history, and it is largely uncontested that the opening of the Royal Mail to the public served several purposes—to generate revenue for the Crown, to provide a means of monitoring communications among individuals, and to facilitate the growing volume of trade and commerce.¹⁰⁴

Thus, from 1635 onward, the Royal Mail was serving four functions—(1) transporting correspondence of the government, (2) generating revenue from the transport of the public's correspondence, (3) facilitating the growth of the empire's economy, and (4) affording a means of spying on the public discourse. By 1637, the Royal Mail became the *de facto* monopoly for mail carrying, serving to further these four aims.¹⁰⁵ Despite the monopoly, however, even the Crown had to pay postage. As explained in one analysis:

The King it seems did not benefit directly from increasing postal revenues; profits went to the Postmaster General. James I and Charles I actually were obliged to pay their own postage. The principal purpose of the postal monopoly, to the Stuarts as to Elizabeth, was to compel all writers to use the royal post so that government officials, by reading the letters, could discover and suppress communication of treason and sedition.¹⁰⁶

Regarding the latter point, any letter or other type of correspondence sent through the Royal Mail was subject to opening and review by its agents; this power went largely unchallenged and was viewed as the government's means of surveillance and quashing dissent.¹⁰⁷ Despite

¹⁰¹ See Matthew White, *The Turbulent 17th Century: Civil War, Regicide, the Restoration and the Glorious Revolution*, THE BRITISH LIBRARY (June 21, 2018), <https://www.bl.uk/restoration-18th-century-literature/articles/the-turbulent-17th-century-civil-war-regicide-the-restoration-and-the-glorious-revolution> [https://perma.cc/NFV2-64YL] (discussing the significant social and political upheavals of seventeenth century England).

¹⁰² A. M. Ogilvie, *A New History of the Post Office*, 23 *ECON. J.* 137, 137 (1913).

¹⁰³ See LEONARD, *supra* note 81, at 8; MELIUS, *supra* note 80, at 14–15.

¹⁰⁴ See *Founding-era Socialism*, *supra* note 10, at 15–18.

¹⁰⁵ *Id.* at 9.

¹⁰⁶ George L. Priest, *The History of the Postal Monopoly in the United States*, 18 *J. L. & ECON.* 33, 35 (1975).

¹⁰⁷ See *id.*

being open to the public, access to the Royal Mail was nonetheless a costly privilege at the time.¹⁰⁸ Only a small fraction of the population was literate enough to correspond by letter and able to afford postage.¹⁰⁹

In 1657, on the heels of a bloody Civil War, Protectorate England adopted the first statute aimed at a general overhaul and codification of the Royal Mail system. In the act, Parliament explained its rationale for codifying the postal system, stating:

[I]t hath been found by experience, That the Erecting and Setling of one General Post-Office, for the speedy Conveying, Carrying, and Re-carrying of Letters by Post, to, and from all Places within England . . . and into several parts beyond the Seas, hath been, and is the best means, not only to maintain a certain and constant Intercourse of Trade and Commerce betwixt all the said Places, to the great benefit of the People of these Nations, but also to Convey the Publique Dispatches, and to discover and prevent many dangerous, and wicked Designs, which have been, and are daily contrived against the Peace and Welfare of this Commonwealth, the Intelligence whereof cannot well be Communicated, but by Letter of Escript.¹¹⁰

The Act also formally codified the government's postal monopoly, fixed rates, and created the general post office in London, which served as the central administrative apparatus of the empire's postal system.¹¹¹ In 1660, following the Restoration, Parliament acted to largely reaffirm the 1657 Act, but otherwise rebranded the public-facing system as the "General Post Office."¹¹² For the next century, administration of the post office was largely left to the Crown's appointees under these laws.

What is clear from the text is that Parliament sought to codify the four objectives of the Royal Mail discussed previously.¹¹³ While it is true, based on the text, that the postal service had a revenue motive, its motives to "benefit the people," facilitate trade and commerce, and provide a means for intelligence gathering are all equally apparent. Therefore,

¹⁰⁸ See LEONARD, *supra* note 81, at 8.

¹⁰⁹ See GALLAGHER, *supra* note 84, at 13.

¹¹⁰ An Act for Setling the Postage of England, Scotland and Ireland (1657) II ACTS & ORDS. INTERREGNUM 1110 (Eng.).

¹¹¹ An Act for Setling the Postage of England, Scotland and Ireland (1657) II ACTS & ORDS. INTERREGNUM 1110 (Eng.); see also MELIUS, *supra* note 80, at 16.

¹¹² An Act for Erecting and Establishing a Post Office (1660) 5 STATUTES OF THE REALM 297 (Eng.).

¹¹³ See *supra* p. 20–21, (discussing the four motives behind the opening of the Royal Mail to the public in 1635).

when Parliament acted to adopt both the 1657 and 1660 acts, it formally acknowledged its duty to provide a postal system for the facilitation of both government correspondence and the private correspondence of the people.

B. Mechanics of the Postal System

During this period, the mechanics of the postal system were largely stable and there was a settled understanding of “posts,” “post offices,” and “post roads.”¹¹⁴ A sender would travel to the local/nearest “post office” to send a small parcel or letter (a “post”), and the office’s postmaster would note the cost of postage by writing it on the item.¹¹⁵ Once received by the post office, the item would travel along the designated routes, the “post roads,” sometimes to a central sorting station, and then to the recipient’s local post office.¹¹⁶ The recipient of the post would have to travel to the post office in order to retrieve the post and would be required to tender the cost of postage at the time—this also meant that the recipient retained the right to refuse the post.¹¹⁷

The modern postage stamp as we know it did not come into existence until 1847, and the pre-paying of postage was the exception.¹¹⁸ Given that most of the population lived in rural areas at the time, home delivery was not contemplated, and the post office came to be seen as a central hub for citizens.¹¹⁹

Each of these terms and their common understandings would eventually form the basis of the Constitution’s Postal Clause.¹²⁰ As will be discussed, when these terms were combined to form the Postal Clause, they embodied a specific and common understanding. This common, original understanding transcended the meaning of the Clause’s individual words and served to impose a duty upon the newly constituted federal government—one where the government must provide such “roads” and “offices.”

C. Postal Services in Colonial America

With the Royal Mail and General Post Office as the background, we can now turn to the establishment of postal services in North America. The

¹¹⁴ See *Founding-era Socialism*, *supra* note 10, at 10–11.

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 11–12

¹¹⁷ See LEONARD, *supra* note 81, at 8.

¹¹⁸ See MELIUS, *supra* note 80, at 19.

¹¹⁹ See *id.* at 18; GALLAGHER, *supra* note 84, at 149.

¹²⁰ See *Founding-era Socialism*, *supra* note 10, at 31.

first attempt at creating a formal service in the colonies was undertaken by New York Governor Francis Lovelace upon direction from the King in 1672.¹²¹ Prior to this, correspondence in the colonies was typically exchanged by means of private carriers, friends, or acquaintances, as the English system had not yet crossed the Atlantic.¹²² While the Crown generally left the colonies to their own devices until this point, the ever-growing prospect of war between the English and Dutch over New York spurred a greater interest in colonial affairs.¹²³ The possibility of conflict created the perception that the communications system in the colonies was inadequate—like other empires before it, England saw the need for a colonial postal system as rooted in the necessities of effective government.¹²⁴

Shortly after receiving his mandate, a monthly service between New York and Boston was established under Governor Lovelace's oversight.¹²⁵ After the Dutch taking of New York City in 1673 and its return to England in 1674, the service was discontinued due to a perceived lack of suitable infrastructure and commerce in the colonies.¹²⁶

In 1683, a regular post finally returned to the colonies—this time in Philadelphia.¹²⁷ While a feeble attempt, a weekly post between Philadelphia and Delaware was nonetheless established.¹²⁸ Two years later, King James II appointed Edward Randolph the postmaster of the “united colonies,” and tasked him with overseeing the establishment of new roads and offices on the continent.¹²⁹ This appointment and the endeavors it entailed ended, however, when King James II was dethroned in 1689.¹³⁰

As the successor to James II, William III took a greater interest in the colonies and its postal system, or lack thereof.¹³¹ He immediately sought to establish a more regular network between the major cities.¹³² By this time, the American colonies were growing and becoming of greater

¹²¹ William Smith, *The Colonial Post-Office*, 21 AM. HIST. REV., 258, 259 (1916).

¹²² See *id.* at 258; GALLAGHER, *supra* note 84, at 14.

¹²³ See Smith, *supra* note 122, at 258–59.

¹²⁴ See *id.* See *supra* Part III, p. 17 (regarding early postal systems).

¹²⁵ See Smith, *supra* note 122, at 259 (citing Letter from Francis Lovelace to John Winthrop, in 9 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY, Fifth Series 84 (John Wilson & Son eds., Cambridge 1913)).

¹²⁶ See Smith, *supra* note 122, at 259.

¹²⁷ *Id.* at 260.

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ *Id.*

¹³¹ See *id.* at 260–61.

¹³² *Id.*

importance to England, thus warranting the increased attention.¹³³ Prior to William III, postal services in colonial America were seen as a mere “temporary convenienc[e] of the state,” as the various attempts to establish a formal system were started and stopped.¹³⁴ Now, however, the Crown firmly viewed the lack of postal services in the colonies as a hinderance to its effective oversight of the territory and a hampering of the economic gains to be had.¹³⁵ Again, addressing the shortcomings of the colonial postal system was a practical necessity of the empire.

