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Articles

The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine

ANUJ C. DESAI*

INTRODUCTION

One of the great urban legends on the Internet was “Bill 602P.” In the late 1990s it spread like wildfire, and it occasionally makes the rounds again like pleas from Nigerian officials seeking help with their Swiss bank accounts or the story of the $250 Neiman Marcus cookie recipe. The bill, supported by (no doubt soon-to-be-defeated) “Congressman Tony Schnell,” would have imposed a five cent tax on each e-mail message. One would be hard put to imagine a more nefarious way for

* Assistant Professor, University of Wisconsin Law School. Many people read all or large parts of this Article and provided helpful suggestions. Ann Althouse, Vince Blasi, N.D. Chang, Orin Kerr, Marty Redish, David Schwartz, Linda Smith, and Dan Solove all read and improved the piece. I am particularly indebted to Dan, who suggested a structural change that has made the piece far clearer than it was in its original form. This Article is part of a larger project that I presented at the 2006 Stanford-Yale Junior Faculty Forum, and I am grateful for comments I received from Jack Balkin and other participants there. Historians Richard R. John, Richard Kielbowicz, and Bill Merkel all were indispensable in ensuring historical accuracy (though I take responsibility for any errors on that count). Conversations with Rich Leffler at the Ratification of the Constitution Project also shaped my thinking about some of the historical background. Sarah Maguire and Keli Rylance provided superb research assistance, and the helpful staff at the University of Wisconsin Law Library, including Bill Ebbott, Mike Morgalla, and student intern Tara Boyer helped track down a multitude of sources. Theresa Dougherty, Mike Dudchek, Melissa Leets, Melissa Melshenker, Sue Sawatske, and Elise Volkman all helped with word-processing and editing. Finally, I am grateful for funding from the Graduate School at the University of Wisconsin.


2. Readers even remotely familiar with the federal legislative process will quickly see “Bill 602P” as a canard. See id. Bills in the United States Congress all begin with either “H.R.” or “S.” (for those that originate in the House or Senate, respectively). Id. Be that as it may, fortunately for all of
government to kill the goose of the Internet as it lays the golden eggs of diffusion of information. Who, according to this tale, was behind this plot to destroy what is now believed to be the most potent communications medium in history? Not tax-and-spend liberals seeking more of your money to spend on their pet projects. Not hard-nosed fiscal conservatives trying to balance the budget on the backs of the poor. Instead, the folks who brought you Bill 602P were none other than the evil monopolists whose business model was most threatened by the e-mail revolution: the United States Post Office.3

This image of the Post Office is one of a threatened monopolist and government bureaucracy with entrenched interests that seeks to retard the course of technological progress.4 In this vision one might even see the Post Office as Professor Lawrence Lessig describes late twentieth century big media and telecommunications companies,5 as dinosaurs threatened by the Schumpeterian destabilizing impact of new communication technologies,6 only worse—a public dinosaur.

That the Post Office is now viewed as a technologically backward relic that has been replaced by the Internet is somewhat ironic. The Post Office has always been a medium of communication and, like the Internet, a medium that developed through a substantial amount of conscious government policy. Moreover, the American Post Office is a reflection of a uniquely American approach to communications and media policy, and when it was established, it shaped the American polity in ways that parallel the early visionary hopes for the Internet. Although new communication technologies have almost always been accompanied by utopian dreams of a society unencumbered by ignorance, inequality, and poverty,7 the Post Office served as a very real vehicle for a

us, "Washington D.C. lawyer Richard Stepp [was] working without pay to prevent this legislation from becoming law." Id. The letter, like many e-mail hoaxes, urged you to “[s]end this email to all Americans on your list.” Id. As with many urban legends, the e-mail tax hoax began to have a life of its own, even snookering a New York City television reporter to ask about it during a televised Senate candidate debate between Hillary Clinton and Rick Lazio in October 2000. Id. In response, both candidates opposed the bill. See id.

3. See id. Currently, the legal name for the post office is the United States Postal Service. Because the name of the institution changed several times through its history—most prominently following the 1970 Postal Reorganization Act, Pub. L. No. 91-375, Aug. 12, 1970, 84 Stat. 761—I refer to it throughout this Article, for simplicity’s sake, as the “Post Office.”


5. See, e.g., id. at 143–44 (comparing these companies to “old Soviets”). See generally id. at 143–261.


transformation in American society, just the sort that one imagines to be the result of a vast increase in the free flow of information.8

The Post Office is important, however, not simply because of the extraordinary parallels between its development and that of the Internet, but also because of its role in shaping modern First Amendment doctrine. How exactly did the Post Office shape constitutional law? I argue that early American policymakers gave the Post Office specific attributes and that those attributes helped establish the Post Office as what Professor Frederick Schauer calls a “First Amendment institution,” an institution in society whose role judges recognized as furthering First Amendment values in unique ways.9

The Post Office is not an ordinary First Amendment institution, however. It is—and from the beginning has been—a government institution. Moreover, in contrast to other government entities that one could characterize as First Amendment institutions, such as public libraries or public universities, it is the only one that spans the entire history of the United States and is the principal, and original, federal institution.

In this Article, I describe the American Post Office’s historical foundations—both legal and social—and explain how this historical legacy directly shaped First Amendment doctrine during the twentieth century. By laying out the historical foundations of the Post Office and its impact on constitutional law in this way, I hope to make two principal

8. The notion of the Post Office as a communication “technology” may be difficult to fathom today, but commentators in the early nineteenth century described the Post Office as “annihilat[ing]” time and distance and compared the information passing through the Post Office to an “electric stream.” Richard R. John, Spreading the News: The American Postal System from Franklin to Morse 10–11 (1995). A very similar phrase was used in referring to the telegraph during a famous toast at a banquet held for Samuel Morse in December 1868: Morse, it was said, had “annihilated both space and time in the transmission of intelligence.” Standage, supra note 7, at 90.

First, I argue that the Post Office has been an underappreciated institution in the shaping of the modern First Amendment. The Supreme Court first dealt with two important constitutional questions—First Amendment restrictions on government subsidies for speech (i.e., First Amendment "unconstitutional conditions") and the right to receive ideas—in cases involving postal regulations. More importantly, I argue that specific, unique aspects of the Post Office enabled the Court to first articulate these important principles. It may well be—in fact, it is likely—that today we would have these doctrines without the Post Office cases from which they came. But their origins in postal policy shed light on their underlying rationales in new and interesting ways.

