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Recommended Citation
Christina M. Bates, From 34 Cents to 37 Cents: The Unconstitutionality of the Postal Monopoly, 68 Mo. L. Rev. (2003) Available at: http://scholarship.law.missouri.edu/mlr/vol68/iss1/10

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From 34 Cents to 37 Cents: The Unconstitutionality of the Postal Monopoly

Christina M. Bates*

I. INTRODUCTION

On April 8, 2002, the Governors of the Postal Service voted to accept the Postal Rate Commission’s recommendation for a three-cent increase in the price of a first-class stamp to 37 cents, as part of an overall rate increase of 7.7 percent.1 The new rates took effect on June 30, 2002.2

Regarding the rate increase,3 Robert F. Rider, Chairman of the Postal Service’s Board of Governors, stated, “The settlement agreement with the industry was in recognition of the urgent financial needs of the Postal Service in light of the terrorist attacks and the downturn in the economy.”4 Rider then noted that “continual rate increases are not the long-term answer to maintaining a national postal system.”5

In March 2002, Postmaster General and Chief Executive Officer John E. Potter confronted the evident financial crisis facing the United States Postal Service.6 In his statement before the Subcommittee on Treasury, Postal Service, and General Government of the Committee of Appropriations of the United States House of Representatives, Potter provided a brief discussion of the history of the United States Postal Service.7 During that discussion, Potter spoke of the

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7. Id.
“Constitution [that] created a federal postal system . . . [that] . . . continued to grow and serve the communication needs of a nation as the path of its development pushed west, north, and south.” But, do the words of Article I, Section 8 of the United States Constitution, as written and interpreted, really create what Potter referred to as a “federal postal system?” Do those words essentially provide the United States Postal Service with a monopoly in terms of the transmission of communications via the mail?

Article I, Section 8 of the United States Constitution (the “Postal Clause”) states that “The Congress shall have the power . . . to establish Post Offices and Post Roads.” Though at ratification the Postal Clause was inserted with very little discussion, there was increasing debate, involving such famous names as Lysander Spooner, as to whether or not the Postal Clause granted Congress a monopoly over the American postal system. In fact, some adventurous Americans, who did not believe that the Postal Clause granted to Congress a postal monopoly, created their own private mail services that nearly eradicated the Post Office Department in the mid-1850s.

Because there was little discussion of the Postal Clause upon its insertion into the Constitution, this Article seeks to ascertain the Postal Clause’s meaning primarily through examining the history of the English and American postal systems. Part II discusses the formation of the English postal system and its integration into the new American colonies.

8. Id.
12. See George L. Priest, The History of the Postal Monopoly in the United States, 18 J.L. & ECON. 33, 68 (1975) (discussing the rise and fall of several private mail businesses during the early 1850s).
13. See The Federalist No. 42, supra note 10; see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 243 (M. Farrand ed., Yale Univ. Press, 1966) (1911): [Resolved] that in addition to the powers vested in the [United] States in Congress, by the present existing [A]rticles of Confederation, they (Congress) be authorized to pass acts for raising a revenue . . . by Stamps on paper, vellum, or parchment, and by a postage on all letters or packages passing through the general post-Office, to be applied to such federal purposes as they shall deem proper & expedient; to make rules & regulations for the collection thereof; and the same from time to time, to alter & amend in such manner as they shall think proper.
Part III examines the early history of the American postal system both prior to, and after, the ratification of the Constitution in an effort to ascertain the Framers' intentions as to the meaning of the Postal Clause.

Part IV deals with the life and works of Lysander Spooner. Spooner, a self-taught lawyer, is known as the first to challenge the constitutionality of the postal monopoly. He was also one of the first of a handful of Americans to establish private mail services in violation of the perceived congressional postal monopoly. Because Lysander Spooner played such an important role in the history of the postal monopoly, this Part examines his works at great length.

Part V examines the handful of cases dealing with the constitutionality of the postal monopoly. In all of these cases, the United States Supreme Court refuses to question the constitutionality of the postal monopoly. It is simply assumed that the Postal Clause grants Congress a postal monopoly. What is interesting is that the Court refuses to explore the history of the postal monopoly in the United States, and neglects to address the fact that the Postal Clause is vastly different from that which existed in the Articles of Confederation.

Part VI identifies the current postal statutes and explains how these statutes permit private companies, like Federal Express, to operate despite the congressional postal monopoly.

Finally, in conclusion, the Author argues that the "Spooner" view represents the more accurate interpretation of the Postal Clause. As support for this argument, the Author refers to, among other things, the history of the postal system in England and America, a comparison of the Postal Clause as it existed

14. See CHARLES SHIVELY, BIOGRAPHY, in 1 THE COLLECTED WORKS OF LYSAN DER SPOONER (Charles Shively ed., 1971), at 29-30. After falling into severe debt, Spooner asked the public for contributions in order to pay his fees associated with the eventual demise of his private mail service. In his plea to the public, Spooner cited the fact that he was the first to challenge the constitutionality of the postal monopoly and as such was solely responsible for the reductions in postage brought about by the 1845 and 1851 Acts. See infra text accompanying notes 110-12.

15. See id. at 29-30. Other private mail services were Adams & Company, James W. Hale Company, and the Friends of Cheap Postage in the City of New York, which was led by Barnabas Bates, a leader among New York postal reformers. Id.

16. Id. at 29-32.

17. See generally Searight v. Stokes, 44 U.S. 151 (1845).

18. See id.

19. See id. In the Articles of Confederation, Congress was granted "the sole and exclusive right of establishing and regulating post offices." ARTICLES OF CONFEDERATION, art. IX, cl. 4. In the Postal Clause, however, there is no mention of the right being either "sole" or "exclusive." U.S. CONST. art. I, § 8, cl. 7. This is evidence that perhaps the Framers did not wish for the right to be a sole and exclusive one. The Supreme Court, however, fails to address this point and simply assumes the existence of a postal monopoly.
in the Articles of Confederation and the Clause as it is in the Constitution, and Lysander Spooner’s arguments to Congress in early 1844.

II. THE HISTORY OF THE ENGLISH POSTAL MONOPOLY AND ITS INTEGRATION INTO THE AMERICAN COLONIES

In 1692, eight years after a postal monopoly was initiated in England, the English introduced the monopoly to the new American colonies.\(^\text{20}\) Thus, to fully understand the history of the American postal system and later postal monopoly, it is essential to outline the development of the postal system in England.