To facilitate the development of a more systematic postal service in the colonies, William III granted a patent to Thomas Neale in 1691, giving him full and exclusive authority to establish a postal service in the colonies for a period of twenty years.¹³⁶ By royal letter, Neale was granted:

[f]ull power and authority to erect, settle, and establish within the chief parts of their majesties’ colonies and plantations in America, an office or offices for the receiving and dispatching letters and pacquests, and to receive, send, and deliver the same under such rates and sums of money as the planters shall agree to give.¹³⁷

For Neale, the first step in establishing the postal service was securing the consent of each colony’s legislature.¹³⁸ In pursuit of this, he appointed Andrew Hamilton his deputy postmaster general.¹³⁹ Hamilton would then go on to negotiate a uniform bill with the colonies as Neale never set foot in North America.¹⁴⁰

The model bill drafted and proposed by Hamilton sought to establish a post office in each main town, overseen by individuals appointed by Hamilton and conforming to the patent’s monopoly.¹⁴¹ Overall, the proposal largely mirrored the Royal Mail system back in the mainland—a post would be delivered to a post office, transported along post roads, and then picked up and paid for by the recipient.¹⁴² After consideration by the respective legislatures, the northern colonies

¹³³ *See id.*

¹³⁴ *Id.* at 260.

¹³⁵ *Id.*

¹³⁶ *Id.* at 261.

¹³⁷ 5560 UNITED STATES CONGRESSIONAL SERIAL SET 3 (1910).

¹³⁸ Smith, *supra* note 122, at 261–62.

¹³⁹ *Id.*

¹⁴⁰ LEONARD, *supra* note 81, at 9.

¹⁴¹ Smith, *supra* note 122, at 262.

¹⁴² *See id.*

conceded to the Crown-sanctioned monopoly that was the Neale Patent.¹⁴³

It is important to note that Massachusetts and New Hampshire attempted to go a step further than Hamilton's proposed act. While still adopting the model act, the two legislatures attempted to include additional language that the service must "maintain constant posts . . . [and] deliver letters faithfully and seasonably[;]" a fine of five pounds was to be imposed for each mistake.¹⁴⁴ This represents the first instance of the colonies viewing postal services as more than a mere convenience—Massachusetts and New Hampshire argued that Hamilton was required to dutifully deliver the materials entrusted to his care.¹⁴⁵ Further, the additional language shows that these colonies believed that the existence of a postal system must be a guarantee; that regardless of profit, or lack thereof, the postal system must operate.¹⁴⁶ Upon review by the Crown, however, the Massachusetts act was rejected, while those of the other assenting colonies were afforded sanction.¹⁴⁷ The two colonies eventually capitulated on the issue as "[t]he post-office was too great a convenience to be refused."¹⁴⁸

While the northern colonies assented to the Neale patent, Virginia and Maryland refused to accept it.¹⁴⁹ In fact, Virginia's refusal was based on its view that a private citizen should not profit off the provision of a mail service—"it was unfair for the king to make his colonial subjects pay Neale for mail delivery when they could do it themselves"—and the two maintained their own systems for handling such correspondence.¹⁵⁰

The postal system created by Neale and Hamilton eventually extended through much of the northern colonies' territories, connecting New Hampshire to Pennsylvania.¹⁵¹ The operation was costly, however, and it incurred annual losses during the first six years—losses Neale was forced to bear personally.¹⁵² It was not until 1697 that the operation was almost able to break even, with revenues being sufficient to cover all costs except Hamilton's salary.¹⁵³ When Neale appealed to the Treasury in 1699 for financial support to ease the

¹⁴³ See *id.* at 263–65.

¹⁴⁴ *Id.* at 263.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ Smith, *supra* note 122, at 263.

¹⁴⁸ *Id.* at 264.

¹⁴⁹ See LEONARD, *supra* note 81, at 9.

¹⁵⁰ See *id.*

¹⁵¹ Smith, *supra* note 122, at 266.

¹⁵² *Id.*

¹⁵³ *Id.* at 266–67.

burden, his pleas were ignored.¹⁵⁴ After Neale died later that same year, the patent was continued under new management, but it fared no better and its holders eventually relinquished the patent in 1707.¹⁵⁵

By the end of the patent's term, the experience led to the consensus that a private postal system in the colonies was not feasible. As explained in the Treasury's records, "there was much reason to doubt whether a post-office in the colonies in private hands could ever succeed," and so the Crown assumed the patent and control over the colonial postal system.¹⁵⁶ With Crown control, the holdout colonies of Virginia and Maryland were forced to participate.¹⁵⁷ But, even under Crown control, the postal system continued to struggle for the next decade, with deficits in the colonial operations reaching £200 by 1709.¹⁵⁸

In 1711, the newly founded Kingdom of Great Britain realized the insufficiency of its postal service and sought to address it through a comprehensive postal act.¹⁵⁹ The subsequent 1711 Act embraced an empire-wide approach and created a central office for the colonial system in New York.¹⁶⁰ The Act also significantly raised costs in an attempt to close what was essentially an annual deficit gap; postage rates increased by as much as 400% in some cases.¹⁶¹ Once again, however, the text of the Act is critical, as it codifies more than just the mechanics of the postal service. As the Act states:

And to the end a general post office may be established for and throughout her Majesty's kingdoms of Great Britain and Ireland, her colonies and plantations in North America, and the West Indies, and all other her Majesty's dominions and territories, in such manner as may be most beneficial to the people of these kingdoms, and her Majesty may be supplied, and the revenue arising by the said office better improved, settled, and secured to her Majesty.¹⁶²

From this text, while Parliament sought to increase revenues generated

¹⁵⁴ See *id.* at 267.

¹⁵⁵ See *id.*; LEONARD, *supra* note 81, at 9.

¹⁵⁶ Smith, *supra* note 122, at 267.

¹⁵⁷ See LEONARD, *supra* note 81, at 9.

¹⁵⁸ See Smith, *supra* note 122, at 267.

¹⁵⁹ See *id.*

¹⁶⁰ *Id.*

¹⁶¹ See *id.* at 268.

¹⁶² Post Office (Revenues) Act 1710, 9 Ann. c.10 (Gr. Brit.) (note that passage by Parliament occurred in 1710, but Royal assent was not provided until 1711; thus, most references consider it the "1711 Act").

from the postal service, there was an understanding that such revenues would be used to better the service, rather than funding the general operations of the empire. Back in the colonies, only Virginia protested the changes and attempted to opt out of the system by imposing a variety of conditions on letter carrying in its territory, which it did until 1732.¹⁶³

Regardless, just as the 1657 and 1660 acts before it, the 1711 Act was rooted in more than just the desire for increased revenues—the text also evidences a functional purpose; that the postal system was to operate in such a manner “most beneficial to the people.”¹⁶⁴ Though the colonial postal system experienced recurring deficits in the years leading up to the 1711 Act, the government did not terminate the service. Instead, when the Neale patent’s unprofitability became too much for its holders, the government simply assumed its operations, believing that such a service was too critical to be allowed to fail in the hands of a private investor.¹⁶⁵ Overall, the growth and development of the postal service during the pre-revolution era shows that the government provided postal services and incurred losses in pursuit of multiple, competing policy objectives.

D. The Importance of Franking

Much is made of the revenue motive and of the revenue function stated in the acts noted previously.¹⁶⁶ While revenue was certainly one of the goals, as evidenced by the 1657, 1660, and 1711 acts, the practice of franking should be understood as a major undermining of this particular objective. It also undermines the general argument that the post office in the United States exists solely as a means of generating revenue, while only tangentially providing something of value to the public and society at large.¹⁶⁷

Dating to the seventeenth century, franking began as an accepted custom that certain communications from members of the government were exempt from having to pay postage.¹⁶⁸ Prior to the English Civil War, the franking privilege was relatively exclusive to the Crown.¹⁶⁹

¹⁶³ See Smith, *supra* note 122, at 268–69.

¹⁶⁴ Post Office (Revenues) Act 1710, 9 Ann. c.10 (Gr. Brit.).

¹⁶⁵ See Smith, *supra* note 122, at 266–67.

¹⁶⁶ See *Founding-Era Socialism*, *supra* note 10, at 17, 34–35, 43–44 (discussing the revenue motive behind postal systems).

¹⁶⁷ See *id.* at 43 (discussing the argument that the Framers intended the post office, in part, to serve as a major source of revenue).

¹⁶⁸ N.J. POSTAL HIST. SOC’Y, <https://njpostalhistory.org/november12featuredcover.html> [https://perma.cc/KV4B-4K5G] (last visited Jan. 6, 2022, 2:22 PM).