Second, I describe an intriguing story of constitutional lawmaking. The judges who interpreted the First Amendment in my examples were in fact constitutionalizing legislation; they took earlier policy choices made by Congress and embedded them into the Constitution. But these were not ordinary policy choices; rather, they were legislative choices about the character of an institution, and in particular an institution that serves what we today view as First Amendment values. The process can be described briefly in four steps: (1) Congress passes a statute. (2) The statutory provisions give an institution certain attributes. (3) Over time, social practice embeds those attributes into the institution. (4) The courts then take those attributes and write them, in different ways, into the First Amendment. In my examples, the Court's interpretations of the Constitution were simply the affirmation of choices made by an earlier legislature, with the institution serving as a mediating force between the legislature and the courts. In short, by establishing an institution and giving it particular attributes, the drafters of postal statutes helped shape the First Amendment long after the promulgation of their statutes.¹⁰

¹⁰. We might see this approach to constitutional lawmaking as one instantiation of what Robert Post has called the "dialectical relationship" between judicial constitutional lawmaking and "constitutional culture," or "the beliefs and values of nonjudicial actors." Robert C. Post, Foreword, Fashioning the Legal Constitution: Culture, Courts, and Law, 117 Harv. L. Rev. 4, 8 (2003). The essence of my argument is that the early postal policymakers were relevant "nonjudicial actors" in understanding the meaning of the Constitution, but more importantly, that the Post Office itself eventually shaped the meaning of the Constitution as interpreted by the Court, by shaping the Court's view of the normative questions it was asked to adjudicate. Cf. id. at 78-80 (arguing that the ultimate dispute in United States v. American Library Association, 539 U.S. 194 (2003), a case in which the Court upheld a law conditioning federal funds to libraries on their installing filters on library internet terminals, can best be seen as embodying disagreements about the social meaning and purpose of public libraries).

This Article is divided into two parts. Part I gives a legal and social history of the formation of the American Post Office. I focus on two dominant themes: subsidization of newspaper delivery, and the Post Office’s legal and practical monopoly over long-distance communication. Putting these themes together, we can see the way that law helped create and then shape the Post Office in unique ways, ways that later shaped the First Amendment.  

In Part II, I look at the first time the Court faced two important First Amendment principles: First Amendment restrictions on government subsidies, and the right to receive ideas. The Court first dealt with both principles in the context of regulations of the Post Office. Both are now viewed as abstract First Amendment principles that represent important components of modern First Amendment doctrine. Their origins can best be seen as reflecting unique aspects of the Post Office, aspects that embody the two themes discussed in Part I. The First Amendment principles were premised at the time on the Court’s recognition of the Post Office’s character as an institution that served constitutional values in particular ways. By embedding those institutional characteristics into constitutional law, the Court furthered First Amendment principles but did so by following the lead of early lawmakers who put those characteristics into the institution in the first place.

I. THE FORMATION OF THE AMERICAN POST OFFICE: EMBEDDING INSTITUTIONAL CHARACTERISTICS INTO A COMMUNICATIONS MEDIUM

Looking at the period between 1774, when the American Post Office was established as an entity independent of the colonial Post Office, and 1792, when Congress passed the first comprehensive postal statute after adoption of the Constitution, several themes emerge. The first, which I discuss in Part I.A, is government subsidization of newspaper delivery. Early American lawmakers adopted these subsidies with a conscious goal...
of promoting republican values through communications policy. In doing so, the federal government not only affirmatively promoted what today many theorists view as one of the fundamental rationales for the First Amendment, but also shaped the Post Office as an institution.

In Part I.B, I discuss the second theme, the Post Office's legal and practical monopoly over long-distance communication. The legal monopoly had been established by the British and was incorporated in turn by the Americans. However, in the unique American context with its vast landmass, one important way in which the practical monopoly was fostered was through a policy of postal expansion unparalleled in the world. That expansion led to a ubiquity of mail service that, combined with the legal monopoly, created widespread dependency on the postal network for long distance communications.

Both of these themes gave the Post Office specific institutional attributes that later were crucial in the shaping of constitutional doctrine. In Part II, I connect these institutional attributes with specific First Amendment decisions and demonstrate how the Court recognized these institutional characteristics and embedded them into the First Amendment.

A. POSTAL SUBSIDIES FOR NEWS

Government subsidies12 played an important role in the American

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12. I use the term "republican" here in the eighteenth century sense, simply to contrast the American "republic" with the English "monarchy." See Daniel A. Farber & Suzanna Sherry, A History of the American Constitution 6 (2005). I am not using the term to refer to the classical republicans of antiquity or the particular American Whigs and English "opposition" or "country" party theorists who were so influential in the founding of the country. See generally Bernard Bailyn, The Ideological Origins of the American Revolution (1967). I thus do not mean to enter any debate about how much these lawmakers were influenced by the Whigs as opposed to either Locke or enlightenment theorists such as Montesquieu. See generally Farber & Sherry, supra, at 7–23. I am also not using the term in the way that modern legal theorists, such as Owen Fiss, Frank Michelman, or Cass Sunstein, use it to refer to "civic republicanism."

13. I should perhaps clarify my use of the term "subsidy." As I describe further below, the early American Post Office was expected to, and did, break even until well into the nineteenth century. The "subsidies" were public in a nominal sense. At the time, the postal network itself was not subsidized by government revenues from other sources. See George L. Priest, The History of the Postal Monopoly in the United States, 18 J.L. & Econ. 33, 55 (1975). Instead, one group of users of the postal network—letter-writers—subsidized another—newspaper publishers. We might thus think of these subsidies as analogous to those embedded in the E-rate program for contemporary telecommunications services, which requires telecommunications customers to contribute to a fund from which others (e.g., libraries and schools from poorer communities) receive subsidies to purchase the same services. See 47 U.S.C. § 254 (2000). Under contemporary jurisprudence, such cross-subsidization is viewed as government spending. See New York v. United States, 505 U.S. 144, 172–73 (1992). See generally Anuj C. Desai, Filters and Federalism: Public Library Internet Access, Local Control, and the Federal Spending Power, 7 U. Pa. J. Const. L. 1, 101–03 (2004).

My use of these terms is thus prochronistic in some sense. Nonetheless, accepting the rhetoric of the time on its face, it is clear that policymakers knew that the government was providing newspaper publishers with a service at well below both average and marginal cost.
Post Office in the early republic. The American Post Office that developed in the first half-century of the republic was, at the time, unlike any postal system in the world in one important respect. For the first time in history, government officials began to view the postal network not simply as a revenue-generating enterprise, but as a tool for promoting the ideals of a republic in which the people were sovereign. Viewing newspapers as one of the principal means to strengthen the republican foundations of the young nation, early American policymakers provided significant postal subsidies for the delivery of newspapers.\(^{14}\)

In this Part, I describe the development of those subsidies, beginning with the pre-Revolutionary era and culminating with the incorporation of those subsidies into the legal framework of the Post Office with the passage of the landmark Post Office Act of 1792. One prominent feature of these subsidies was the fact that they were based on the format of the communication (i.e., printed newspaper, as opposed to hand-written letter) but were independent of its content. The subsidies were thus based on what we might today call “network neutrality”\(^{15}\)—not complete