Prior to the early years of the sixteenth century, letters were carried throughout England exclusively by special courier.\(^\text{21}\) By the early sixteenth century, however, Henry VIII had instituted an exclusive permanent letter carriage on specified routes.\(^\text{22}\) In spite of Henry’s instruction, the Merchant Strangers\(^\text{23}\) began operating their own postal service in order to communicate with other cloth markets in various cities.\(^\text{24}\) Later, Queen Elizabeth, upon learning of these private posts, began to fear the possible communication of treason and sedition and, therefore, issued a proclamation in 1591 which prohibited foreign letter delivery by any carrier other than the royal post.\(^\text{25}\) This proclamation has been characterized as the first postal monopoly.\(^\text{26}\)

In 1609, James I granted a monopoly for inland mail delivery to John Stanhope.\(^\text{27}\) The monopoly was a limited one, however, in that letter carriage by special messenger, a friend of the correspondent, or common carrier was permitted.\(^\text{28}\) The principle purpose of this monopoly was not to raise revenues or to stifle competition, but instead was to force persons wanting to communicate plans of treason either to pay the exorbitant cost of sending a private messenger or to run the risk of discovery by using the royal post system.\(^\text{29}\)

Then, in 1637, Charles I, in an effort to stifle the flow of unsavory communication regarding his kingship and to preserve his realm, secured the

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20. See Priest, \textit{supra} note 12, at 34.
22. \textit{Id.} at 5.
23. Any non-English merchant was generally referred to as a “merchant stranger.”
25. See Priest, \textit{supra} note 12, at 34.
26. See Priest, \textit{supra} note 12, at 34.
27. See Priest, \textit{supra} note 12, at 34.
29. See Priest, \textit{supra} note 12, at 35.

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postal monopoly in Coke and Windebank, his Secretaries of State. Shortly thereafter, Charles outlawed all private correspondence. Outraged by his actions, Parliament, in 1642, seized the monopoly from Charles and granted it to the party willing to pay the highest price for the annual contract rights to manage the office and to collect and retain all postage revenues. Because the successful bidder was not permitted to increase prices or reduce service quality, however, the government received all expected monopoly payments within the successful bidder's rental payment.

After the Protectorate fell in 1659, the restoration Parliament modified the postal ordinance to assign the choice of contractor to Charles II, instead of to the Protector, and the profits were assigned to the crown instead of to the state. This modification also prohibited the discontinuance of service on "losing routes."

Based on the new postal ordinance, Charles II discontinued competitive bidding for the contract and assigned management of the post to his allies. Because Charles disregarded expertise when assigning the postal monopoly, the post failed to operate efficiently and the development of better postal operations was nonexistent. This lack of concern for the development of postal operations led to the establishment of private operations despite the existence of the monopoly.

After the Restoration, the failure of British Post Office managers to consider developments and extensions of service resulted in a delay in the integration of the postal system within the new American colonies. Beginning in the early seventeenth century, the colonists repeatedly demanded postal service within the North American colonies. When their demands were not answered, the young colonies set out to organize the dispatch of letters as early as 1639.

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30. See ROBINSON, supra note 21, at 33.
31. See Priest, supra note 12, at 36.
32. See Priest, supra note 12, at 36.
33. See Priest, supra note 12, at 37.
34. See Priest, supra note 12, at 37.
35. Priest, supra note 12, at 37 n.28. This modification significantly decreased postal profits.
36. See ROBINSON, supra note 21, at 51.
37. See Priest, supra note 12, at 38.
38. See HEMMEON, supra note 28, at 195.
39. Priest, supra note 12, at 39. Despite the demand for postal services in the colonies as early as the 17th century, the British Post Office experienced significant delays in introducing the post to the colonies. Id.
40. Priest, supra note 12, at 39.
41. Priest, supra note 12, at 39.
III. THE BIRTH OF THE AMERICAN POSTAL SYSTEM

In the absence of initiatives by the English Post Office, individual colonial assemblies organized postal systems of their own although these systems were never interconnected.\(^{42}\) Meanwhile, the English crown, concerned only with the centers of colonial government which were located in port towns, saw the development of inter-colonial services, either by themselves or the colonists, as needless.\(^{43}\) It was not until 1707 that the English Post Office, due to royal embarrassment on the part of England, established a postal system within the American colonies.\(^{44}\)

Thomas Neale, an apprentice to King William, was permitted to establish an inter-colonial postal service in the North American colonies for his own profit.\(^{45}\) Neale was granted a monopoly for twenty-one years in return for his promise to keep postal rates at levels that “the Planters may freely agree to give.”\(^{46}\) Because Neale was forced to obtain legislation from each province to confirm his grant of the monopoly, he succeeded only in New York, Massachusetts, New Hampshire, and Pennsylvania.\(^{47}\)

In 1698, possibly because of complaints about service, Neale was asked to report the status of his operations to the British Postmasters General.\(^{48}\) Neale refused to invest his own money into the venture and offered to sell the monopoly to the English crown for five thousand pounds.\(^{49}\) The crown initially refused, but in 1707 it relented and the colonial postal operations fell under the control of the Postmasters General of England.\(^{50}\)

\(^{42}\) Priest, supra note 12, at 40.

\(^{43}\) Priest, supra note 12, at 40. It is highly likely that if demand for colonial communication by the English government had been greater, the colonies would have received postal service much earlier than they had. This is so because royal correspondence in the colonies required only a channel between various local governors and the home office in England. Given that the centers of colonial government were in port towns, however, rather than inter-mingled within the colonies, England thought the development of inter-colonial service to be needless. \textit{Id.}

\(^{44}\) See Priest, supra note 12, at 42.

\(^{45}\) See Priest, supra note 12, at 42-43.

\(^{46}\) Priest, supra note 12, at 43.

\(^{47}\) Priest, supra note 12, at 43. However, these states issued a large number of penalties, obligations, and exceptions prior to confirming Neale’s grant of the monopoly. \textit{Id.}

\(^{48}\) Priest, supra note 12, at 44. Neale’s representative Hamilton reported to England with his office’s account books that showed a large deficit in the budget. \textit{Id.}

\(^{49}\) Priest, supra note 12, at 44.

\(^{50}\) Priest, supra note 12, at 44. In the years following Neale’s appointment, up until the Postmasters General took control of the colonial postal operations, the postal service had severely deteriorated. \textit{See generally id.}
Postal operations under the Postmasters General did not fare well. Low rates established by the Act of 1710 left the office without a profit until 1761. Route extensions were reluctantly approved, if at all, and those communities in need of service were required to hire post riders for themselves. The situation grew bad enough that five of the thirteen colonies established separate delivery systems in order to supplement the Postmasters General.

England’s power over the colonial postal system began to disintegrate by 1765. By 1774, the colonists resented the postal tax and distrusted English management of the postal system within the colonies. Finally, in July of 1775, the Continental Congress, compelled by the need for a dependable channel of communication to the army and to state assemblies upon which it relied for financial support, established its own government-managed postal operation. This operation was to be protected from competition by a monopoly.