¹⁶⁹ See *id.*

But with Parliament's victory, it assumed the privilege in 1652 as well, ordering that "all . . . letters of members of Parliament and Council of State, secretaries, clerks, or officers in public service under them, or their committees, or in any other service of public concernment shall be carried free."¹⁷⁰ Following the Restoration, the franking privilege continued, exercised by both Parliament and the Crown.¹⁷¹

In 1693, the franking privilege came under fire for its abuse, leading the Crown to issue a Royal Warrant in an attempt to impose limitations on who could exercise the privilege.¹⁷² This action was ineffective, however, and abuse of the franking system continued largely unimpeded.¹⁷³ In 1715, Parliament added the requirement that franked materials be signed by the person who possessed the franking privilege, in another attempt to reduce fraudulent franking.¹⁷⁴ Despite these efforts, a 1716–1717 audit calculated that the revenue lost by franked mail was £18,708.¹⁷⁵ This was at a time when annual revenue for the entirety of the British postal system was £256,231 in 1718.¹⁷⁶ Thus, if revenue was the only goal of the Royal Mail and General Post Office, franking would be an unexplainable phenomenon—the sending of mail without a fee imposed a significant financial burden on the postal system. Therefore, the widespread usage and acceptance of franking can only be explained by other, equally important goals sought to be achieved by the postal system—chiefly that of the facilitation of discourse and commerce.¹⁷⁷

Possibly due to their low pay, appointed postmasters enjoyed access to the franking privilege as well.¹⁷⁸ By the time of Benjamin Franklin, the privilege was seen as the main benefit of the job and most postmasters during the colonial period were, in fact, newspaper owners.¹⁷⁹ The practice of franking mail, exempting an

¹⁷⁰ James E. Tierney, *Eighteenth-Century Authors and the Abuse of the Franking System*, 48 *STUD. IN BIBLIOGRAPHY* 112, 113 (1995) (quoting *Calendar of State Papers Domestic (1651) 25 ACTS & ORGS. INTERREGNUM* 463 (Eng.)).

¹⁷¹ See N.J. *POSTAL HIST. SOC'Y*, *supra* note 169.

¹⁷² See Tierney, *supra* note 171, at 113.

¹⁷³ *Id.* at 113–14.

¹⁷⁴ *Id.* at 113.

¹⁷⁵ *Id.* at 114.

¹⁷⁶ *Declared Accounts: Post Office*, *BRIT. HIST. ONLINE*, <https://www.british-history.ac.uk/cal-treasury-books/vol32/ccclii-ccclviii> [<https://perma.cc/397C-UPTE>].

¹⁷⁷ See *supra* Part IV.A (discussing the competing goals of underpinning the opening of the Royal Mail to the public).

¹⁷⁸ See *THE COMM. ON PUBL'N & THE RECORDING SEC'Y, RECORDS OF THE COLUMBIA HISTORICAL SOCIETY* 169 (VOL. 9 1906).

¹⁷⁹ GALLAGHER, *supra* note 84, at 9, 21; MELIUS, *supra* note 80, at 18.

item from postage based on its contents or sender, was included in American legislation until its abolishment by Congress in 1873.¹⁸⁰

V. THE EMERGENCE OF AN “AMERICAN” POSTAL SYSTEM

Following the 1711 Act, the British postal system persisted, and this era can be summarized by the apposite quote, “British postal institutions advanced only by fits and starts.”¹⁸¹ This same sense of malaise towards postal services after 1711 spurred the divergence between the British and soon to be American systems. Ultimately, the beginning of this schism can be traced to the appointment of Benjamin Franklin as Philadelphia’s postmaster general.¹⁸²

Even in his youth, Franklin understood the importance of the press and the postal system. Starting in 1721, he began working at *The New-England Courant*, where he published a series of letters under the pen name Silence Dogood in 1722, which are generally recognized as the first instances of public mockery in colonial press.¹⁸³ After dabbling in the Boston publication industry for some time, primarily at his brother’s paper, Franklin moved to Philadelphia.¹⁸⁴ In 1729, while still residing in the city, he acquired the *Pennsylvania Gazette*.¹⁸⁵ His subsequent emergence in Philadelphia was important not only for him personally, but also for the colonial postal system, which would eventually inform the Constitution’s Postal Clause.

A. The Franklin Era in Colonial Postal Services

Franklin was appointed postmaster for the city in 1737.¹⁸⁶ With the appointment came the franking privilege, and he immediately established his personal frank, “Free. B. Franklin.”¹⁸⁷ This privilege was multi-

¹⁸⁰ *Senate Ends Franked Mail Privilege*, UNITED STATES SENATE, https://www.senate.gov/artandhistory/history/minute/Senate_Ends_Franked_Mail_Privilege.htm [https://perma.cc/392A-J45U] (last visited Jan. 6, 2022, 2:35 PM).

¹⁸¹ *Founding-Era Socialism*, *supra* note 10, at 24.

¹⁸² See LEONARD, *supra* note 81, at 3.

¹⁸³ See *id.* 2–3. See also GALLAGHER, *supra* note 84, at 19; *Silence Dogood, No. 1, 2 April 1722*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Franklin/01-01-02-0008> [https://perma.cc/P6H6-FAV4] (last visited Dec. 1, 2022).

¹⁸⁴ See LEONARD, *supra* note 81, at 2–3.

¹⁸⁵ *Id.*; *The Pennsylvania Gazette (Philadelphia, Pa.) 1729-1778*, LIBR. OF CONG., <https://www.loc.gov/item/sn84026371/> [https://perma.cc/P5G7-SK2H] (last visited Dec. 1, 2022).

¹⁸⁶ LEONARD, *supra* note 81, at 3.

¹⁸⁷ *Id.* at 4.

faceted. First, it allowed him to circulate the *Pennsylvania Gazette* free of charge and he immediately expanded his paper's coverage at the expense of his competition by doing so.¹⁸⁸ Second, it enabled Franklin to exchange vast amounts of personal correspondence with the intellectual elite in the colonies and Europe.¹⁸⁹ These personal letters are important due to both their volume and in that they provide a first-hand account of how Franklin began to see the colonies as a single entity bound together by shared institutions.¹⁹⁰ As evidenced by his personal correspondence, to foster this notion of an American identity, Franklin soon came to believe that the colonies' postal services needed significant improvement.¹⁹¹

In 1751, Franklin started his influence campaign for postmaster general, a position that would afford him much more control over the colonial postal system.¹⁹² In 1753, he secured the position from an ailing Elliott Benger, though he technically shared the title with William Hunter.¹⁹³ Hunter, however, was more than happy to defer to Franklin's administration of the system.¹⁹⁴ Before the appointment even became effective, Franklin toured various post offices and explored the post roads in the colonies.¹⁹⁵ Once in control, he promptly implemented reforms—he chartered new routes to reduce transit time and created the Dead Letter Office.¹⁹⁶

Franklin's improvements to the postal system entailed significant expense in terms of both time and money. To finance the creation of the postal system in his image, Franklin had to borrow funds, which he did to the tune of £900 in the first years of his appointment.¹⁹⁷ As had been the case since the time of the Neale patent, Franklin's post office continued to generate deficits.¹⁹⁸ But, when confronted with the idea of raising postage rates to help close the deficit, Franklin

¹⁸⁸ See *id.* at 3–4.

¹⁸⁹ Patrick J. Kiger, *How Ben Franklin Established the US Post Office*, HIST. (Aug. 10, 2020), <https://www.history.com/news/us-post-office-benjamin-franklin> [<https://perma.cc/AC3X-T9UH>].

¹⁹⁰ See LEONARD, *supra* note 81, at 4.

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ *Id.* at 5.

¹⁹⁴ See Kiger, *supra* note 190.

¹⁹⁵ See LEONARD, *supra* note 81, at 11.

¹⁹⁶ While still existing today in form and substance, the Dead Letter Office was rebranded the Mail Recovery Center in 1994. See *id.* See also Ashley Bowen-Murphy, *The Dead Letter Office, Where U.S. Mail Went to Die*, THE NEWS LENS (Nov. 4, 2015), <https://international.thenewslens.com/article/30102> [<https://perma.cc/Z7ZN-C3JY>].

¹⁹⁷ See LEONARD, *supra* note 81, at 11.

¹⁹⁸ *Id.*

declined to do so, arguing that postage was a fee-for-service, rather than a tax to be imposed purely for purposes of generating revenue.¹⁹⁹

Ultimately, Franklin's actions led to an explosion in the number of newspapers in the colonies, and his service eventually produced a surplus in 1760.²⁰⁰ Franklin's participation in the Albany Congress makes it clear that this result was not an accident and was part of his ultimate goal—creating the singular American identity.²⁰¹ With the prospect of another war on the horizon in 1754, the colonies realized the need for a greater degree of unity and coordination.²⁰² At the ensuing Albany Congress, Franklin presented his Plan of Union.²⁰³ Though it failed, the plan nonetheless emphasizes Franklin's view that the colonies formed a single unit with a common identity.²⁰⁴ In his plan, Franklin called for the creation of a more centralized government and a system of common government services, inherently including a common postal service, and it is often referred to as the foundation of the post-revolution union.²⁰⁵

The colonies' experiences during the Seven Years' War highlighted the need for greater and more regular channels of communication, as well as Franklin's wisdom during the Albany Congress.²⁰⁶ During the period immediately before the war and in its early days, the Treasury resisted efforts to fund improvements to the colonial postal service, having viewed the investments already made as sufficient.²⁰⁷ But, following defeat on the battlefield at Fort du Quesne, the Treasury acquiesced to the idea of new investments in the colonial system—the lack of efficiency hampered the war effort.²⁰⁸ In response, among other changes, a regular service was established that would make monthly trips between New York and the mainland.²⁰⁹ In seven years of operation, this new service cost £62,603, and generated a mere £12,458 in revenue.²¹⁰ When peace was secured in 1762, the need for the service was questioned, but despite the large

¹⁹⁹ See *id.* See also *Founding-Era Socialism*, *supra* note 10, at 26.

²⁰⁰ See LEONARD, *supra* note 81, at 11.

²⁰¹ See GALLAGHER, *supra* note 84, at 21, 23, 24; Off. of the Historian, *Albany Plan of Union, 1754, Milestones: 1750-1775*, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1750-1775/albany-plan> [<https://perma.cc/LX7H-YCSN>].