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14. I should be clear here that I am making a historical point, not an economic argument. There are huge debates about how much, or even whether, government should provide, or subsidize, communications as an economic matter. The principal argument in favor of subsidization is that the government should invest in infrastructure, or what some economists refer to as “social overhead capital.” See Albert O. Hirschman, The Strategy of Economic Development 83–86 (1958); D. Biehl, The Role of Infrastructure in Regional Development, in Infrastructure and Regional Development 9–35 (R.W. Vickerman ed., 1991). See generally Carl Danner, “Infrastructure” and The Telephone Network: Defining the Problem iii (1992) (defining and developing a three-part typology for understanding the word “infrastructure” in the context of telecommunications). By doing so, the argument goes, the government enables, or contributes to, the conditions necessary for further productive economic activity: a communications infrastructure is thereby lumped together with certain other types of basic services, such as transportation, power (e.g., electrical), water, and (less analogously) law and order. The assumption underlying the necessity of government investment is of course that, for whatever reasons—externalities, high capital-output ratios, etc.—the private sector will not invest in a communications network. See Richard A. Posner, Taxation by Regulation, 2 Bell. J. Econ. & Mont. Sci. 22, 40 (1971); Priest, supra note 13, at 53. Given what seems in retrospect to be too much private investment in telecommunications infrastructure over the past decade, see Olga Kharif, The Fiber Optic Glut—in a New Light, Business Week Online, Aug. 31, 2001, http://www.businessweek.com/bwdaily/dnflash/aug2001/nf20010831_396.htm, one has to wonder whether the resolution of even that debate might be contingent on an individual country’s stage of economic development. See, e.g., Milton Mueller, Telecommunication as Infrastructure: A Skeptical View, 43 J. Comm. 147, 148–49 (1993) (noting the way in which the phrase “infrastructure” was transformed in the 1980s from the notion that underdeveloped countries needed to establish telephone service as a precursor to economic growth to the notion that the U.S. had to modernize its already functional network in order to facilitate economic growth); id. at 156 (“[T]he efficiency contributions of telecommunications investments and usage depend entirely on where and how they are made.”).

network neutrality, but a form of neutrality nonetheless. As I argue in Part II.A, the neutrality built into the allocation of these subsidies became so embedded into the institutional structure of the Post Office that aspects of that allocation became a matter of First Amendment law.

I. Pre-Revolutionary Era

As I noted in the Introduction, our modern conception of the government postal system views it as having attributes of a monopoly. This communications monopoly was crucial to the pre-Revolutionary notion that a post office was an ideal method for raising revenue for the government. The Post Office was, in essence, a means of taxation. Prices were generally well above the cost of providing service, and there was only one place to get the service, the government monopoly provider. This so-called “fiscal rationale” for a postal system had long been assumed prior to the American Revolution. In 1692, William and Mary gave Thomas Neale, the first official colonial “Postmaster” in British North America, a royal grant to establish a postal system in exchange for a mere six shillings per year. Key to the grant was the guarantee that Neale was entitled to all of the profits from the enterprise. Whether a

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16. The United States Postal Service’s current monopoly extends to the delivery of “letters” and “packets,” the latter of which refers simply to “two or more letters . . . under one cover or otherwise bound together.” 39 C.F.R. § 310.1(b) (2005); accord 18 U.S.C. §§ 1696, 1697 (2000); 39 U.S.C. § 601 (2000); 39 C.F.R. § 310. The definition of “letter,” which excludes a vast number of things, has historically been used to respond to political pressures from groups that wanted to exclude themselves from the postal monopoly. 39 C.F.R. § 310.1(a)(7); see Priest, supra note 13, at 77-79, 78 n.219.

17. The phrase “fiscal rationale” is historian Richard R. John’s. See John, supra note 8, at 25-26. This rationale did not, however, guarantee the British Post Office a profit, nor did it result in consistent increases in prices or volume of mail delivered. Other considerations affected postal policy. For one, the basic economic fact that, even with respect to a monopoly service, at some point, a rise in rates will result in a decrease in total revenues if the price significantly enough impacts the demand for the service. More important, though, was the tension between Parliament, whose members jealously guarded their franking privilege—the right of members to send mail for free—and the Treasury Department. Since more “pay letters” invariably resulted in fewer franked letters because of limits on how much could be carried, the result was a compromise, and not always one that resulted in maximizing profit. See Kenneth Ellis, The Post Office in the Eighteenth Century, A Study in Administrative History 39-46 (1958). Nonetheless, the British Post Office clearly saw the need to portray itself as a net revenue-generating enterprise, as its accounts showed profits—even if it did not always generate real profits—throughout the eighteenth century. See id. at 44-46. This was true in the colonies as well. See Wesley Everett Rich, The History of the United States Post Office to the Year 1829, at 91 (1924) (“Until the adoption of the Articles of Confederation, the aim had been to secure a small revenue from the office, or at least to make it self-supporting.”); id. at 71 (“The policy in colonial times had been to make a profit out of the postal business.”); Julian P. Bretz, Some Aspects of Postal Extension into the West, in Annual Report of the American Historical Association for the Year 1909, at 141, 143 (1911) (“Prior to the Revolution . . . [t]he [P]ost [O]ffice was regarded as a source of revenue to the Crown, and in accordance with this theory post roads had been established only where they were profitable.”). In short, the Post Office was seen as an optional service provided by the Crown with its goal being seen as maximizing net profits. One place this can be seen is by the fact that Blackstone’s discussion of the Post Office is in his chapter on “the King’s Revenue.” See William Blackstone, 1 Commentaries *323 (1765) (“There cannot be devised a more eligible method than this of raising money.”).
communications network such as a postal system is a “natural” monopoly or not,\textsuperscript{18} monopoly it would be and, indeed, a monopoly without regulation. The fact of the monopoly, in other words, gave the Post Office a unique opportunity for profit. There was of course no way to ensure that people would want to communicate over great distances but, if they did, the monopoly provided a unique opportunity for outsized profits. Unfortunately, Neale was an abject failure in capitalizing on his monopoly and lost large sums of money.\textsuperscript{19} Upon his death, his creditors inherited the monopoly, but they too had great difficulty turning a profit.\textsuperscript{20} Finally, in 1707, the Crown relieved Neale’s creditors and took over the postal monopoly in the colonies.\textsuperscript{21}

As the postal network slowly grew through the early years of the eighteenth century, the monopoly began to encompass a new service: the newspaper.\textsuperscript{22} Recognizing that a monopoly over the “conduit” through which people communicated provided unique opportunities for disseminating “content,” early eighteenth century postmasters began to take on another role—printer—and to provide a complementary service to postal delivery: publishing news.

This leveraging of the postal monopoly to establish what amounted to a second monopoly caused few problems until competition began to creep into the business of publishing. As one might imagine, control over the postal network gave postmasters the ability to undermine competing printers.

When competition increased in some communities and more publishers sought to print newspapers, the Postmaster’s role increasingly became a huge competitive advantage. Indeed, the Postmaster-publisher effectively used his position to discriminate against other publishers.\textsuperscript{23} Controlling the “pipes” or the conduit through which communication flowed gave the Postmaster a huge advantage when it came to controlling

\textsuperscript{18} A “natural monopoly” is one in which “a single firm can serve the whole market (however defined) with lower overall costs per customer than could multiple firms.” JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 12 (2005). Following the postal reorganization of 1970, the Governors of the Postal Service submitted a report to Congress concluding that the postal network was a “natural monopoly.” See STAFF OF H. COMM. ON POST OFFICE AND CIVIL SERVICE, 93d CONG., REPORT ON STATUTES RESTRICTING PRIVATE CARRIAGE OF MAIL AND THEIR ADMINISTRATION 9–10 (Comm. Print 1973). The claim was highly controversial. See, e.g., Priest, supra note 13, at 69–71.

\textsuperscript{19} See Priest, supra note 13, at 44.