Fearing further financial decay, the Continental Congress immediately prohibited private carriage of letters for profit by a statute that was drafted in 1776, but not enacted until 1782. Thus, the creation of a postal monopoly was a reaction to the financial crisis that faced the Continental Congress during the colonial era. There seems to be no evidence that the Continental Congress relied upon its perceived authority under its Postal Clause to create a postal monopoly. In fact, there is no reason to believe that Congress in 1789 would have created the postal monopoly had a competent private party made a credible offer to manage the post office and to provide reliable service. Looking at this

51. Priest, supra note 12, at 44.
52. Priest, supra note 12, at 45. To pay these post riders, the communities were forced to collect subscriptions. Id. In this sense, the more desolate communities were subsidizing their own postal system.
53. Priest, supra note 12, at 45. These five colonies were Connecticut, Maryland, Rhode Island, North Carolina, and South Carolina. Id. at 45 n.55.
54. See Priest, supra note 12, at 46. The Stamp Act furthered colonial resistance to English taxes and regulations, as well as to the colonial post office. Id.
55. Priest, supra note 12, at 46.
56. See 2 JOURNALS OF THE CONTINENTAL CONGRESS 208 (Worthington C. Ford, ed. U.S. Govt. Printing Office 1905). Upon establishing the post, the Continental Congress enacted postage rates twenty-percent lower than those set by the English. Id. Two months later, however, the prices were raised and since then have never been as low as the prior English rates. Id.
57. Id. at 210-11.
58. See 22 JOURNALS OF THE CONTINENTAL CONGRESS, supra note 56, at 123.
59. See Priest, supra note 12, at 48. Priest believes that this action by Congress is precisely what the Framers intended when drafting the Postal Clause. Id. Priest, arguing that the Postal Clause does grant a postal monopoly to Congress, believes that the Framers intended the Postal Clause to sanction Congress’ provision of delivery service and monopolization, especially in times of financial crisis. See id.
60. Priest, supra note 12, at 50.
evidence collectively, it seems that Congress did not interpret its power under the Postal Clause to be an exclusive one. For if Congress did believe its postal power to be exclusive, it would not have waited until 1782 to enact a statute to prohibit the private carriage of letters for profit. It was not until the late 1780s and early 1790s that Congress, fearing further financial decay, enacted successive statutes to prevent such private carriage.

It quickly became clear that something needed to be done to achieve a more organized and efficient postal system within the North American colonies. The first movement toward change appeared in the Articles of Confederation. The Articles of Confederation granted the Congress the “power of . . . exacting such postage . . . as may be requisite to defray the expences of the said office . . . [conferring upon Congress] the sole and exclusive right [of] establishing and regulating post offices.”61 This clause strongly implies that the Congress had the affirmative duty to provide service and that it clearly possessed monopoly power over the system.

Article I, Section 8, Clause 7 of the Constitution, however, states that “[t]he Congress shall have Power . . . [t]o establish Post Offices and Post Roads.”62 Thus, as Lysander Spooner would later argue, the language of the Constitution, compared to that of the Articles of Confederation, seems to deny Congress the power to create a postal monopoly. It seems odd that the Framers would choose such an ambiguous clause to grant Congress the power to provide service and to create a postal monopoly.63 But because the records of the Constitutional Convention show that there was no debate over the Postal Clause,64 one must look to other factors to determine the meaning of the clause. It would be several years, however, before anyone would challenge the constitutionality of the postal monopoly.

After 1792, postal operations expanded greatly throughout the country. When the Post Office experienced deficits, however, Congress responded not by reducing the number of new routes, but by increasing the protection of its monopoly,65 which was crucial if Congress was to continue to finance the expansion of postal routes. Thus, through a series of enactments from 1789 through 1838, Congress continued to redefine and to tighten its postal

63. The Postal Clause as it existed in the Articles of Confederation as compared to the Clause as it exists in the Constitution, will be discussed further in this Article.
64. See supra notes 10, 13 and accompanying text.
65. Priest, supra note 12, at 55. Congress did, however, discontinue routes where postage had failed to equal one-fourth the expense of the carriage for three consecutive years. Id. at 53 n.106.
monopoly. Despite this, no one challenged the constitutionality of Congress' actions.

Then, in 1832, eastern commercial companies began to complain about the postal taxation. Eventually, the price of postage was reduced but, because of the reduction, the Post Office was unable to continue to expand routes. Moreover, even after the reduction, postal rates remained outrageously high. For example, in 1843, it cost eighteen and three-fourth cents to send one folded sheet of paper from New York to Boston. Because of these high rates, customers quickly sought other means of delivery, and the rapid decline of the Post Office led to the birth and expansion of the private express service. One such pioneer of the private express service, who would later argue that the postal monopoly was unconstitutional, was Lysander Spooner.

IV. LYSANDER SPOONER AND THE AMERICAN LETTER MAIL COMPANY

Lysander Spooner was born on January 19, 1808, near Athol, Massachusetts. The second child in a family of nine, Lysander grew up in very modest conditions. As a self-educated lawyer, he was very interested in

66. Priest, supra note 12, at 55.
67. Priest, supra note 12, at 58. The Postmaster General was forced to discontinue expansion and to reduce the existing service. Id.
68. See Ernest A. Kehr et al., Look Before You Lick, READER'S DIGEST, June 1947, at 125. At this time, to mail a letter, a citizen had to wait while the post office determined the rate (according to the letter's destination) and then had to pay a fee in cash. Id. Letters were usually sent C.O.D., however, because pre-payment entailed more bother and there was no guarantee of delivery. Id. When the U.S. government failed to simplify procedures by using postage stamps, as England had begun to do, private enterprises, like those of Lysander Spooner and James W. Hale, came into being and began, among other things, to issue adhesive stamps, which greatly simplified the mailing process and attracted many customers as a result. Id. at 126.
69. See Priest, supra note 12, at 58. Congress would later bring suit against several of these private express services under the monopoly provisions of the Postal Acts of 1825 and 1827. Id. at 60. In 1842, Congress prosecuted Adams & Company, a private mail carrier service, in the hopes of discouraging others from opening up other private services. SHIVELY, supra note 14, at 29; see United States v. Adams, 24 F. Cas. 761 (S.D.N.Y. 1843). When the case of United States v. Adams & Co. went to the jury in November of 1843, it was held that while under postal law it was illegal for anyone to set up a stagecoach or other company to transport the mail, the carriage of mail by commissioned passengers was permitted. SHIVELY, supra note 14, at 29; Adams, 24 F. Cas. at 792. In response to this favorable decision, a number of companies, including Spooner's, formed to carry letters. SHIVELY, supra note 14, at 29-30.
70. SHIVELY, supra note 14, at 15.
71. See SHIVELY, supra note 14, at 15-16.
"unmask[ing] the hypocrisy" and as such he was often identified by his critics as a "radical." Spooner's identification as a radical did not draw many clients into his office and he quickly abandoned his legal practice to seek out fortune in what was then the booming American West—Ohio.