²⁰² See Off. of the Historian, *supra* note 202.

²⁰³ See *id.*

²⁰⁴ See *id.*

²⁰⁵ See *id.*

²⁰⁶ See Smith, *supra* note 122, at 271.

²⁰⁷ See *id.* at 271–72

²⁰⁸ See *id.*

²⁰⁹ See *id.* at 272.

²¹⁰ See *id.*

deficits, Parliament allowed it to continue based on the idea that it could eventually become “self-sustaining.”²¹¹ Once again, however, the Crown came to terms with the necessity of investing in the colonial postal system.

The end of the Seven Years’ War marked the beginning of the path towards revolution as the British government incurred significant expenses in fighting a war that was all but declared by the colonies.²¹² As tensions between the colonies and the mainland grew following the passage of various acts aimed at raising additional revenue to cover war debts, including the Stamp Act, Franklin’s political thoughts became the subject of controversy. His vocal disagreement with Crown policies resulted in his abrupt removal from the postmaster general position in 1772.²¹³

By the time Franklin’s tenure ended, the postal system in colonial America had undergone significant changes—it became an embedded part of colonial life, investments in the system increased (as did deficits initially), and by the end of his postmastership, the post office began to show glimmers of self-sustainability.²¹⁴ As one scholar notes, “Franklin’s success . . . was remarkable. He showed an early grasp of the trust that monopoly alone does not assure prosperity, and that in order to gain business it was essentially to make his service attractive to the public.”²¹⁵ If revenue alone was the primary motive behind the colonial postal system, Franklin would certainly have been removed long before 1772. But, as discussed, the Franklin post office was premised on more than just revenue generation.

B. The Eve of Revolution and the Wartime Post

Shortly before the start of the revolution, the High Court of England and Wales issued its opinion in *Smith v. Powdich*, which held that “[a] postmaster is bound to deliver all letters to the several inhabitants within a post town or place at their respective places of abode, at the rate of postage only as established by Act of Parliament.”²¹⁶ While not a groundbreaking statement, the case serves to highlight the general attitude towards postal

²¹¹ *Id.*

²¹² See *The Cost of Empire: The Seven Years’ War and the Stamp Act Crisis*, BRIT. LIBR., <https://www.bl.uk/the-american-revolution/articles/the-cost-of-empire-the-seven-years-war-and-the-stamp-act-crisis> [<https://perma.cc/YPD7-FTKQ>], (last visited Jan. 6, 2022, 2:52 PM).

²¹³ See *id.* See also LEONARD, *supra* note 81, at 14–15; GALLAGHER, *supra* note 84, at 24–25.

²¹⁴ See LEONARD, *supra* note 81, at 14.

²¹⁵ Smith, *supra* note 122, at 271.

²¹⁶ *Smith v. Powdich*, 1 Cowp. 182, 182 (1774).

services in the eighteenth century—that the post office performed a service.

The removal of Franklin as postmaster general can be seen as the demarcation between the traditional British approach towards the post office and that which would be held by post-revolution America. After Franklin's removal, the Crown exerted its power over the system to stymie the growing clamor for independence.²¹⁷ It restricted the delivery of various papers and forced others to shutter because they were "too incendiary" or "too liberal or outspoken in their expressions of condemnations of things as they then were and who dared to urge the liberty and independence of the colonists."²¹⁸

Similarly, the practice of letter opening became more rampant, as Britain "professed to exercise[ing] a supervising care over the newspapers."²¹⁹ The long-standing tradition of opening private mail, coupled with the heavy-handed oversight of printers themselves, seems to have spurred the colonies into action. Quickly, moves were made to establish an independent, American post office.²²⁰ Put simply, these circumstances led the colonies to become "tired of the British-controlled colonial post."²²¹

At its core, *Powdich* can be seen as capturing part of the attitude that was spreading throughout the colonies at the time. By 1774, the colonies became dissatisfied with letter opening and developed a solidified understanding that there was a right to the free exchange of ideas and that the British system was failing to fulfill its purpose.²²² Together, these issues created a "distaste" for the British system and were the basis for the growing sentiment that the colonies should "opt out" of it.²²³ Further, while the colonies' resentment towards the British system was growing, the increase in postal rates remained a relatively minor issue. During this period, the cost of postage again increased as Great Britain tried to raise revenues to cover its debts, yet the general sentiment was that this was the necessary price of facilitating correspondence, rather than it being a tax or source of profit for the government.²²⁴ The colonists' relatively muted response to increases in postal rates is said to be "evidence of a disposition on the part of Americans . . . that postal charges were not

²¹⁷ LEONARD, *supra* note 81, at 14–15.

²¹⁸ *Id.*; MELIUS, *supra* note 80, at 18 (quoting a 1913 *Evening Star* news article).

²¹⁹ LEONARD, *supra* note 81, at 14–15.

²²⁰ See LEONARD, *supra* note 81, at 14.

²²¹ *Id.*

²²² See GALLAGHER, *supra* note 84, at 25.

²²³ See *Founding-Era Socialism*, *supra* note 10, at 34.

²²⁴ See Smith, *supra* note 122, at 268.

taxes”—the exact view pronounced by Franklin a decade earlier.²²⁵

The movement to sever reliance on the British system ultimately gained its footing with William Goddard, a printer and opponent of British policy, who found his papers being subject to censorship.²²⁶ Beginning in 1773, he published statements of his intent to create an independent postal system, free from the Crown’s control in coordination with other printers.²²⁷ On the eve of the revolution, colonial printers, who had long been central to the postal system itself, were tired of the Crown’s censorship as a means of quashing the growing call for independence.²²⁸

Stemming from this discontent, Goddard published “The PLAN for establishing a New American POST-OFFICE.” As the name suggests, it outlined a framework for an independent, American postal service.²²⁹ Later that year, Goddard followed through on the plan and established the Constitutional Post. Unlike other posts in existence at the time, the Constitutional Post was financed by its subscribers and focused on the delivery of newspapers.²³⁰ While Goddard was unique in that he argued that postage was unconstitutional taxation, he otherwise adopted the basic British mechanics of postal services.²³¹ As evidenced by his movement, the attempts by the British government to censor the posts served only to unite the colonists, and the post office was the nexus of that unity.²³² In fact, while reflecting on the anniversary of the post office in 1913, the *Evening Star* published an article stating “[t]he post office led in unification of the colonists . . . [it] did more than any one other agency to unify and unite the colonists. . . . It brought the leading men and women to know and exchange ideas It added an incentive to trade and intercourse.”²³³

Though the Constitutional Post was a private enterprise at first, by the time of the Second Continental Congress in 1775, the need for a true American post office, one controlled by the government, was apparent.²³⁴ The primary concern was not revenue, but rather that the growing independence movement desperately needed the ability to

²²⁵*Id.* See also *Founding-Era Socialism*, *supra* note 10, at 26.

²²⁶ See Joseph Adelman, “A Constitutional Conveyance of Intelligence, Public and Private”: *The Post Office, the Business of Printing, and the American Revolution*, 11 ENTER. AND SOC’Y 711, 726-77 (2010).

²²⁷ See *id.* at 726.

²²⁸ See *id.* at 738..

²²⁹ See *id.* at 727–28.

²³⁰ See *id.* at 727–28. See also GALLAGHER, *supra* note 84, at 26.

²³¹ See *Founding-Era Socialism*, *supra* note 10, at 30.

²³² See MELIUS, *supra* note 80, at 18.

²³³ *Id.*

²³⁴ See GALLAGHER, *supra* note 84, at 25.

transfer intelligence outside of British eyes.²³⁵ Thus, just as the first post offices of millennia past, the Continental Congress viewed a postal service as a matter of government necessity. By official act that year, the Congress authorized the conversion of the Constitutional Post into the American post office, and appointed Franklin its postmaster general.²³⁶ As part of the 1775 Act, the Continental Congress even adopted the practice of franking, declaring that “all letters to and from the delegates of the United Colonies, during the sessions of Congress, pass, and be carried free of postage, the members having engaged upon their honour not to frank or enclose any letters but their own.”²³⁷

At the time, the Congress all but formally dispensed with the revenue motive for its postal service and focused on possessing and maintaining an independent system to facilitate the movement of vital correspondence outside the Crown’s view.²³⁸ With the American post office taking shape, the British responded by withdrawing its postal services from the colonies.²³⁹ By December 1775, its colonial operations were shuttered, never to be resumed.²⁴⁰ The speed at which the British dismantled its system in the colonies represents the growing divergence in ideology at the time—Britain withdrew its services knowing that its colonial competitor displaced it in principle and in practice.

During the war, the American postal service continued to generate deficits that had to be borne by the Continental Congress.²⁴¹ Yet,

²³⁵ *See id.*

²³⁶ For the most part, Franklin would not truly serve as America’s first postmaster. This was due to his concurrent appointment as ambassador to France, which resulted in him being overseas for much of the revolution. Prior to his departure, he appointed his son-in-law Richard Branch to serve in his place, to the dismay of Goddard. *Id.* at 26. *See also* LEONARD, *supra* note 81, at 15.

²³⁷ Kristin Onuf, *Postal Service*, THOMAS JEFFERSON’S MONTICELLO (Aug. 14, 1992), <https://www.monticello.org/site/research-and-collections/postal-service> [https://perma.cc/QR9-2CR8].