\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} See FRANK LUTHER MOTT, AMERICAN JOURNALISM: A HISTORY: 1690 TO 1960, at 11–14 (3d ed. 1964) (noting that Boston’s Postmaster John Campbell founded the “first continuous American newspaper” in 1704); id. at 14–15 (noting that after an initial spat between Campbell and his successor, who viewed the newspaper as “one of the perquisites of his office,” newspapers remained with a series of five postmasters following Campbell).

\textsuperscript{23} ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 76 (1983).
the content that could be distributed through that conduit.

As a young publisher in the 1730s, Benjamin Franklin was one of the first to suffer from the Postmasters' network monopoly when Philadelphia Postmaster Andrew Bradford, himself a competing publisher, refused to permit Franklin's Gazette into the mails. In order to distribute his publication, Franklin had to bribe the post-riders. Franklin learned his lesson well and by 1737 got himself named Postmaster of Philadelphia. For much of the eighteenth century, then, mail delivery of newspapers had an "indeterminate status," dependent upon the whims of local postmasters. When Franklin was named Deputy Postmaster General for the colonies in the 1750s, he and co-Deputy Postmaster General William Hunter regularized that status to a certain extent, issuing regulations that explicitly required postmasters to collect postage for the delivery of all newspapers.

Newspapers and the postal network as a distribution channel were deeply intertwined by the 1760s, as tensions between the colonists and the mother country increased. Newspapers and pamphlets, distributed through the mail, became one of the principal vehicles by which colonists communicated amongst themselves. The nature of colonial newspapers was changing, and the center of gravity was moving away from communication solely with or through London and towards more direct contact among the colonies. Newspapers were increasingly providing colonists "the Notice of the Tyrannical Designs formed against America, and [were] kindl[ing] a Spirit that has been sufficient to repel them." The postal network was thus also becoming crucial to the inter-colony

25. Id.
27. Id. at 17.
28. See 5 Papers of Benjamin Franklin 18 (Leonard W. Labaree et al. eds., 1965).
29. See Ruth Lapham Butler, Doctor Franklin: Postmaster General 57-58 (1928). The one exception to this rule was the exchange privilege, which permitted newspaper publishers to send copies of their papers to other printers for free. See id. at 58.
30. See Timothy E. Cook, Governing with the News: The News Media as a Political Institution 40 (1998) ("[T]he percentage of news about British North America . . . increased, as news items from other colonies from 1728 to 1765 were taken less from London than from other colonial newspapers."); see also, e.g., Charles E. Clark & Charles Wetherell, The Measure of Maturity: The Pennsylvania Gazette, 1728-1765, 46 WM. & MARY Q. 279, 296 (1989) (noting that use of the postal exchange privilege "involved [readers] increasingly in a shared world of experience with the rest of British North America").
31. Kielbowicz, supra note 26, at 23 (quoting Letter from John Holt to John Adams (1776)). Though Holt's letter to Adams is from 1776, Holt is describing the past and the ways in which newspapers had been used to promote the inter-colonial cohesion in opposition to the Crown prior to his writing of that letter. Id.; accord Mott, supra note 22, at 71 (noting that during the period from 1765 to 1783, "American political affairs took on more and more importance" in the publication of news).
communication that was necessary for spurring the Revolutionary War.

2. Revolutionary Era

In 1773 the British commissioned Hugh Finlay, who was then in charge of the Canadian Post Office, to do a study of the entire North American postal system. One of Finlay’s conclusions was that newspapers were overburdening the mails. By this point, however, tensions were increasing between the Crown and the colonists. American printers were still using the British-controlled Post Office, but a number of parallel private posts had sprung up—in clear violation of the postal monopoly—for deliveries to unserved areas and for faster delivery. These private posts were undermining the official post’s revenue and, according to Finlay, it was

next to impossible to put a stop to this practice in the present universal opposition to every thing connected with Great Britain. Were any Deputy Post Master to do his duty, and make a stir in such matter, he would draw on himself the odium of his neighbours and be mark’d as the friend of Slavery and oppression and a declar’d enemy to America.

Most prominent of these parallel networks was the one established by printer William Goddard, whose Pennsylvania Chronicle began in January 1767. Goddard had had trouble with the official posts from the beginning because Philadelphia’s Postmaster at the time was William Bradford, himself a newspaper printer and a direct competitor of Goddard’s Chronicle. Prior to his move to Philadelphia, Goddard had lived in Providence, where he had been both a printer and the Postmaster, so he understood the value that control over the postal network gave to a printer. By late 1773, it became clear to Goddard that a printer needed his own network and—more fundamentally—that the many colonists who were increasingly dissatisfied with relations with the Crown could no longer count on the official Post Office, what Goddard

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33. Kielbowicz, supra note 26, at 21.
34. Finlay, supra note 32, at 32.
35. See Ward L. Miner, William Goddard, Newspaperman 70, 72 (1962).
36. Bradford was the nephew and protégé of Andrew Bradford, the Postmaster-printer who had refused to allow postal delivery of Benjamin Franklin’s paper three decades earlier. See supra text accompanying note 24.
37. Though he was the official Postmaster, his mother and sister did the postal work most of the time. See Miner, supra note 35, at 113. His sister, Mary Katherine Goddard, eventually became the Postmaster—or “Postmistress,” as she called herself—of Baltimore between 1775 and 1789, one of the few women serving in the federal government during the revolutionary era. See Richard R. John & Christopher J. Young, Rites of Passage: Postal Petitioning as a Tool of Governance in the Age of Federalism, in The House and Senate in the 1790s: Petitioning, Lobbying, and Institutional Development 100, 110 (Kenneth R. Bowling & Donald R. Kennon eds., 2002).
and others called the "Parliamentary Post." 38

By early 1774, Goddard had sketched out a plan to establish what he referred to as a "Constitutional Post" to provide service entirely independent of the British. 39 He traveled through New England in the first half of 1774 drumming up support for the plan. 40 By the beginning of June 1774, the "constitutional or Goddard's [P]ost [O]ffice, as it was sometimes called," was in operation from Falmouth on Casco Bay in what was then the District of Maine all the way down to Baltimore. 41 During the summer, Goddard traveled south and by August, he had extended his postal network down to Williamsburg, Virginia. 42 Given the sparseness of the population of Georgia and the Carolinas, this was effectively a network throughout the full extent of the colonies. 43 Nearly two years before formal independence, the American colonies had established a communications network independent of the British. 44

Goddard's "Constitutional Post" was still "private," however, and in October 1774 Goddard tried to convince the First Continental Congress to adopt his network. 45 He was unsuccessful, because at the time most of the Congress still worried about alienating the British. 46 By the next year, however, in the wake of the Battle of Lexington and Concord, attitudes had changed, and the Second Continental Congress began to recognize the military need for an independent communications network. 47 On May 29, 1775, the Second Continental Congress established a committee, with Benjamin Franklin at its head, "to consider the best means of establishing Posts for conveying Letters and Intelligence through this Continent" 14 and on July 26th adopted Goddard's postal system. 49 By this point, most postmasters had resigned their British commissions and had

38 MINER, supra note 35, at 113-14. It became clear to others as well. The Boston Tea Party was December 16, 1773, and news of the event reached Philadelphia by Christmas and Baltimore by the 30th only because Goddard had by then hired his own post-riders who brought the news. See id.