After a handful of disappointing banking ventures in Ohio, Spooner ventured to New York City in the early 1840s. He quickly found himself in the midst of the growth of private express services. Not long after his arrival in New York City, he formed the American Letter Mail Company.

Spooner's operation differed from the handful of other private express services in that he was extremely open about his course of business. In fact, before establishing his company, he sent a letter informing the Postmaster General that he proposed "soon to establish a letter mail [company] from Boston to Baltimore. I shall myself remain in this city, where I shall be ready at any time to answer to any suit." Spooner included with the letter a copy of his pamphlet, *The Unconstitutionality of the Laws of Congress Prohibiting Private Mails.* It was in this pamphlet that he presented his arguments against the constitutionality of the postal monopoly.

In his pamphlet, Spooner set forth twenty-seven arguments as to why the postal monopoly was unconstitutional. Primarily, he argued that the words of Article I, Section 8 "express the extent of the authority granted to Congress" and as such Congress' power is "simply to establish post offices and post roads of their own—not to interfere with those established by others." Spooner argued:

72. See Shively, supra note 14, at 17-18. Spooner was also identified as a radical because of his atheist beliefs and ideas. *Id.* at 18.

73. Shively, supra note 14, at 18-19. Before departing for the West, Lysander tried his luck at banking in New York City, but once he accumulated enough money, he was on his way to the promised land of the American West. *Id.* at 19.

74. Shively, supra note 14, at 29.

75. Shively, supra note 14, at 29-30. When his company began business on January 23, 1844, Spooner openly advertised in all the major newspapers, soliciting business. *Id.* at 30. His company "printed its own stamps, hired agents, and was soon conducting a busy trade." *Id.* In fact, in a few short months, the private mail companies, like Spooner's American Letter Mail Company, Adams & Company, and James W. Hale's company had "engrossed the bulk of the service between Boston, New York, Philadelphia, and Baltimore." *Id.*

76. Shively, supra note 14, at 30. This letter was sent by Spooner to Charles Wickliffe, who was then Postmaster General, on January 11, 1844. *Id.*

77. Shively, supra note 14, at 30.

78. See Spooner, supra note 11, at 5-17. In this Article, the Author has chosen to discuss the better of Spooner's arguments. Thus, the Author has not discussed all twenty-seven of his arguments.

79. See Spooner, supra note 11, at 5 (internal quotation marks omitted). Spooner felt that the words defined the power and that the power was limited by the definition. In other words, the postal power is defined by the word "establish" and the power is
The power to establish post-offices and post roads of their [Congress'] own, and the power to forbid competition, are, in their nature, distinct powers—the former not at all implying the latter—any more than the power, on the part of Congress to borrow money, implies a power to forbid the people and States to come into market and bid for money in competition with Congress. 

This reasoning is strongly supported by the idea that, but for the fact that no persons had come forward to create and maintain a postal operation, Congress would not have engaged in the business itself. Thus, Spooner argued it must follow that the Postal Clause only grants Congress the power to establish post offices of its own—not to prohibit the establishment of others.

Next, Spooner argued that the Constitution neither expresses a prohibition against the establishment of mails by the states or individuals, nor does it express “any surrender, on the part of the people, of their own natural rights to establish mails.” This argument seems to be in accord with the Ninth Amendment’s preservation of the rights retained by the people. For, if the Constitution does not expressly, or even implicitly, deny or abridge one’s right to establish mails, then how can such a denial be incorporated into the words of the Postal Clause?

Spooner further argued that “[i]f there were any doubt as to the legal construction of the authority given to Congress, that doubt would have to be decided in favor of the largest liberty, and the natural rights of individuals . . . and to be designed to secure them; and any thing ambiguous must be decided in conformity with this principle.” Clearly, Spooner was a natural rights activist and firmly believed in construing a clause to enlarge, instead of to lessen, the fundamental liberties of man. None can deny that the Postal Clause is ambiguous. Just what does “to establish Post Offices and Post Roads” mean? Does establishment include maintenance and regulation? Does the Postal Clause essentially confer a postal monopoly? Spooner argued that when ambiguity exists, it should be resolved in favor of the individual in order to preserve the limited by the definition given to that word. Spooner believed that the establishment of one particular bank or store, does not, based upon the definition of “establish,” preclude the establishment of a second bank or store. Likewise, the establishment of a postal system by Congress does not preclude the later establishment of private mail services. See id.

80. See SPOONER, supra note 11, at 6 (internal quotation marks omitted).
81. As noted earlier in this Article, Congress did not make any attempts to organize a cohesive postal system until the colonies, after having failed at their handful of attempts to establish a rudimentary postal operation, repeatedly demanded that the government establish a postal system.
82. SPOONER, supra note 11, at 5.
83. U.S. CONST. amend. IX.
84. See SPOONER, supra note 11, at 7.
largest liberties for man. Thus, he proposed that the Postal Clause be read to preserve the individual's right to establish and maintain a post office.85

Spooner then made a very interesting argument in which he claimed that the extent of the power to establish post offices and post roads could not go beyond the meaning of the word "establish."86 According to Spooner, the word "establish," as it appears in the Postal Clause:

[E]xcludes what is necessarily inconsistent with, contradictory to, or incompatible with, the establishment of the thing declared to be established. [However], [i]t does not exclude the establishment of any number of other things of the same kind, unless they would be necessarily inconsistent with the thing first established . . . . The designation, therefore, or the establishment of a particular road as a post road, excludes nothing except obstacles to the progress of the posts over that road.87

Since the establishment of private mail services would not in any way hinder Congress' operation of its post offices and post roads, it is unconstitutional to deny individuals the right to establish mail services of their own.

Perhaps Spooner's strongest argument is that in which he compared the Postal Clause as it existed in the Articles of Confederation to the Clause as it exists in the Constitution. Spooner argued that the alteration of power, from a "sole and exclusive" one as noted in the Articles of Confederation, to a simple "power" as outlined in the Constitution, "must have been intentional and clearly indicates that the framers of the Constitution did not intend to give to Congress, under the Constitution, the same 'exclusive' power, that had been possessed by the Congress of the Confederation."88

There seems to be a great amount of validity in Spooner's argument. The verbiage of the Articles of Confederation is quite clear; Congress was to be granted sole and exclusive power over the postal system.89 Yet, in the ultimate Postal Clause contained in the Constitution, no such power is delegated. One can safely deduce from this change that the Framers did not intend to grant Congress sole and exclusive power over the postal system. A more likely conclusion is the Framers intended to give Congress power to establish a postal

85. See SPOONER, supra note 11, at 7.
86. See SPOONER, supra note 11, at 9-10.
87. See SPOONER, supra note 11, at 10.
88. See SPOONER, supra note 11, at 11. Others, like Priest, have discussed similar arguments based on this type of comparison. It seems that Spooner did not regard this argument as persuasive as his others for it was number nineteen in his list of twenty-seven arguments.
system if the need for such a system should arise, or if other private mail systems needed to be supplemented. If the Framers intended for Congress to have sole and exclusive power over the postal system, they could have adopted the Postal Clause in its entirety as it appeared in the Articles of Confederation. That they did not do so is ample evidence that the Framers did not intend for Congress to have such power.