²³⁸ It is worth emphasizing that rather than contract with or otherwise utilize Goddard’s private system, the Continental Congress acted to acquire and convert Goddard’s system into one controlled by the Congress. This service then mirrored the British system in terms of its mechanics and operations. If anything, this evidences a rejection of Goddard’s views on postal services—Goddard simply had something that the Congress could easily convert into its own postal service to aid in the movement for independence. That Goddard never had a role in actually managing the system after its conversion further evidences the rejection of his views and the Congress’s alignment with the general views held at the time explained herein. *See Adelman, supra* note 227, at 743–44.

²³⁹ *See Smith, supra* note 122, at 275.

²⁴⁰ *Id.*

²⁴¹ *See Founding-Era Socialism supra* note 10, at 31.

the Congress did not seem to treat this as a worrisome issue—certainly revenue could not have been the motive for the service then. Instead, as was true of the early Royal Mail and the postal systems before it, the Congress’s operation of postal services was not the revenue-generating machine it is often pictured to be.²⁴²

VI. THE UNITED STATES OF AMERICA, POST OFFICES, AND POST ROADS

When the war for independence ended, postal services appear to have been a mere afterthought. Having just emerged as an independent nation, the colonies were focused on establishing some type of effective government. Thus, the new nation largely continued with the British model of postal services.²⁴³ This included the same terminology, offices, roads, and even the franking privilege that existed in the former system.²⁴⁴

When the Articles of Confederation were adopted in 1777, a strong postal power was included. As provided in Article IX:

The United States in Congress assembled shall also have the sole and exclusive right and power of . . . establishing or regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office.²⁴⁵

This text is far more detailed than what would be included in the Constitution.²⁴⁶ In fact, Article IX implies that only Congress had the power to establish post offices for the purpose of carrying a more general category of “papers” between the states.²⁴⁷ This view was solidified in 1781 when the Confederation Congress codified the same postal monopoly that had existed in the colonies since the Neale Patent.²⁴⁸

While Congress possessed a complete and exclusive power under the Articles of Confederation, it did not actually need to do much in way

²⁴² Again, while generating some revenue was certainly a goal, the competing goal of transmitting vital correspondence and intelligence had to be equally, if not more important, else Congress would have protested the continued deficits.

²⁴³ See *Founding Era-Socialism*, *supra* note 10, at 35–36.

²⁴⁴ See *id.*

²⁴⁵ ARTICLES OF CONFEDERATION of 1781, art. IX.

²⁴⁶ See *id.* Not only is the prefatory clause to Art. IX longer and clearer than the Constitution’s Art. I in its grant of power, Art. IX codified the notion that the Postal Power was exclusive to the national government. See U.S. CONST. art. I.

²⁴⁷ See ARTICLES OF CONFEDERATION of 1781, art. IX.

²⁴⁸ See GALLAGHER, *supra* note 84, at 51.

of “establishing” post offices. As noted earlier, the newly independent country simply continued to operate the system it inherited when the Articles of Confederation were adopted.²⁴⁹ Because the components of a postal service, the “post offices” and “post roads,” already existed, the new country did not have to set up the system from scratch. Rather, it only needed to ensure that the new government had the power to continue operating the system that already existed.²⁵⁰

As a developing nation, newspapers and correspondence were vital to the creation of an orderly government. At the time, there was no viable alternative to using the postal system to spread individual ideas and the news that mattered to the masses.²⁵¹ The post office “was essential to this experimental new union” for this very reason.²⁵² While the idea of a government-run postal system was largely uncontested, issues that the colonists faced under the British system carried over into the post-independence period. The opening of mail and the unreliability of the system were two key issues that remained to be addressed.²⁵³

A. *The Constitutional Convention*

In May 1787, fifty-five members of the newly commissioned Constitutional Convention convened in Philadelphia.²⁵⁴ These delegates, appointed by the various states, were sent to remedy the failing Articles of Confederation.²⁵⁵ Over the course of the next several months, much debate was had over the powers to be vested in an entirely new federal government. On one side of this debate were the proponents of a strong federal government, Alexander Hamilton among them.²⁵⁶ On the other side, were the proponents of a limited federal government with most powers to be reserved for the states.²⁵⁷ With the delegates’ sharp differences in opinions and intense passions, the first two months of the Convention yielded little progress. Delegates could not even

²⁴⁹ See *Founding-Era Socialism*, *supra* note 10, at 35–36.

²⁵⁰ See *id.*

²⁵¹ See GALLAGHER, *supra* note 84, at 30–36.

²⁵² *Id.* at 29.

²⁵³ See *id.* at 31–34, 51.

²⁵⁴ *The Constitutional Convention*, CONSTITUTIONFACTS.COM, <https://www.constitutionfacts.com/us-constitution-amendments/the-constitutional-convention/> [<https://perma.cc/3ZWK-CZ2L>].

²⁵⁵ See *id.*

²⁵⁶ See *The Great Debate*, CONSTITUTIONFACTS.COM, <https://www.constitutionfacts.com/us-articles-of-confederation/the-great-debate/> [<https://perma.cc/YYL8-L8LL>].

²⁵⁷ See *id.*

agree on basic issues of representation or the number of chambers in the national legislature.²⁵⁸ It was not until the establishment of the Committee of Detail in July 1787 that progress would be made.²⁵⁹

The Committee of Detail created the first draft of the Constitution, which was then provided to the entire Convention.²⁶⁰ This draft was based on the Committee's review of various sources, including the New Jersey Plan, the Virginia Plan, and even the Articles of Confederation.²⁶¹ While the committee intensely debated various pieces of the draft, there was little debate regarding the proposed language in Article I, § 7 that "[t]he Legislature of the United States shall have the power . . . to establish post offices."²⁶² Compared to the Articles of Confederation, the first draft of the Constitution contained much less detail as to what this power entailed—it neither affirmed the federal monopoly nor expressly granted Congress the power to set rates.²⁶³

Starting in August 1787, with the first draft complete, the members of the Convention painstakingly reviewed it line by line—offering critiques, comments, and edits.²⁶⁴ The record reveals that the proposed power to “establish post offices” received little discussion.²⁶⁵ George Washington, however, apparently desired for the clause to reflect the traditional notions of both components of the system—the “post offices” and “post roads”—for in the margins of his draft, he noted that “postal roads” should be added to the proposal.²⁶⁶ Ultimately, the language used in the draft simply relied upon the common understanding of the postal system at the time, as evidenced by its use of the more general terminology.²⁶⁷

²⁵⁸ See *The Constitutional Convention*, *supra* note 255.

²⁵⁹ See *id.*

²⁶⁰ *Id.*

²⁶¹ See *id.* It is also noteworthy that both the New Jersey and Virginia Plans included a postal clause. The New Jersey Plan, however, included language that the postal power be for “raising revenue,” unlike the Virginia Plan or what was ultimately adopted by the Convention. See *Founding-Era Socialism*, *supra* note 10, at 44–45.

²⁶² See *The Constitutional Convention*, *supra* note 255. See also, *Founding-Era Socialism*, *supra* note 10, at 43; U.S. CONST. art. 1, § 7.

²⁶³ See *supra* Part VI (discussing Art. IX of the Articles of Confederation, which provides that Congress has the “sole and exclusive” power to “establish[] or regulat[e] post-offices from one State to another, throughout all the United States, and exact . . . such postage on the papers passing through the same as may be requisite to defray the expenses of the said office.”) As noted in Part IV, the first draft of the Constitution provided only that “Congress shall have the power to . . . establish post offices.” This draft contains no reference to the monopoly, to the regulation of the postal system, or to the ability to set postage rates. ARTICLES OF CONFEDERATION of 1781, art. IX.

²⁶⁴ See *The Constitutional Convention*, *supra* note 255.

²⁶⁵ See *Founding-Era Socialism*, *supra* note 10, at 43.

²⁶⁶ See *The Constitutional Convention*, *supra* note 255.

²⁶⁷ See *Founding-Era Socialism*, *supra* note 10, at 44–46. See also *supra* Part IV.B

Once the Committee of Detail presented its draft, the Convention established the Committee on Style, which was tasked with “polish[ing] up” the proposed Constitution.²⁶⁸ During this phase, the Constitution was organized in the way it exists today.²⁶⁹ With respect to the Postal Clause, the record shows that Elbridge Gerry moved to add “and post roads,” which was then seconded and approved without debate.²⁷⁰ When the delegates reached an agreement to enumerate Congress’s powers in Article I, both camps acquiesced to the Postal Clause with almost no discussion.²⁷¹

As a result, the states and the people were presented the Postal Clause as we know it for ratification. Article I, §8 begins by stating that “[t]he Congress shall have Power To,” and it then lists the 18 enumerated powers of the federal legislature; Clause 7 sets forth the Postal Power by stating “establish post Offices and post Roads.”²⁷²

As states considered whether to ratify the Constitution, the postal service played a vital role to its supporters. In fact, antifederalists accused the Constitution’s supporters of using the postal service to their advantage—spreading pro-Constitution views to the populace through the newspapers.²⁷³ The primary target of this criticism was *The Federalist Papers*, written by James Madison, Alexander Hamilton, and John Jay, which remains an essential source for constitutional interpretation to this day.²⁷⁴ The *Federalist Papers* are useful not only in that it provides crucial explanations regarding constitutional text, but also because the manner of its distribution underscores the Framers’s understanding of postal services. At the time, each individual essay was published in a newspaper and the masses were able to read the essays by virtue of the postal system that distributed those newspapers.²⁷⁵

Relevant to the issue at hand, *The Federalist Papers* also explicitly

(discussing the terminology of postal services during this era).