39 Id. at 131.
40 Id.
41 Id.
42 Id. at 132.
43 Id. at 132-33.
44 Id. at 133. See generally KIELBOWICZ, supra note 26, at 21-22.
45 MINER, supra note 35, at 133-34.
46 Id.; 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 55 (Worthington Chauncey Ford ed., 1904) ("An address from William Goddard to the Congress was read and ordered to lie on the table.").
47 MINER, supra note 35, at 135.
49 Id. at 135, 208-09; see also LINDSAY ROGERS, THE POSTAL POWER OF CONGRESS: A STUDY IN CONSTITUTIONAL EXPANSION 13 (1916) ("The establishment of postal facilities was one of the first problems taken up by the Continental Congress when it began to exercise sovereign powers which it did not legally possess but which of necessity it had to assume.").
begun working within Goddard’s network.50

Throughout 1775 the “parliamentary Post Office” was increasingly abandoned as a means of communication, not only by American military and state officials but also by ordinary letter-writers. By the end of the year, it was hemorrhaging finances at such a rate that it became impractical for the British to maintain it. The coup de grace came at the end of 1775.51 In mid-December, the Maryland Assembly passed a motion forbidding the “parliamentary post” from passing through Maryland and, on Christmas Day, the Secretary of the British Post Office in New York announced the cessation of British postal deliveries in the colonies.52 As historian Carl Bridenbaugh has written, “[t]hus occurred the first institutional change of the American Revolution”: the establishment of a communications network that would “play[ ] a vital role in bringing about American independence.”53 It was Goddard’s “constitutional post” network, and its adoption by the Second Continental Congress, that began a transformation of American communications policy. Though the adoption of Goddard’s post was motivated largely by military necessity, its initial establishment was due to a printer’s attempt to ensure delivery of his newspapers to the populace at large. As I explain in more detail below, the historical origins of the postal network as a vehicle for the distribution of news continued to play an important role through the period of the Confederation and culminated in the passage of the 1792 Post Office Act.

Given Goddard’s initial interest in providing a network for distributing his own newspaper, there is little question that he saw newspaper distribution as a crucial component of what a postal service should do. There is also evidence of this from Goddard’s proposal itself. When he first proposed his “constitutional post,” he set forth a series of “Model Rules” for the enterprise, one of which was to appoint Postmasters, who would, inter alia, “regulate . . . the terms on which newspapers are to be carried.”54

During the remainder of the Revolutionary War, newspaper delivery was a minor issue, as the security of correspondence became the crucial concern of the Continental Congress and postal authorities.55 By 1782,

50. BUTLER, supra note 29, at 160.
51. MINER, supra note 35, at 135.
52. Id. at 136; WILLIAM SMITH, THE HISTORY OF THE POST OFFICE IN BRITISH NORTH AMERICA, 1639–1870, at 65 (1920); Notice from the General Post-Office, New York (Dec. 25, 1775), in PETER FORCE, 4 AMERICAN ARCHIVES, SERIES 4, at 453.
53. MINER, supra note 35, at 136.
54. Mr. Goddard’s Proposal for Establishing an American Post Office (July 2, 1774), reprinted in PETER FORCE, 1 AMERICAN ARCHIVES, SERIES 4, at 502; accord RICH, supra note 17, at 45.
55. See Anuj C. Desai, The Birth of Communications Privacy, Part I, 60 STAN. L. REV. (forthcoming 2007); KIELBOWICZ, supra note 26, at 22 (“Adapting postal operations to the vicissitudes of war preoccupied Franklin and other officials; they had little time to devote to the relative niceties of
however, when the Continental Congress passed its comprehensive postal ordinance, it explicitly provided that newspapers could be admitted to the mails, and "at such moderate rates as the Postmaster General shall establish."  

Although the reference to "moderate" rates might have implied subsidized rates, the result was, as one might expect, complete discretion for the Postmaster General. An earlier draft of the law shows, however, that at least in some people's minds there was a link between reduced rates for newspapers and promoting the dissemination of information about public affairs. Deleted from the eventual law was preambulary language that read as follows: "And whereas it will greatly tend to the communication of due information to the inhabitants of these United States to enable the transportation of public newspapers by the post-riders at a cheaper rate than the postage of letters, packets or other despatches." While this language was struck from the ordinance that the Continental Congress eventually passed, its very existence suggests an early connection between newspaper subsidies and what historian Richard R. John calls an "educational rationale" for a postal network.

From the establishment of the "American" Post Office in 1774-1775 through the 1830s, the purpose of the Post Office in the United States

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56. An Ordinance for Regulating the Post Office of the United States of America (Oct. 18, 1782), reprinted in 23 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 670, 677 (Gaillard Hunt ed., 1914) ("And be it ordained by the authority aforesaid, that it shall and may be lawful for the Postmaster General, or any of his deputies, to license every post-rider to carry any newspapers to and from any place or places within these United States, at such moderate rates as the Postmaster General shall establish, he rendering the post-riders accountable to the Postmaster General, or the respective deputy postmasters by whom they shall severally be employed, for such proportion of the moneys arising therefrom as the Postmaster General shall think proper, to be by him credited to these United States in his general account."); see also KIELBOWICZ, supra note 26, at 22.

57. See KIELBOWICZ, supra note 26, at 23.

58. JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 56, at 677 n.1.

59. John, supra note 8, at 30; accord KIELBOWICZ, supra note 26, at 22 (describing a letter from John Holt, a newspaperman and former Postmaster, to John Adams explaining why the public "had an interest in facilitating the circulation of public information" through the mails). Language in the Articles of Confederation also suggests, albeit obliquely, the idea that the Post Office was meant to provide a public service rather than simply be a tool for raising revenue. The Articles gave Congress the power to "establish[ ] and regulat[e] post offices" but, in doing so, limited the power to "exact[ ] . . . postage" to that which "may be requisite to defray the expences [sic] of the said office." Articles of Confederation, art. IX (Nov. 15, 1777), reprinted in 9 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 919 (Worthington Chauncey Ford ed., 1907) [hereinafter 9 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789]; see also Second Draft of Articles of Confederation, art. XIV (Aug. 20, 1776), reprinted in 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 682 (Worthington Chauncey Ford ed., 1906) [hereinafter 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789]; cf. Rich, supra note 17, at 58-59 (noting that this provison suggests that the Post Office "was intended to be of public service rather than a source of revenue" because "[i]t was . . . provided that any surplus which might arise was to be put back into the office, in the betterment and extension of postal facilities").
went through a transformation. Though the fiscal rationale remained at least part of the thinking of some of those seeking independence,\textsuperscript{60} the question of newspaper subsidization became part of a larger debate about the purpose of a postal network. Over time, the educational rationale overtook the fiscal rationale in importance.

This transformation away from the fiscal rationale, and toward the educational rationale, was premised on republican\textsuperscript{61} ideology and the role that communications and the free flow of information play in fostering both an informed electorate and civil society. In January 1787, Benjamin Rush, a signer of the Declaration of Independence\textsuperscript{62} and an important member of the Pennsylvania Convention for ratifying the Constitution,\textsuperscript{63} gave one of the clearest contemporary articulations of the ideological underpinnings of this shift. In an “Address to the People of the United States,” he proposed two policy recommendations: first, that Congress provide for the conveyance of newspapers for free; and second, that it turn what had been at the time a network confined primarily to the larger towns of the Eastern seaboard into a nationwide network that reached into every town, including those in the interior.\textsuperscript{64} He made clear that both proposals were directly tied to his view about the importance of the Post Office as a vehicle for fostering, in the new citizens of a young country, the republican values that would prove to be necessary. Thus, key to the proposal to provide free distribution of newspapers through the Post Office was a belief in the importance of that medium of communication in promoting republican ideals.