A similar argument was presented by President Monroe twenty-two years earlier in 1822.90 During the early 1800s many challenged the constitutionality of Congress' power to establish post roads by appropriating state land without the States' permission. The constitutional question was whether the power to establish post roads meant that the Congress merely could select pre-existing roads as postal routes, or that Congress could actually develop the necessary roads as they saw fit.91

President Monroe believed that Congress merely was given the power to select pre-existing roads and that the States, under their police power, could decide whether or not they would permit Congress to appropriate state land in order to construct postal roads.92 The reasoning for his decision is strikingly similar to Spooner's argument based upon the differences in the Postal Clause as it existed in the Articles of Confederation and as it exists in the Constitution. Monroe argued:

Had it [the Postal Clause] been intended to convey a more enlarged power in the Constitution than had been granted in the Confederation, surely the same controlling term ["establish"] would not have been used; or other words would have been added, to show such intention, and to mark the extent to which the power should be carried . . . . It would be absurd to say, that, by omitting from the Constitution any portion of the phraseology, which was deemed important in the Confederation, the import of that term was enlarged, and with it the powers of the Constitution, in a proportional degree, beyond what they were in the Confederation.93

Like Spooner would twenty-two years later, Monroe took note of the fact that if the Framers had wished for Congress to have the same postal powers as they possessed under the Articles of Confederation, they simply could have inserted the Postal Clause, as it existed in the Articles of Confederation, into the

91. See id. at 210. Jefferson posed this constitutional question to Madison in 1796.
92. Id. at 224.
93. Id. at 224-25.
Constitution. That this did not occur and that the words "sole and exclusive right" were not included in the Postal Clause as it exists is evidence that the Framers intended to lessen Congress' power under the Postal Clause.

Spooner's next argument was a quite clever one. He argued that if the Framers of the Constitution had intended to grant Congress the exclusive right of establishing mails, "it would have required, and not merely permitted, Congress to establish them—so that the people might be sure of having mails."94 If Congress should neglect or refuse to establish a mail system, the people would have no mails, unless individuals or the States have the right to establish them. Spooner concluded his argument by stating that "but now [as the Postal Clause is currently read] Congress are no more obliged to establish mails, than they are to declare war."95

Under this reasoning, it seems that Spooner is correct. For example, if Congress were to cease conducting the post office tomorrow, who would take its (Congress's) place? Under the Postal Clause, as it is currently interpreted, individuals and the States are prohibited from establishing a postal system. Thus, the only logical conclusion is that the entire system would come to a halt and, thus, individuals would be at the mercy of the Congress. Surely, this type of situation could not have been what the Framers intended when drafting the Postal Clause.

Spooner then used the congressional power of taxation as the basis for his next argument. He explained that the words of the grant in Article I, Section 8 "are simply, 'The Congress shall have power to lay taxes, to establish Post Offices and Post Roads, etcetera.'"96 "[Because] the power of taxation is not an exclusive one, the power of establishing post offices and post roads clearly is not—for both powers are granted in precisely the same terms."97

Spooner's analytical approach regarding the location of the Postal Clause is very logical. Certainly the power to lay taxes is not an exclusive power of Congress; every state shares the same power. Furthermore, the fact that the Framers placed the Postal Clause in the same context as the taxation clause is evidence that they intended the power to establish post offices and post roads, like the power of taxation, to be shared among Congress and the states. From its context, one can fairly assume that the Framers intended for the Postal Clause to grant concurrent rights to establish post offices and post roads.

Finally, Spooner argued that "[i]f the Constitution had intended to give to Congress the exclusive right of establishing mails, it would have prescribed some rules for the government of them, so as to have secured them privacy, safety, cheapness, and the right of the people to send what information they should

94. SPOONER, supra note 11, at 12.
95. SPOONER, supra note 11, at 12.
96. SPOONER, supra note 11, at 14.
97. SPOONER, supra note 11, at 14.
please through them." Thus, Spooner was perplexed by the fact that the Postal Clause completely lacked qualification.

If one examines this argument in light of the history of the postal monopoly in England and the United States, as outlined earlier in this Article, one quickly finds that Spooner’s arguments are very persuasive. The English monopoly arose from the crown’s desire to monitor the mails for treasonous or seditious literature and communications. The colonies disliked such intrusions by the English. Based on this history, it is difficult to believe that the Framers, having experienced these English intrusions, would, in the face of such fears, insert the Postal Clause completely unqualified.

Spooner concluded that because the Postal Clause is unqualified, the Framers must have intended that individuals act as “qualifiers” by establishing mails of their own when, and if, Congress engaged in mail inspection and censorship. Therefore, the Framers intended that the Clause grant concurrent rights of establishment—not an exclusive right to Congress.

Despite his arguments, Spooner’s mail service was short-lived. “Hoping to drive Spooner out of business without raising any constitutional questions, the Postmaster General resorted to some extra-legal measures.” "Transport companies were told that they would lose their government contracts unless they stopped carrying American Letter Mail Company mail." The government began to arrest and prosecute Spooner’s agents in district court. "Under a barrage of such harassing legal actions, [Spooner’s American Letter Mail Company] could not survive; for all practical purposes it had ceased to exist by July, 1844." Though the Post Office never brought a claim against Spooner, his actions resulted in the Postal Reduction Act of 1845 in which postal rates were nearly halved. This was a short-lived victory for Spooner, however, because

98. SPOONER, supra note 11, at 16. Spooner believed that such power over the mails “would be incomparably the most tyrannical, if not the only purely tyrannical feature of government.” Id.
99. SPOONER, supra note 11, at 16.
100. See Priest, supra note 12, at 35. The postal monopoly enabled Queen Elizabeth and the early Stuarts to lessen the costs of inspecting the mails for such treasonous materials. Id.
101. See SPOONER, supra note 11, at 16.
102. See SHIVELY, supra note 14, at 31.
103. See SHIVELY, supra note 14, at 31.
104. See SHIVELY, supra note 14, at 31.
105. See SHIVELY, supra note 14, at 31.
106. Note that Spooner’s agents were arrested and prosecuted but Spooner himself was not prosecuted—he was simply driven out of business. See SHIVELY, supra note 14, at 31.
107. See SHIVELY, supra note 14, at 31. The Postal Reduction Acts of 1845 and
the 1845 Act “was so successful in increasing the business of the Post Office and in eliminating competition, that Congress was able to reduce the postal rates again in 1851.”¹⁰⁸ This final reduction signaled the death of private mail services in the United States and solidified Congress’ postal monopoly.¹⁰⁹

Driven out of business after only seven months in operation, Spooner, suffering great debt, issued a second pamphlet to the public, entitled Who Caused the Reduction of Postage?¹¹⁰ In this pamphlet Spooner argued that but for his actions there would never have been a reduction of the postal rates.¹¹¹ He then requested that the public, in appreciation for the reduction of postal rates, donate monetary contributions to him in order to satisfy debt incurred during his seven months of struggle with Congress.¹¹²

Though many reputable scholars in the legal profession praised Spooner for his work and attested to the validity of his claims, the public was not convinced.¹¹³ In May of 1851, in response to the public’s inaction, Spooner wrote a friend, George Bradburn: “That seems to be of a piece with all my fortune—The World seems determined to starve me to death, and I suspect it will succeed in doing so.”¹¹⁴

V. THE CASELAW

Because the courts repeatedly have upheld, without question, the constitutionality of the congressional postal monopoly, there are very few cases in which courts directly, and thoroughly, address this issue.