²⁶⁸ *Committee of Style Report*, AMERICAN TREASURES, [https://constitutioncenter.org/american-treasures/committee-of-style-report/kiosk#:~:text=September%2012%2C%201787,previous%2023%20articles%20into%20seven](https://constitutioncenter.org/american-treasures/committee-of-style-report/kiosk#:~:text=September%2012%2C%201787,previous%2023%20articles%20into%20seven.). [https://perma.cc/7L9T-35HB] (last visited Dec. 1, 2022).

²⁶⁹ *Id.*

²⁷⁰ *Founding-Era Socialism*, *supra* note 10, at 44–46.

²⁷¹ *See id.*

²⁷² U.S. CONST. art. I, § 8, cl. 7.

²⁷³ *See* Robert W. T. Martin, *How a Political Dispute Over the Early American Postal System Could Have Jeopardized the Whole U.S. Constitution*, TIME (Aug. 24, 2020 5:19 PM), <https://time.com/5883034/usps-politics-founding/> [https://perma.cc/44WR-GJ24].

²⁷⁴ *Full Text of The Federalist Papers*, LIBRARY OF CONGRESS, <https://guides.loc.gov/federalist-papers/full-text> [https://perma.cc/5LPH-NARM].

²⁷⁵ *See* Martin, *supra* note 274.

addresses the importance of the postal service to the new republic. As stated by Madison in Federalist No. 42, “[t]he power of establishing post roads must, in every view, be a harmless power, and may, perhaps, by judicious management, become productive of great public conveniency. Nothing which tends to facilitate the intercourse between the States can be deemed unworthy of the public care.”²⁷⁶

At the time, Madison was not fully aligned with Hamilton’s notions of a strong federal government.²⁷⁷ Yet, in this text, Madison acquiesces to the idea that the postal service is crucial to the body politic—it is worthy of “public care” as he says, because of its importance to the people, its facilitation of interstate activity, and its transportation of items of governmental consequence.²⁷⁸ If anything, Eldridge Gerry’s uncontested motion to amend the proposed Postal Clause demonstrates a shared understanding of the Clause’s purpose and the desire for the post office to be a matter of public charge as explained in *The Federalist Papers*.²⁷⁹

Furthermore, when placing the Postal Clause within the larger structure of the Constitution, the Framers codified the public’s protection from unwarranted interference with the mail and the essential liberty of circulating the press. This arises from the Framers’ understanding of the Constitution at the time and their initial hesitancy to adopt a Bill of Rights; for as explained in *The Federalist No. 84*, the Framers believed that the Bill of Rights was moot because the Constitution already protected those

²⁷⁶ THE FEDERALIST NO. 42 (James Madison), *Federalist Nos. 41–50*, LIBRARY OF CONGRESS <https://guides.loc.gov/federalist-papers/text-41-50> [<https://perma.cc/P3PF-Z8QR>].

²⁷⁷ See GALLAGHER, *supra* note 84, at 44.

²⁷⁸ THE FEDERALIST NO. 42 (James Madison), *Federalist Nos. 41–50*, LIBRARY OF CONGRESS <https://guides.loc.gov/federalist-papers/text-41-50>. [<https://perma.cc/P3PF-Z8QR>].

²⁷⁹ THE FEDERALIST NO. 42 states that the powers to “regulate commerce among the several States and the Indian tribes; to coin money, regulate the value thereof, and of foreign coin; to provide for the punishment of counterfeiting the current coin and securities of the United States; to fix the standard of weights and measures; to establish a uniform rule of naturalization, and uniform laws of bankruptcy, to prescribe the manner in which the public acts, records, and judicial proceedings of each State shall be proved, and the effect they shall have in other States; and to establish post offices and post roads” are all within the “third class” of federal powers. Madison defines this third class as “those [powers] which provide for the harmony and proper intercourse among the States.” If this third class of powers is necessarily granted to the federal government because these powers ensure that Congress can provide for harmony and proper intercourse among the states, it would again conflict with the logic of the Constitution for Congress not to exercise these powers. In fact, THE FEDERALIST NO. 42 explicitly addresses the failure of the Articles of Confederation in this regard—stating that the Articles allowed for a patchwork system of governance that failed and “[t]he new Constitution has accordingly, with great propriety, made provision against them.” *Id.*

rights deemed necessary by the antifederalists.²⁸⁰ As the federalists argued, with a government of enumerated rights, the people retained all those rights left unenumerated.²⁸¹ Thus, in applying this understanding to the Constitution, the rights and liberties discussed in *Ex parte Jackson* that attach to the government's postal system would exist even in the absence of the Bill of Rights, including the freedom from unnecessary letter opening and censoring of the newspapers.²⁸² The subsequent enactment of the Bill of Rights merely reinforced these protections. Therefore, the Postal Clause sought to not only ensure that the people would retain access to the system which they understood to be a duty of the government to provide, but it also affirmed the understanding of the rights that attached to that system.

B. The Early Days of the Republic

At the time of ratification, the American postal system consisted of 75 offices and 1,875 miles of roads, serving a population of 3,929,214.²⁸³ Much of the foundation for this system existed prior to independence, with many offices and roads having been chartered and operated prior to the revolution.²⁸⁴ These offices and roads largely continued to operate under the Articles of Confederation and during the Constitutional Convention as the nation sought to establish itself.²⁸⁵

With ratification of the Constitution in 1789, the discharge of the Postal Power under the first administration and by the early Congresses is essential to understanding the intent behind the Clause. As the foundation for this analysis, George Washington understood the Postal Power to be not only essential to the functioning of the new government, but also to the development of a national identity.²⁸⁶ Through his experiences both as a landowner and a politician, he recognized the

²⁸⁰ The FEDERALIST No. 84 (Alexander Hamilton).

²⁸¹ *James Madison and the Bill of Rights*, BILL OF RIGHTS INSTITUTE, <https://billofrightsinstitute.org/essays/james-madison-and-the-bill-of-rights> [https://perma.cc/62V3-T9SM] (Of course, it is important to note that Madison, author of The Federalist No. 42, initially agreed with Hamilton's impression of the proposed Bill of Rights, saying "the amendments are a blemish.").

²⁸² See *supra* Part II.A.

²⁸³ GALLAGHER, *supra* note 84, at 31 (2016); *POP Culture: 1790*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/fast_facts/1790_fast_facts.html [https://perma.cc/3WAW-7E86].

²⁸⁴ See GALLAGHER, *supra* note 84, at 31.

²⁸⁵ See *id.*

²⁸⁶ See *id.*

country's vital need for an effective communications system.²⁸⁷ In the early days of the United States, Washington was concerned about the fragility of the nation's unity—he was quoted as stating that the loyalty of the people to the new country was tenuous and that “[t]he touch of a feather, would turn them any way.”²⁸⁸ Of course, with this, he was speaking of the neighboring and rival colonies still possessed by the French and Spanish, and even the British who still maintained control over Canada.²⁸⁹

As noted earlier, the Constitutional Convention saw two main camps locked in debate. By 1790, Thomas Jefferson headed the side that feared a powerful federal government, remaining opposite of Alexander Hamilton. As this debate continued into the First Congress, the two sides reached a compromise to continue the postal service under temporary legislation for the time being.²⁹⁰ Despite the lack of real attention to the post office, the public understanding of the Postal Power remained unchanged from what it was prior to ratification. As noted by one scholar, “[t]he new government did nothing during that period that would have changed the public meaning of the postal clause. It seems to have been taken for granted that the postal system would serve its traditional role as a medium for governmental intelligence, a source of revenue, and an aid to commerce.”²⁹¹

1792 marks a major event for reinforcing this understanding of the Postal Clause, as re-authorization of the system placed the postal service in the spotlight. During his presidency, Washington was acutely aware of the importance of building the nation's foundation, and as the question of re-authorization was reaching its apex, he stated: “[t]he importance of the post office and post roads on a plan sufficiently liberal and comprehensive . . . is increased by their instrumentality in diffusing a knowledge of the laws and proceedings of the Government.”²⁹² Benjamin Rush, one of the revolution's key figures, also weighed in on the debate and argued that the post office is “the only means of carrying heat and light to every individual in the federal commonwealth.”²⁹³

The 1792 Postal Service Act represents another grand compromise of sorts. The Act was underscored by Washington and Rush's national identity argument, but in accordance with Jefferson's small-government

²⁸⁷ *See id.*

²⁸⁸ LEONARD, *supra* note 81, at 17.

²⁸⁹ *See id.*

²⁹⁰ *See id.*

²⁹¹ *Founding-Era Socialism*, *supra* note 10, at 52.

²⁹² GALLAGHER, *supra* note 84, at 31.

²⁹³ *Id.*

philosophy, it also intended for the postal system to be revenue neutral.²⁹⁴ Since the system was to be revenue neutral, generating only enough revenue to cover costs, any surplus was required to be turned over to the Treasury.²⁹⁵ Furthermore, the Act continued the franking privilege, granted benefits to newspaper printers, and criminalized interference with the postal system.²⁹⁶ Not only did the Act criminalize private interference with the postal service, it also explicitly rejected the British practices of censorship and letter opening, as such were declared to be “great . . . evil[s].”²⁹⁷

The few concerns raised regarding the 1792 Act were less concerns about the government’s role in providing postal services and were more concerns about the importance of the mail more generally. Included in the record of the bill’s passage is the quote that “[i]t is easy to see what hand could be made of the post offices, if ever they are under the direction of an improper person.”²⁹⁸ If the concern was that a powerful, unchecked appointee could corrupt the post office, then placing the entire system in the hands of a private entity would surely have been more concerning.