Rush was by no means the only one to understand the connection between a long-distance communications network and the cohesion of the new republic. George Washington, for example, also saw the need for a postal network to disseminate political news.\textsuperscript{65} The early Postmasters

\begin{footnotes}
\item [60.] Governor Morris, for example, noted in 1777 that the Post Office was the perfect vehicle for revenue-raising because “it constituted payment for a service that the taxpayer could conveniently secure in no other way.” John, supra note 8, at 26. Moreover, with respect to the postal monopoly, this “fiscal rationale” survived well into the nineteenth century. See United States v. Bromley, 53 U.S. 88, 96–97 (1851) (characterizing the postal monopoly as a “revenue law” when interpreting a statute granting the United States Supreme Court appellate jurisdiction over cases involving violations of “revenue laws”). Indeed, understanding the postal monopoly in terms of the fiscal rationale even helps explain at least one modern-day First Amendment case, United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114 (1981). In that case, the Supreme Court relied primarily on the long history of the postal monopoly on “mailable matter” to uphold the constitutionality of a statute that prohibited the deposit of unstamped “mailable matter” in a mailbox approved by the United States Postal Service. Id. at 116, 123–24.
\item [61.] As I mentioned in the Introduction, I use the term “republican” here to refer simply to the general notion of a republican form of government. See supra note 12.
\item [62.] The Declaration of Independence (U.S. 1776).
\item [63.] See, e.g., 2 Documentary History of the Constitution 456 (Merrill Jensen ed., 1976).
\item [64.] Benjamin Rush, Address to the People of the United States, 1 Am. Museum 8, 10 (1787). I will return to Rush’s second proposal in Part I.B.2, infra.
\item [65.] See Rich, supra note 17, at 68 (quoting Washington’s Message to Congress in 1791: “[T]he
General likewise regarded their task as using the Post Office to disseminate information, particularly political information, to the furthest reaches of the nation, notwithstanding the costs of transmission. Madison and Jefferson both also saw the Post Office as an indispensable link in disseminating information. In an era in which most political theorists believed that democracy was only possible in small political units because of the need for the electorate to act as a direct check on the officers of the government, a conduit for political information was a necessary condition for maintenance of a democracy over such a geographically dispersed area.

To be fair, the notion of using the postal network to deliver newspapers, though premised on the "educational rationale," was not as radical a break with the practice of the British Post Office as its...

66. See generally RICH, supra note 17, at 69–71, 91–92 (discussing the importance of the Post Office in disseminating political intelligence throughout the new nation).


ideological differences with the fiscal rationale might suggest. From the Licensing Act of 1662, when the Crown first enjoyed a legal monopoly over printing, through the middle of the eighteenth century, the English government used the Post Office as a vehicle for propaganda. The Post Office often delivered government pamphlets and subsidized newspapers (known as Pension Papers) for free. In this sense, the Post Office acted as a very real propaganda arm of the Crown. Though the opposition press obtained the right to publish with the expiration of the Licensing Act in 1695, it was subject to the law of libel (at a time at which any criticism of the government constituted libel) and in 1712, the government began imposing exorbitant charges under the first Stamp Act partly to raise revenue and partly in response to the increased influence of the opposition. This tax was simply for the privilege of publishing and was completely independent of postal delivery. But by the 1760s and 1770s the opposition press had grown and also gradually had begun to gain access to the Post Office. More importantly, this access was increasingly at the same subsidized postal rates as the government press—i.e., free!—because the 1764 Franking Act had given members of Parliament and Peers in the House of Lords a statutory franking privilege, which was used to distribute opposition newspapers. By the 1780s, certain members of the House of Commons were so widely "sharing" their right to mail periodicals for free that booksellers and printers began to use the names of Members of Parliament without permission. By 1790, the general public became increasingly aware of the practice of using forged franks and so adopted it as well. By the early nineteenth century, then, virtually all British newspapers were being sent through the mails for free.

Notwithstanding the fact that English newspapers were similarly subsidized in fact, the American approach, premised on the notion that a communications network was central to an educated populace, viewed the Post Office in very different terms. It was an approach rooted in the very attitude that the Founders brought to structuring government. In a

69. ELLIS, supra note 17, at 47-49.
70. Id.
71. Id.
73. Id. at 11-12. This led to a short-term reduction in the number of periodicals printed and distributed. Id. But, because the law had been poorly drafted, imposing levies only on newspapers of one sheet (four pages) or two (eight pages), printers began to publish six-page papers, which allowed the printers to distribute through the Post Office without paying the tax. Id.
74. ELLIS, supra note 17, at 51.
75. Id. at 51-54.
76. Id. at 54; HERBERT JOYCE, THE HISTORY OF THE POST OFFICE FROM ITS ESTABLISHMENT DOWN TO 1836, at 192 (1893).
77. ELLIS, supra note 17, at 54-59. Newspapers in Britain were still subject to the stamp tax. See generally HANSON, supra note 72, at 11-12.
republic, in which the people—not the Crown and not Parliament—are sovereign, the people need to be able to share information with each other, especially “news” about public affairs.

This is of course precisely the premise underlying the various interpretations of the First Amendment that stress democratic governance, from Meiklejohn to Bork. What is different, however, is that the role that federal officials played in affirmatively promoting those values contrasts sharply with the notion that it is the job of the judiciary to enforce those values against the legislative and executive branches of government. Indeed, this very basic historical fact raises serious questions about First Amendment theories that call for an arm’s length relationship between government and the press. While this historical story does not directly undermine the normative basis of such theories, it raises important questions about whether such approaches to the First Amendment conflict so profoundly with the real, rather than imagined, historical tradition of the government-press relationship in the United States as to render them unrealistic as a practical matter.

For those who worry about having the government involved in communications policy any more than might seem necessary, this history might create some unease. While I do not want to be seen as taking a position on any of these normative theories, I do contend that any First Amendment theory based on originalism, or that incorporates the United States historical tradition, must contend with this intertwined relationship. A theorist might wish to reject this history as normatively unpalatable, but s/he would have to deal with the prospect that, as a historical matter, the American press most likely would have been significantly impoverished without the federal government’s affirmative role in promoting it.

This connection between the early postal privileges for newspapers and the First Amendment’s Press Clause has been noted in the history, political science, and communications literature. With one important

79. See, e.g. Bork, supra note 78.
81. If we view constitutional law in part as the means by which “we are able to constitute ourselves” as a nation in light of “our own distinctive history,” as political theorist Hanna Pitkin has put it, a normative constitutional theory that ignores that history—in all its complexity—risks irrelevance outside of the academy. Hanna Fenichel Pitkin, The Idea of a Constitution, 37 J. LEGAL EDUC. 167, 169 (1987).
82. See Kielbowicz, supra note 26, at 31.
83. The most influential work in this area is Professor Ithiel de Sola Pool’s Technologies of Freedom, which discusses the Post Office as an integral, early component of U.S. communications policy. See Pool, supra note 23, at 75-91. Pool states that
exception, however, it has been virtually ignored by First Amendment scholars, even those whose work explores the historical origins of the Free Speech and Free Press Clauses.