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¹⁰⁸ See SHIVELY, supra note 14, at 31.
¹⁰⁹ See generally Priest, supra note 12.
¹¹¹ Id. at 6 (“... Mr. Spooner has been the principal, and by far the most efficient agent in effecting the reduction of postage.”).
¹¹² Id. at 11-12.
¹¹³ Id. at 14. Some of these legal scholars included the Hon. Rufus Choate, Hon. Simon Greenleaf, Hon. Benjamin F. Butler, Hon. William Kent, Hon. William H. Seward, Hon. Robert Rantoul Jr., and Hon. Joseph Story. In his pamphlet, Spooner included quotations from the above-named, and various other, legal scholars and several newspapers of the time, in support of his argument that it was he who caused the reduction of postage in 1845.
¹¹⁴ See SHIVELY, supra note 14, at 33-35. Spooner sent this letter to Bradburn on May 11, 1851. Id. at 32 n.7.
The United States Supreme Court first addressed the issue of the constitutionality of the postal monopoly in *Searight v. Stokes.* In *Searight,* the United States Supreme Court was faced with the issue of whether Pennsylvania could lawfully impose a toll on carriages employed in transporting the mail of the United States over that part of the Cumberland road which passed through the territory of that state. Basing its decision mainly on the fact that Pennsylvania had previously entered into an agreement with her sister states and Congress to exclude the United States mail carriages from payment of the toll, the Court held that Pennsylvania would not be permitted to recover the half-toll.

But *Searight* is an important case for a more pertinent reason. It was in this case that Chief Justice Taney solidified the constitutionality of the Congressional postal monopoly. Interestingly enough, Chief Justice Taney did not see any just ground for questioning the postal powers of Congress: "The Constitution gives it [Congress] the power to establish post-offices and post-roads; and charged, as it thus is, with the transportation of the mails, it would hardly have performed its duty to the country . . . [to perform] efficiently a great public duty, which the Constitution has imposed upon the general government." In fact, without any basis, Chief Justice Taney concluded that, "certainly, neither Ohio, nor . . . Pennsylvania, nor Maryland, nor Virginia, appear . . . to have doubted the power of Congress." Yet, Chief Justice Taney failed to explain exactly how Congress got this power, if it does exist, and what the extent of the power is. Clearly, Chief Justice Taney must have been privy to the very recent debates in Congress regarding the infringement of private carriers on the supposed congressional postal monopoly. Similarly, Chief Justice Taney would have been remiss if he had not heard of Spooner's arguments just a year prior. Yet, Chief Justice Taney did not appear even to think for a moment about the constitutionality of the congressional postal monopoly. He simply assumed the

115. 44 U.S. 151 (1845).
116. *Id.* at 162. The Cumberland road was the principle line of communication between the seat of government and the great valley of the Mississippi. *Id.* at 163. It passed though Maryland, Pennsylvania, Virginia, and Ohio and was constructed at an immense expense by the United States under the authority of several congressional acts. *Id.* Because it was so heavily traveled, the road fell into severe disrepair and Pennsylvania, unlike her sister states, wished to exact a full toll on vehicles passing through its section of the road, and a half-toll on United States vehicles carrying the mail, in order to raise money to continuously repair and maintain that portion of the Cumberland road that traversed her. *Id.* at 163-64.
117. *Id.* at 168.
118. *See id.* at 166-67, 170.
119. *Id.* at 166-67.
120. *Id.* at 167.
lawful existence of a monopoly and saw no “just ground for questioning the power of Congress.”  

The dissenting Justice Daniel, however, apparently recognized some ground for questioning the power of Congress. In his dissent, Justice Daniel explained his belief “that the authority vested in Congress by the Constitution to establish post-roads, confers no right to open new roads, but implies nothing beyond a discretion in the government in the regulations it may make for the Post-office Department for the selection amongst various routes, whilst they continue in existence.”

Thus, Justice Daniel recognized a limit to the congressional power as it applied to the establishment of post roads. Nevertheless, his views were not enough to convince the majority and the Searight Court set a precedent that rigidly would be followed throughout the history of the Supreme Court.

Thirty-two years later, in Ex Parte Jackson, the United States Supreme Court held that Congress could constitutionally prohibit the carriage of lottery tickets, or materials soliciting lottery tickets, through the mails. In reaching its decision, Justice Field, speaking for a unanimous Court, began his opinion by stating:

[T]he 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 . . . but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and prompt delivery of its contents . . . . The power possessed by Congress embraces the regulation of the entire postal system of the country.

It is interesting that Justice Field based his finding that Congress possesses the power of a postal monopoly upon an existing “practical construction” of the

121. Id. at 166.
122. Id. at 181 (Daniel, J., dissenting); see also Rogers, supra note 90, at 76. This reasoning is similar to that used by President Monroe regarding the construction of the Cumberland road.
123. 96 U.S. 727 (1877).
124. Id. at 735. The defendant in the case was indicted for knowingly and unlawfully depositing in the mail of the United States, to be conveyed in it, a circular concerning a lottery offering prizes. Id. at 727. The defendant argued that the Act, which stated, “No letter or circular concerning illegal lotteries . . . or concerning schemes devised and intended to deceive and defraud the public, for the purpose of obtaining money under false pretenses, shall be carried in the mail,” was unconstitutional and void. Id.
125. Id. at 732 (emphasis added).
Postal Clause. In doing so, he failed to address the constitutionality of that construction. Instead, he simply assumed that the traditional construction was the just and constitutional construction of the Postal Clause. Perhaps, if he had ventured to examine the history of the postal monopoly in particular, the change in the Postal Clause from the Articles of Confederation to its insertion in the Constitution, and Spooner’s arguments before Congress in 1844, Justice Field may have questioned the “practical construction” of the Clause. This inquiry did not occur, however, and the Court, in *Jackson*, continued the precedent, established in *Seabright*, that would be rigidly followed throughout the history of the Supreme Court.