As with the reforms introduced by Franklin, the 1792 Act ushered in an era of a communications boom, as the firm commitment to postal services and the implementation of beneficial rates led to an exponential growth in the number of newspapers.²⁹⁹ Once again, this growth was not an accident. As one historian notes:

Both Federalists and Republicans believed that the same policy – low newspaper postage – advanced their political goals. Federalists assumed that the widespread circulation of news and political discourse buttressed a strong central government by fostering nationalism and promoting party cohesion. Federalists recognized, too, that their partisans occupied most postmasterships and their newspapers had the wherewithal to make aggressive use of the mails. At the same time, Republicans hoped that their party papers carried inexpensively through the mails would inform constituents of Federalist abuses.³⁰⁰

²⁹⁴ See *id.* at 38–39. (Again, it is undeniable that revenue was certainly a consideration when it came to the Postal Clause. However, revenue alone could not be the ultimate or primary concern of the Framers, as the system was only intended to be revenue neutral, rather than a profit-generating machine). See *id.*

²⁹⁵ Act of Feb. 20, 1792, ch. 8, § 28, 232, 239 (1792) (establishing the Post-Office and Post Roads within the United States).

²⁹⁶ Act of Feb. 20, 1792, ch. 8, § 28, 232, 234, 236–38 (1792) (establishing the Post-Office and Post Roads within the United States).

²⁹⁷ GALLAGHER, *supra* note 84, at 40–41.

²⁹⁸ LEONARD, *supra* note 81, at 18.

²⁹⁹ See GALLAGHER, *supra* note 84, at 39–40.

³⁰⁰ Richard B. Kielbowicz, *The Press, Post Office, and Flow of News in the Early Republic*,

From this, we can discern that both sides of the philosophical debate on how the federal government should be structured supported the 1792 Act and the ideas that underpinned it – that the government had the duty to facilitate communication with and among its people, no different than the scope of its duty under the Articles of Confederation.³⁰¹

Despite the 1792 Act's aspirations to be revenue neutral, the post office required subsidy in the years following independence and for parts of the next century.³⁰² Time and time again, however, Congress willfully provided the necessary funds, never stopping to require systemic changes to produce a profit.³⁰³ Since 1792, the post office has operated as a permanent government institution.³⁰⁴

VII. CONGRESS'S DUTY UNDER THE POSTAL CLAUSE

The nation's victory in the fight for independence led to a new form of government, unlike anything that had preceded it.³⁰⁵ The Framers of the Constitution learned from the lessons of history and understood that "America needed a central nervous system to circulate news throughout the new body politic."³⁰⁶ For most of the founding era, the postal service failed to generate surpluses and was often subsidized by the General Treasury, yet only rarely was the value of those expenses questioned.³⁰⁷

Postal services existed in colonial America with the sanction of the Crown, having taken root in the early eighteenth century.³⁰⁸ The

3 J. OF THE EARLY REPUBLIC 255, 255 (1983).

³⁰¹ See U.S. POSTAL SERV., *Postage Rates for Periodicals: A Narrative History*, <https://about.usps.com/who/profile/history/periodicals-postage-history.htm> [<https://perma.cc/LYL8-LCPN>] (detailing the correspondence between Washington and Jefferson regarding the importance of the post office to the body politic).

³⁰² See GALLAGHER, *supra* note 84, at 39.

³⁰³ See U.S. POSTAL SERV., *supra* note 302.

³⁰⁴ *About the United States Postal Service*, U.S. POSTAL SERV., <https://about.usps.com/who/profile/> [<https://perma.cc/U75E-ZVTV>] (last visited Sept. 25, 2022). During his tour of the United States in 1831, Alexis de Tocqueville marveled at what the U.S. postal system had become, aghast at how it managed to connect the entire nation. As he explained, the post office served as "the great link between minds." See GALLAGHER, *supra* note 84, at 63; LEONARD, *supra* note 81, at 23.

³⁰⁵ See *Federalism*, PUB. BROAD. SERV., <https://www.pbs.org/tpt/constitution-usa-peter-sagal/federalism/> [<https://perma.cc/9R5P-R2UT>] (discussing the Constitution's "innovation" that is American federalism).

³⁰⁶ See GALLAGHER, *supra* note 84, at 1.

³⁰⁷ See *id.* at 4.

³⁰⁸ See *supra* Part IV.C (discussing the implementation of postal services in the colonies).

continuation of those services, utilizing the same network and mechanics as the British system prior to independence, was largely a public assumption that was eventually codified with the Postal Service Act of 1792.³⁰⁹ Since the passing of the Act, the government has continued to expand the scope of services offered by the federal postal service. In 1863, residential delivery in urban areas was introduced.³¹⁰ In 1896, Rural Free Delivery was created.³¹¹ In 1918, the postal service took to the sky with airmail.³¹² In 1929, Congress passed a law that banned all non-government uses of mailboxes – an act that would later be affirmed by the Supreme Court.³¹³ In 1963, the post office introduced the ZIP Code, a feature of daily life we now take for granted.³¹⁴ During all of this, even as the number and types of services offered grew, the postal system routinely operated as a deficit-generating enterprise.³¹⁵

Taking all of this together leaves the fundamental question of how did we get here? How exactly are we to interpret those six words that constitute the Postal Clause? As set forth in one analysis, “[t]he ratifying public would be justified in assuming that the congressional role under the Constitution would be similar to existing practice. Both advocates and opponents of the Constitution represented the Constitution’s postal power as the same as under the Articles of Confederation.”³¹⁶ While revenue has certainly been a common talking point when it comes to the postal service, the idea that government postal services exist only to generate revenue thus conflicts with history and what would have been understood by the public at the time of ratification.³¹⁷

If we accept the premise that the public understanding of the Postal Clause was constant during the eighteenth century, then the Postal

³⁰⁹ See *Founding-Era Socialism*, *supra* note 10, at 24–26.

³¹⁰ See GALLAGHER, *supra* note 84, at 149–51.

³¹¹ MELIUS, *supra* note 80, at 26.

³¹² LEONARD, *supra* note 81, at 87.

³¹³ See, *id.* at 121–22; *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114 (1981).

³¹⁴ LEONARD, *supra* note 81, at 141.

³¹⁵ See, LEONARD, *supra* note 81, at 51; see also GALLAGHER, *supra* note 84, at 148–52.

³¹⁶ *Founding-Era Socialism*, *supra* note 10, at 68.

³¹⁷ See, *e.g.*, *id.* at 33, 44, noting discussions over revenues to be derived from the postal service. This paper does not dispute that revenue was certainly an important aspect of the Postal Clause, but it recognizes that the revenue function was balanced against other, equally important functions and that the Framers did not intend for the postal service to be revenue maximizing. See *supra* Part IV.A (for a further discussion of the competing goals of the early postal service. Similarly, focusing solely on the revenue motive ignores the public’s perception and understanding of the Postal Clause and postal services).

Clause is nothing more than the codification of that understanding. Thus, there was never a question as to whether the federal government would provide such services, for the operation of postal services was seen as a duty of government and the scope of the Postal Power was to be no different than what had been afforded to the national government under the Articles of Confederation.³¹⁸ As noted throughout this paper, a postal service has been viewed as a necessity for the handling of certain correspondence for thousands of years.³¹⁹ This is true of the Royal Mail, the first post office established by the Continental Congress, and the motivations underpinning the Constitution's Postal Clause.³²⁰ Since the early half of the seventeenth century, public access to such a system has also been available.³²¹ By the time of the eighteenth century and the American revolution, the system was a given.³²² As evidenced by the tenure and life of Benjamin Franklin, coupled with the statements and actions of the Framers, the newly founded United States of America viewed the operation of the post office as a matter of necessity for not only operating an effective government, but for also disseminating information to the public through newspapers and individual correspondence—it is an important enough system to be a matter “public care.”³²³

Therefore, based on the historical evidence available, we can conclude that the Postal Clause has an implied duty whereby Congress must exercise the powers afforded to it by Art. I, § 8, cl. 7. Under this duty, Congress, at the very least, has an obligation to furnish a means of transporting the letter correspondence of the people, circulating newspapers and the like, and distributing governmental correspondence. As a means of doing so, Congress must simply maintain a network of post offices reasonably situated near population centers, to which citizens can travel to send and receive mail, and it must designate the post roads upon which the mail travels from post office to post office. Further, this system is subject to the protections afforded by other constitutional provisions, such as the freedom from unwarranted intrusion and censorship under the First and Fourth Amendments.³²⁴

³¹⁸ See *Founding-Era Socialism*, *supra* note 10, at 51, stating “[the Confederation] Congress opted for the status quo . . . but it did nothing that would alter the public understanding of what it meant to ‘establish Post Offices and Post Roads.’”

³¹⁹ See *supra* Part III.

³²⁰ See *supra* Part IV; *supra* Part V.B; *supra* Part VI.

³²¹ See *supra* Part IV.A (regarding the opening of the Royal Mail to the public).

³²² See *id.* for a further discussion of public access to postal services.

³²³ THE FEDERALIST NO. 42 (James Madison).