[t]he twentieth century notion that the proper relation between government and the press is one of arm's-length adversaries has no roots in the thinking of the founding fathers. Their belief in the importance of the press not only led them to insist that Congress pass no law "abridging the freedom of the press" but also persuaded them to subsidize the press.

Id. at 78.


Professor David Currie's work on the Constitution in Congress notes the connection between the postal power and the First Amendment in the context of Elbridge Gerry's advocating in favor of Members of Congress being able to frank newspapers for free. See Currie, Federalist Period, supra note 10, at 151; David P. Currie, The Constitution in Congress: The Second Congress, 1791–1793, 90 NW. U. L. REV. 606, 633 (1996). Currie's easy dismissal of Gerry's arguments and the fact that he does not cite to any of the debate related to newspaper rates suggests, however, that he is not connecting the question of newspaper subsidies and the First Amendment.

86. See, e.g., Leonard W. Levy, Emergence of a Free Press (1985); David A. Anderson, The Origins of the Press Clause, 30 UCLA L. REV. 455 (1983); Vincent Blasi, The Checking Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 521, 529–44 (1977). This omission evidences itself in at least one place in Professor Leonard Levy's path-breaking and exhaustive account of the original understanding of the First Amendment, Emergence of a Free Press (the revised and expanded edition of Legacy of Suppression). In discussing the choice of the word "abridging" in the Senate's version of what eventually became the free speech and press clauses of the First Amendment, Levy notes that the drafters clearly did not mean to prohibit all laws "regulating" the freedom of speech, or of the press, since they well understood that Congress had the power to pass copyright laws under Article I, section 8, clause 8 (a step the same First Congress took in 1790, the year after sending the first twelve amendments to the states for ratification). See Levy, supra at 271. But, the phrase "the press," while perhaps meant to include books, was obviously meant to apply to newspapers, and newspapers were not even covered—or imagined to be covered—by copyright law in the late eighteenth century. See
In sum, by the time of the First Congress in 1789, the ideological transformation that underlay the American Revolution had its parallel in a shift in attitudes towards the postal network. The Americans had seen its importance as a conveyor of newspapers and believed that this role was a link in establishing and maintaining a republican form of government. The Post Office as a government enterprise or institution was seen as the principal conduit through which political news would flow, and this view of the Post Office crystallized a few years later in the 1792 Post Office Act.

3. The Post Office Act of 1792

One of the central debates leading up to the passage of the 1792 Post Office Act—indeed, one of the principal reasons it took Congress three years after ratification of the Constitution to pass postal legislation—involved the question of newspapers in the mail. Crucial in furthering Benjamin Rush’s educational rationale were the subsidies for the transmission of newspapers. The debate surrounding the 1792 Post Office Act provides a window into both the importance of the educational rationale in establishing newspaper subsidies and the way in which practical considerations and political expediency shaped the manifestation of those principles into law.

The debate that led to Congress legislating postal subsidies for newspapers into the 1792 Act focused on two issues: (1) selective versus universal admission of newspapers; and (2) how much, if anything, to charge for providing mail service for newspapers.

Act of Apr. 24, 1802, ch. 36, § 1, 2 Stat. 171 (repealed) (limiting copyright to “maps, charts, and books”); Clayton v. Stone, 5 F. Cas. 999, 1003 (C.C.S.D.N.Y. 1829) (No. 2872) (holding that newspapers are not protected by copyright); see also Neil Netanel, Copyright and a Democratic Civil Society, 106 YALE L.J. 283, 354–55 n.325 (1996). See generally Oren Bracha, Owning Ideas: A History of Anglo-American Intellectual Property, ch. III (2005) (unpublished S.J.D. dissertation, Harvard Law School), available at http://www. obracha.net/oi/oi.htm. So, the power to promulgate copyright law is by no means the best way to evidence the Framers’ assumption that the word “abridging” does not encompass all laws that could constitute “regulating” the press. Rather, to make Levy’s point even more clearly, the postal power found in Article I, section 8, clause 7 seems a better source. Those who approved the First Amendment all understood that the postal power was intimately connected to “the press” and that the federal government was going to be “regulating” the press through use of the postal power. They also understood that the Post Office was the conduit through which newspapers flowed.

87. My reference to the “ideological transformation” of the American revolution focuses primarily on the question of the locus of “sovereign” power, what Gordon Wood calls “the single most important abstraction of politics in the entire Revolutionary era.” See GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 348 (1969); see also BAILYN, supra note 12, at 198. I do not mean to imply that the changing notions of sovereignty that accompanied the Revolutionary period were theoretically necessary for viewing the postal network as Rush and other Americans were beginning to see it. Cf. ELLIS, supra note 17, at 49 (noting that an “informed public opinion as the guardian of the [English] constitution” was “implicit” in the “Revolution Settlement” following the Glorious Revolution of 1688).

88. See JOHN, supra note 8, at 31.
a. Selective Admission of Newspapers

One of the principal disputes during the debates on newspapers in the mails centered on a proposal made in 1790, during the First Congress, to admit a select number of newspapers into the mails. By the late 1780s and early 1790s the Post Office was circulating newspapers, as a general matter, in only two circumstances. First, members of Congress enjoyed franking privileges which they used to transmit newspapers to their constituents, making them, in the words of historian Richard R. John, "newsbrokers for the public at large." Second, printers were allowed to "exchange" one copy of their newspapers with other printers for free, which was a way postal authorities encouraged the distribution of nonlocal information to other papers. Other than that, newspapers were, as a practical matter, no longer being circulated through the mails. The proposal to admit some newspapers to the mail would thus have increased the flow of newspapers, thereby increasing access to information about public affairs, while simultaneously relieving Congressmen from the burden of having to frank. Key to the proposal for selective admission was the fact that, in contrast to a policy of allowing all newspapers access to the mails, selective admission would have precluded the possibility of the postal system being overwhelmed by newspapers. This was by no means an idle concern. From the mid-1760s until the beginning of the Revolutionary War, the handling of newspapers in the Post Office was a serious issue straining relations between the Colonists and the British government. As I noted earlier, when the British commissioned a study of the North American Post Office in November 1773, one of the author's conclusions was that newspapers were overburdening the mails.

However, the underlying idea of selective admission met with intense criticism: those who later became Republicans feared that such a policy would be used discriminatorily and would effectively amount to a federal subsidy for the government's supporters in the press, particularly the Washington Administration's quasi-official paper, the Gazette of the United States. In an era in which the Postmasters General had significant partisan connections, these future Republicans worried that selective admission would provide the government with a tool for propaganda. Given the history of the British Post Office as a vehicle for promoting the Crown and the problems that anti-federalists had had with the Post

89. Id. at 32.
90. This practice dated back to the early eighteenth century, and was first codified by Benjamin Franklin and William Hunter, the two Deputy Postmasters-General, in 1758. KIELBOWICZ, supra note 26, at 18. It was perhaps no coincidence that both Franklin and Hunter were themselves newspaper publishers. By the 1780s, this exchange privilege was discretionary, and postriders were permitted to leave exchange papers behind if their saddlebags were too heavy.
91. See text accompanying note 32.
Office during the debates on the ratification of the Constitution, this too was not an idle worry. The policy of selective admission was defeated, and the First Congress ended without addressing the question of newspapers in the mail. The stopgap postal law that was enacted simply provided that newspapers were to be admitted “under rules to be made by the Postmaster General.” Though selective admission was not written into law, the fear of a “Court Press and Court Gazette” remained strong as long as newspaper conveyance remained within the discretion of the Postmaster General.