In 1919, the Alabama Supreme Court found itself faced with the postal power issue in *State v. Burleson*. The court had to decide whether Congress could make telephone and telegraph lines part of the postal system and thereby increase the charges or tolls upon intrastate business. Justice Anderson, expressing his individual views after the court, per curiam, dismissed the complaint, conceded that the decision to allow Congress to make telephone and telegraph lines part of the postal system could rest on Congress’ war and emergency powers, but preferred to rest his decision on “Congress’ postal authority.”

Justice Anderson stated:

In the eighth section of article 1 of that instrument [the Constitution], it was provided that Congress shall be vested with power to establish post offices and post roads, and this provision 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 . . . but the carriage of the mail, and all the measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents.

126. *Id.*
128. 82 So. 458 (Ala. 1919).
129. *Id.* at 459.
130. *Id.* In this case, the court, per curiam, denied the plaintiff’s requested injunction upon the idea that what Congress had done (appropriating the telephone and telegraph lines as part of its postal authority) could easily be justified as a war measure. Justice Anderson, however, felt that the decision did not need to reach that far—it could have rested upon Congress’ postal authority under Section 8 of Article I of the Constitution.
131. *Id.* at 459-60.
Surely, Justice Anderson, when speaking about “the practical construction since the foundation of the government” was referring to the precedent set in Searight and affirmed in Jackson. Justice Anderson never once questioned the constitutionality of the postal monopoly, but simply accepted, without basis, that essentially, “[s]ection 8 of article 1 . . . in effect give[s] the federal government the absolute control of all matters incidental to the growth and expansion of our great post office department.”

Finally, in order to further emphasize his belief in the postal monopoly, Justice Anderson ended his opinion:

It may be that the denial of the injunction can be justified upon the idea that what has been done was as a war measure and without resort to section 8, article 1 of the Constitution; but I prefer resting my conclusion upon the rule of reason and right, rather than having to resort to the rule of might.

In 1978, the United States Supreme Court was asked to decide the constitutionality of the Private Express Statutes, and thus, indirectly, the constitutionality of the postal monopoly. In Brennan v. United States Postal Service, the defendants, Paul and Patricia Brennan, were charged with violating the Private Express Statutes when they conducted a service delivering letters and small to medium size parcels for compensation.

The defendants argued that the Private Express Statutes were unconstitutional because the postal monopoly was unconstitutional. While the Court acknowledged the difference between the Postal Clause as it existed in the Articles of Confederation and as it exists in the Constitution, it found that “the postal power, like all other enumerated powers of Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.” The Court then noted that the constitutionality of the postal monopoly had been challenged rarely and never successfully, yet it still went through a long discussion as to the reasons why a congressional postal monopoly is necessary. The Court stated:

132. Id. at 460.
133. Id. at 461. Clearly, Justice Anderson was a strong supporter of the congressional postal monopoly and he wished that the fact be known.
136. Id. at 714.
137. Id. (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).
138. Id. at 715.
If private agencies can be established, the income of the government may be so reduced that economy might demand a discontinuance of the system; and thus the business which it is the right and duty of the government to conduct for the interest of all, and on such terms that all may avail themselves of it with advantage, may be handed over to individuals or corporations who will conduct it with the sole view of making money, and who may find it for their profit to exclude localities or classes from the benefit of the service.\textsuperscript{139}

Finally, the Court concluded "[t]he monopoly which Congress created is an appropriate and plainly adapted means of providing postal service beneficial to the citizenry at large. Consequently the Private Express Statutes are constitutional."\textsuperscript{140} As discussed earlier in this Article, the Court did acknowledge Spooner's writings, but simply dismissed them without any explanation.\textsuperscript{141} Clearly, the Court did not doubt the constitutionality of the postal monopoly at all.

It was not until 1981, in the case \textit{United States Postal Service v. Council of Greenburgh Civic Associations},\textsuperscript{142} that the Supreme Court finally considered the history of the postal monopoly. History can be given many different shades of meaning, however. Justice Rehnquist, speaking for the majority, examined the history of the postal monopoly and concluded that the postal monopoly was a great benefit to our nation and will continue to be a great benefit and, therefore, would not be destroyed. He stated, "given the importance of the post to our early Nation, it is not surprising that when the United States Constitution was ratified in 1789, Art I, § 8, provided Congress the power 'To establish Post Offices and Post Roads.'"\textsuperscript{143} While he acknowledged the benefits of the postal monopoly, however, Justice Rehnquist neglected to address the constitutionality of that monopoly. In fact, Justice Rehnquist cited to \textit{Jackson} as precedent for the constitutionality of the postal monopoly.\textsuperscript{144}

Thus, though he began his opinion by stating that, "a page of history is worth a volume of logic," it seems that Justice Rehnquist had already decided the

\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.} at 715-16.
\textsuperscript{141} \textit{Id.} at 717 n.11.
\textsuperscript{142} 435 U.S. 114 (1981).
\textsuperscript{143} \textit{Id.} at 121. In this case, the plaintiffs, Greenburgh Civic Associations, challenged the Postal Service's threatened enforcement of a federal statute prohibiting the deposit of unstamped mailable matter in a letterbox by claiming that the postal monopoly did not afford Congress the power to abridge freedom of speech in violation of the First Amendment. \textit{Id.} at 116-17. Justice Rehnquist, speaking for a majority of the Court, found the postal monopoly and the statute constitutional. \textit{See id.} at 132-34.
\textsuperscript{144} \textit{Id.} at 126.
meaning of that history before having reviewed it. He placed more emphasis on prior decisions, like Jackson, than on the actual history of the Postal Clause itself. As such, we are once again left with an opinion that simply accepts as true that the postal monopoly is constitutional.

Similarly, in *Air Courier Conference of America v. American Postal Workers Union AFL-CIO*, Justice Rehnquist did not examine the history of the postal monopoly to determine its constitutionality. Instead, he examined the history and determined that the postal monopoly is just, not because it is constitutional, but because it "ensure[s] that postal services will be provided to the citizenry at large." Justice Rehnquist’s method of determining the constitutionality of the postal monopoly, that "if the Court perceives the interpretation of the clause as being ‘good,’ then it must be constitutional," is rather unique.

When examining the history of the postal monopoly, Justice Rehnquist completely neglected to address the constitutionality of the monopoly. Instead, he sifted through the history, highlighting the "benefits" of a government postal monopoly, and then implicitly concluded that something so beneficial must be right. With all due respect, this reasoning seems to be flawed.

Even assuming that the post office does work more efficiently because of the fact that it is conducted through a government monopoly, the Court would have to agree that efficiency does not, without question, equal constitutionality. It seems that the United States Supreme Court understands it to be fact beyond question, however, that the Constitution grants to Congress the power to create and to maintain a postal monopoly.