³²⁴ See *Ex parte Jackson*, 96 U.S. 727 (1877), noting the protections afforded by the First and Fourth Amendments as it relates to the postal system. It is also important

From this baseline, Congress's duty hinges on that which it deems reasonable, related to both the cost and efficiency of its operations. While, as noted, the post office has generally incurred deficits throughout its history and postage rates have fluctuated over time, increasing and decreasing based on the passions of government, at no point was there widespread condemnation of rates being unreasonable.³²⁵ Even from the time of the Neale patent, postage rates were set based on a balance between the competing tensions of generating revenue and facilitating correspondence.³²⁶ If, as Franklin argued, postage is not a "tax," the only requirement is that postage must be reasonable. Similarly, the historical analysis shows that a government's service has not always been the fastest at transporting mail, nor the most reliable.³²⁷ The public has simply accepted that which they deemed to be reasonable in the circumstances, and discontent with the system was often the catalyst for improvement.³²⁸ As noted in *Currier*, this duty does not require that a "post" be delivered to the most convenient location nor transported through the most efficient means.³²⁹

to note that this paper does not seek to determine whether Congress could contract out of direct provision of such services while still fulfilling its duty. Whether Congress's duty could be effectively and properly transferred to a private enterprise by contract remains an open question beyond the scope of this paper.

³²⁵ See, e.g., *supra* Part V.A.

³²⁶ See *supra* Part IV. The specific language of the Neale patent even implies that rates were to be set to the highest rate deemed "reasonable" by planters.

³²⁷ See *Founding-Era Socialism*, *supra* note 10 (discussing the drawbacks of the English/British postal service).

³²⁸ See *supra* Part V. Further, while a monopoly has traditionally been afforded to government-operated postal services, whether the monopoly must also be maintained is a separate question beyond the scope of this paper. The history of the postal monopoly is complex in itself. Private companies and individuals attempted to intrude upon the Royal Mail and General Post Office monopoly at various points in the seventeenth and eighteenth centuries. For example, in 1680, Thomas Dockwra attempted to initiate a service within London, as there was no urban service at the time. Initially, his service was left alone by the Crown. But, when it began to generate a profit, the Duke of York crushed the operation through the courts and the Crown eventually absorbed its network within the Royal Mail. The same happened in 1708 when Charles Povey attempted to create another separate post in London. See *Founding-Era Socialism*, *supra* note 10, at 22–23. For a greater discussion of the Crown's motives in granting legislative monopolies to the postal service, see A. D. SMITH, *THE DEVELOPMENT OF RATES OF POSTAGE: AN HISTORICAL AND ANALYTICAL STUDY* (1910). Even if the system is not required to have a monopoly over the carrying of "posts," that would not change the requirement that the system be nonetheless available.

³²⁹ *Currier v. Henderson*, 190 F. Supp. 2d 1221, 1230 (W.D. Wash. 2002).

VIII. CONCLUSION

During the era of privatization that gripped the nation in the 1970s, Congress explored the possibility of privatizing the postal service. The Kappel Commission's report on "postal excellence" in 1968 found complete privatization unworkable, without regard to the postal service's relationship to the Constitution.³³⁰ Instead, the Commission recommended the restructuring of the post office as an independent government-corporation, which ultimately led to the formation of the United States Postal Service as we know it today—an entity taking the form of a traditional corporation, yet still owned and operated by the government and accountable to Congress.³³¹

Today, these same calls for privatization persist.³³² Despite the arguments that can be made in support of complete privatization of postal services, and without regard to the merit of those arguments, such an action would be at odds with the original understanding of the Postal Clause. The original understanding of the Clause, rooted in how the public understood it in the ratification era, leads us to conclude that a maintaining a system of "post offices" and "post roads" is a required function of the federal government. This service is no less crucial to the orderly operation of society than Congress's duty to provide the currency upon which daily life relies, to set forth the rules of naturalization, and to establish the Supreme Court.³³³

³³⁰ LEONARD, *supra* note 81, at 153–56.

³³¹ *Id.*; *Postal Reorganization Act*, BRITANNICA, <https://www.britannica.com/topic/Postal-Reorganization-Act> [<https://perma.cc/K3F7-SVY7>].

³³² *See, e.g.*, Chris Edwards, *Privatizing the U.S. Postal Service*, DOWNSIZING THE FEDERAL GOVERNMENT, (July 9, 2019), <https://www.downsizinggovernment.org/usps> [<https://perma.cc/AW8A-FRF7>].

³³³ It is critical to differentiate between what must be provided and the post office as we know it. Congress could, in fact, jettison most functions of the USPS as it exists today; at-home and parcel delivery, which we now take for granted, were not components of the ratification-era system or what was understood through the use of "post offices" and "post roads." Nonetheless, Congress must provide a system, reasonable in terms of its cost and efficiency, for the transportation and delivery of private and governmental letter correspondence to central locations to meet its constitutional duty. If anything, understanding this distinction is where the revenue motive becomes crucial. It would make little sense for Congress to deliberately maintain an incompetent system that hemorrhages money. While Congress could choose to gut today's post office to the point that private alternatives are the economically rational option, Congress would nonetheless still be required to adhere to its duty and provide the minimum level of services. Thus, the revenue motive encourages providing services to an extent that achieves a reasonable degree of revenue to support the system. This balancing of services and revenue underpinned the Postal Service Act of 1792 and succinctly describes the grand compromise upon which the Act relies—a compromise largely by and among key Framers and in line with the expectations of the ratifying public. *See supra* Part V. Furthermore, as noted in THE FEDERALIST NO. 42 (James Madison), the "judicious management" of the postal systems drives it to be a matter of "great public

“Post offices” and “post roads” are a necessary component of an effective government, as has been the case throughout the history of civilization.³³⁴ This was understood by the Framers and the general public at the time of ratification, and the Postal Clause rested upon this shared understanding—the people transferred power to the new government with the expectation that it discharge its duties in line with their spirit and for their collective benefit.³³⁵ Just as Article III is written broadly, Article I and the Postal Clause are designed with similar vagueness so as to serve as an enduring feature of American system; allowing the powers to contract and expand in response to social, political, and economic changes, while nonetheless ensuring a constitutional baseline.³³⁶ As demonstrated by this paper, during the ratification era, the people expected the provision of postal services by the federal government. Failure to continue to provide such services would thus be counter to the basis for the people’s consent to be governed under the Constitution.

As Justice Story noted, the Constitution gives rise to this type of issue because it is intentionally vague, thereby enabling it to be the enduring foundation of our nation’s government.³³⁷ Rather than including detailed rules and requirements, the Constitution sets forth various guiding principles that are often left open to interpretation—“[I]est its ratification be jeopardized . . . the framers preferred to keep things simple.”³³⁸ By applying an originalist perspective to Article I, we can conclude that the powers granted to Congress are not entirely discretionary and that, based on the understanding of the Framers and the ratifying public, Congress was expected to discharge certain powers. In other words, Article I contains implied duties. This paper demonstrates that exercising the Postal Power and maintaining the federal post office is one such implied duty. Overall, in order to determine which Article I powers contain an implied duty, this paper’s analytical framework must be applied to each enumerated power in § 8. However, as noted previously, The Federalist No. 42 sets forth a “third class” of powers under Article I, § 8, and at the very least, the text of The Federalist No. 42 supports the idea that implied duties are contained only within this narrow subset of § 8 powers.³³⁹

conveniency,” rather than just a static minimum.

³³⁴ See, e.g., *supra* Part III (discussing the impetus for the first postal systems).

³³⁵ *Martin v. Hunter’s Lessee*, 14 U.S. 304, 348 (1816).

³³⁶ See *id.* (discussing the intentional vagueness of the Constitution as it relates to Article III).

³³⁷ *Id.*

³³⁸ GALLAGHER, *supra* note 84, at 33.

³³⁹ See *supra* Part VI. It is the author’s hope that this paper will generate additional

Understanding Article I as containing implied duties also presents a difficult, and likely even more controversial question implicating the separation of powers; that of enforcing these implied duties. Enabling the judicial branch to require Congress to act in accordance with an implied duty would likely entail an expansion of judicial power at the expense of the legislative power. However, given that the First and Second Congresses immediately acted to exercise its power in accordance with the implied duty under the Postal Clause, in order for Congress to abrogate its duty, it must take an affirmative action, which more squarely falls into the realm of traditional judicial review.³⁴⁰ The alternative is simply that enforcement of implied duties is only possible through examination of Congress by the electorate and the mechanism of accountability that is the ballot box. Regardless, this paper sets forth an original understanding analysis that is capable of determining if and when Article I imposes an implied duty onto Congress and asserts that the Postal Clause contains one such duty. Whether other Article I powers contain such a duty remains an open question that will hopefully be explored in greater detail as a result of this paper.

scholarly research in this area. Given the constraints of this paper, a full analysis of THE FEDERALIST NO. 42 (James Madison) was not feasible. Nevertheless, it must be emphasized that the powers described in this work are treated and classified differently than other Article I powers.

³⁴⁰ In reference to Part II.B, *supra* p. 9, if Congress passed legislation to immediately end the U.S. dollar or repeal all laws regarding naturalization, it is unclear whether a court would sit in judgment on a claim that Congress is failing to meet a constitutional duty. As explained in this Part, the issue presented here is novel—case law in this area is almost non-existent as Congress has yet to attempt to voluntarily relinquish a power afforded to it by Article I. Unless and until that happens, whether the judicial branch possesses the power to enforce constitutional obligations on Congress remains an open question.