145. *Id.* at 120. Justice Rehnquist stated that only by review of the postal system and its present statutory and regulatory scheme could the constitutional challenge to Section 1725 be placed in its proper context. *Id.* at 121.


147. In this case, plaintiff unions representing Postal Service employees brought an action challenging the rule that resulted in the suspension of the Postal Service’s statutory monopoly in the international remailing market under the Private Express Statutes. *See id.* at 521. Justice Rehnquist held that postal employees were not in the “zone of interests” of the Private Express Statutes and, thus, could not challenge the suspension. *See id.* at 528. The zone of interests of the Private Express Statutes is to prevent private couriers from competing selectively on the service’s most profitable routes. The postal monopoly, according to Rehnquist, therefore, exists to protect the citizenry at large, not postal workers. *Id.*

148. *Id.*

149. *See generally id.*

150. *Id.*
V. THE PRIVATE EXPRESS STATUTES

If, as the United States Supreme Court has consistently held, Congress has a constitutionally protected postal monopoly, how do private express services, such as Federal Express, legally conduct business without violating that monopoly? The answer indirectly lay in the Private Express Statutes.\(^{151}\)

Under the Private Express Statutes, Congress granted to the United States a monopoly on the conveyance of "letters and packets," thereby precluding competition by private express.\(^{152}\) The stated purpose of the Private Express Statutes is "to give effect to the constitutional mandate that Congress establish 'Post Offices and Post Roads' and their plain intent is that the United States . . . have a monopoly in the delivery of letters."\(^{153}\) Under the statutes, "[i]t is generally unlawful for any person other than the Postal Service in any manner to send or carry a letter on a post route or in any manner to cause or assist such activity."\(^{154}\) A letter is defined as "a message in writing, printed or otherwise in whole or in part, addressed to a particular person or concern and may be in a sealed or unsealed envelope or not in an envelope at all."\(^{155}\) "Violation [of the statutes] may result in an injunction, fine or imprisonment or both and payment of postage lost as a result of the illegal activity."\(^{156}\)

But what is permissible under the statutes? The act of sending or carrying a letter on a post route, or assisting such activity, is lawful only if several conditions are met.\(^{157}\) First, the letter must be "enclosed in an envelope or other suitable cover."\(^{158}\) The letter must be stamped, with either a postage stamp, or a postage meter stamp, on the cover.\(^{159}\) "The name and address of the person for whom the letter is intended [must] appear on the cover."\(^{160}\) The cover must be sealed and the stamp on it must be cancelled, in ink, by the sender.\(^{161}\) The date or receipt of the letter must be endorsed on its cover, in ink, by the sender or carrier.\(^{162}\) If a private carrier complies with these requirements, he will be

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156. 39 C.F.R. § 310.2(a) (2002) (citation omitted).
permitted, at the discretion of the United States Postal Service, to conduct a private express service for letter mail. The Postal Service may suspend the operation of the private express service at anytime, however, when the public interest would require such a suspension. 163

A private carrier may also conduct a letter service if his activity is in accordance with the terms of a written agreement between himself (the carrier of the letter) and the United States Postal Service. 164 This agreement must adequately ensure payment of an amount equal to the postage to which the United States Postal Service would have been entitled had the letters been carried in the mail, 165 "remain in effect for a specified period," 166 and "provide for periodic review, audit[s], and inspection." 167

Thus, the Private Express Statutes explain that the postal monopoly only encompasses letter mail, thereby implicitly permitting private competition in the delivery of non-letter mail, such as packages (i.e., fourth class mail). 168 This exception allows companies, such as Federal Express, to legally conduct business without infringing upon Congress' postal monopoly. When companies such as Federal Express engage in the practice of carrying letter mail, they must comply with the strict requirements set forth in the Private Express Statutes and postal regulations. 169 Because the United States Postal Service will receive the amount to which they would have been entitled had the letter been mailed via their (the

163. 39 C.F.R. § 310.2(c) (2002).
168. See Brennan v. U.S. Postal Serv., 574 F.2d 712, 716 (2d Cir. 1978). In this case, the defendants, having conducted a service delivering for compensation letters and small- to medium-size parcels, were charged with violating the Private Express Statutes. Id. at 713. The defendants argued that the postal monopoly was unconstitutional and, therefore, the Private Express Statutes were unconstitutional as well. Id. Circuit Judge Mulligan, first addressing the issue of the constitutionality of the postal monopoly, held that, as to letter mail, the postal monopoly was authorized by the Postal Clause of the Constitution as read in conjunction with the Necessary and Proper clause of the Constitution. Thus, according to Circuit Judge Mulligan, if the postal monopoly is constitutional, the Postal Service acted within its constitutional authority in its definition of letters and packets for purposes of the Private Express Statutes. Finally, Circuit Judge Mulligan held that the enforcement of the postal monopoly, with regard to letter mail as well as the allowance of private competition in the delivery of non-letter mail, did not violate the defendants' equal protection rights. Curiously enough, in a lengthy footnote, the court acknowledged Spooner's work, The Unconstitutionality of the Laws of Congress Prohibiting Private Mails, and presented Spooner's main argument, and then simply dismissed it without discussion or explanation. See id. at 717 n.11.
169. See, e.g., 39 C.F.R. § 310.2(b) (1998) (detailing requirements for lawful sending or carrying of mail by private person or company).
Postal Service’s) service, they do not experience any revenue loss by permitting companies such as Federal Express to engage in the carriage of letters.

VI. CONCLUSION

For over a century now, the constitutionality of the power of Congress to create and to maintain a postal monopoly has been upheld. Even in light of the teachings of the history of the postal monopoly and the carefully crafted arguments of Lysander Spooner back in 1844, the United States Supreme Court has refused to question Congress’ powers under the Postal Clause.

In this Article, the Author has argued that the “Spooner” interpretation of the Postal Clause clearly is more firmly supported than the interpretation that the United States Supreme Court has adopted. After a thorough examination of the history of the English and American postal monopolies, the Articles of Confederation as compared to the Constitution, and the many convincing arguments presented by Lysander Spooner, it is clear that the Framers intended the Postal Clause to grant a concurrent right to Congress, the States, and the individual to establish post offices and post-roads.

Though it is highly unlikely that the congressional postal monopoly will ever be deemed unconstitutional, the Author leaves the reader with an eerily true quote from Lysander Spooner:

If this power, so absolute over its own mails, were also an exclusive one over all mails, it would be incomparably the most tyrannical, if not the only purely tyrannical feature of the government. The other despotic powers, such as those of unlimited taxation, and unlimited military establishments, may be perverted to purposes of oppression. Yet it was necessary that these powers should be entrusted to the government, for the defense of the nation. But an exclusive and unqualified power over the transmission of intelligence, has no such apology. . . . It has no aspect whatever, that is favourable either to the liberty or the interests of the people.\(^\text{170}\)

\(^{170}\) See Spooner, supra note 110, at 16-17.