Early in the Second Congress, in March 1791, the issue of newspapers in the mails was back on the table. There was little discussion of selective admission, but most Congressmen still wanted the postal statute to include an explicit policy on the propriety of newspapers in the mail. This was now the third time Congress was addressing their power to establish a post office (albeit only the second that touched on substantive policy matters), and the Post Office was still operating under the Continental Congress’s 1782 Ordinances, the authority of which Congress had extended in both 1789 and 1790. Publishers on both sides of the political divide agreed that part of the central government’s role was to promote the press, and most Congressmen likewise believed that the federal Post Office should admit newspapers in the mails, since both Federalists and Republicans thought that the resulting increased flow of information would benefit them politically. Congress thus settled on a policy that would permit all newspaper publishers to use the mail notwithstanding the worry that newspapers would overburden the system.

b. Newspaper Rates

With selective admission no longer at issue, the debate turned to the question of rates. Throughout the debate, there was one key assumption:

92. See supra note 65.
93. 2 ANNALS OF CONG. 1737 (1790); ELLIS, supra note 17; HANSON, supra note 72; JOHN, supra note 8, at 34. I use the Annals of Congress as documentary support recognizing that, for the period until March 8, 1790, the notes are unreliable because the reporter, Thomas Lloyd, was both a notorious federalist partisan and, at that point in his life, often thoroughly inebriated. See James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 TEX. L. REV. 1, 36-38 (1986); Marion Tinling, Thomas Lloyd’s Reports of the First Federal Congress, 18 WM. & MARY Q. 519, 520, 527-28, 538 (1961).
94. The 1790 Act, as had the 1789 Act before it, simply extended the authority of the Post Office to continue under the 1782 Ordinances of the Continental Congress. See Act of Aug. 4, 1790, ch. 36, 1 Stat. 178 (1790) (expired 1791); Act of Sept. 22, 1789, ch. 16, 1 Stat. 70 (1789) (expired 1790).
95. See KIELBOWICZ, supra note 26, at 32.
96. See 1 Stat. at 70; id. at 178.
every proposal entailed newspaper rates that were both far below those of ordinary letters and below the actual cost of delivery. Thus, everyone viewed what were effectively federal government subsidies for newspapers as part of the role a national postal network should play. Though the “fiscal rationale” for the Post Office overall remained, newspaper policy in particular was premised entirely on the “educational rationale.”

Though there was some public discussion of postage-free delivery of newspapers, the congressional debates focused on whether the postal rates for newspapers should be flat or graduated based on the distance traveled. Those who argued for a low, flat rate were generally those who later became Republicans who believed that the diffusion of information would help check the Federalist government; they feared that graduated rates would make it more difficult to disseminate information to outlying parts of the country, where their support was greatest. Those who supported graduated rates noted that it generally cost more to transport mail further—that is, they did make what seems to be the obvious argument that cost of delivery should be relevant to rates—but this argument was not pressed in the debates as much as the fear that a flat rate would result in a competitive advantage for big city newspapers in the north, particularly those in the “seat of Government,” vis-à-vis their rural counterparts. Since costs of production were much higher in smaller towns and since people bought even local newspapers primarily for national and foreign news, most Congressmen viewed cheap postage rates as a subsidy for big city papers to the detriment of local publications. Somewhat of a compromise was reached when Representative James Hillhouse from Connecticut proposed two rates for newspapers, one cent for any distance less than one hundred miles and a cent and a half for anything greater. While there was thus some

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98. See KIELBOWICZ, supra note 26, at 33.
99. For example, Benjamin Franklin Bache, Benjamin Franklin’s grandson and the editor of the General Advertiser (which later became the Aurora), one of the most prominent anti-federalist newspapers, viewed postage-free delivery of newspapers as a crucial method for the government to ensure an enlightened citizenry. John, supra note 8, at 35.
100. Massachusetts Representative Elbridge Gerry advocated free delivery of newspapers, noting the importance of free dissemination of information in preventing despotism in the future, but he did so in the context of a debate about whether to retain the franking privilege. See 2 ANNALS OF CONG., supra note 93, at 289–90.
101. KIELBOWICZ, supra note 26, at 33.
102. See 2 ANNALS OF CONG., supra note 93, at 285; KIELBOWICZ, supra note 26, at 34.
103. KIELBOWICZ, supra note 26, at 34; Kielbowicz, supra note 97, at 258–59. Indeed, the objections raised in 1792 to low postage rates for newspapers, that they permitted city papers to infiltrate rural areas, persisted well into the Jacksonian period (though, by then, the fear embodied in the Jacksonians was based less on the competitive disadvantage for rural printers and more in terms of the cultural divide between urban and rural that marked other debates in the period). See KIELBOWICZ, supra note 26, at 57, 62.
connection to the cost of transportation, this two-tier rate structure for newspapers contrasted sharply with the nine different rates for letters, which cost anywhere from six cents per sheet for a distance of less than thirty miles to twenty-five cents per sheet to go more than 450 miles.

Moreover, it was assumed throughout the entire debate—even on the part of those advocating graduated rates—that newspapers were not to be charged even close to the rate charged for letters. At one point in the debate, a few Congressmen worried that the newspaper rates were insufficient to defray the expense incurred by the government. Yet, Representative Hillhouse was among them, and even his proposal was nowhere near enough to break even. As a point of comparison, a typical four-sheet newspaper would have cost twenty-four cents for less than thirty miles and a dollar to deliver more than 450 miles if sent by letter rate; yet, under the 1792 Act’s reduced newspaper rates, the actual rates were one cent and a cent and a half, respectively.¹⁰⁴

In short, by providing reduced rates for newspapers sent to subscribers, the 1792 Post Office Act encompassed huge subsidies for the transmission of newspapers. Those subsidies, which were effectively provided by letter-writers—mostly merchants—who paid the higher letter rates,¹⁰⁵ were premised on the underlying educational rationale

¹⁰⁴ The drafters of the 1792 Act clearly understood that there was a difference between newspapers and letters and that this difference was not simply in the use of a printing press. The legislators recognized that the medium of a newspaper was primarily one-to-many and that the medium of a letter was one-to-one. They also fully understood that they were writing into law what was, in effect, a content-based distinction. They recognized that newspapers printed information about public affairs, whether as propaganda for the government or attacks on it, and that letter-writers—generally speaking—did not. It is worth noting that Congress debated this content-based distinction at the same time that Virginia was in the midst of debates on the ratification of what became the federal Bill of Rights, including of course our First Amendment. Given the exorbitant charges for letters and the fact that the law prohibited the delivery of letters outside the Post Office, see 1792 Post Office Act, ch. 7, § 14, 1 Stat. 232, 236 (expired 1794); Oct. 1782 Ordinance, reprinted in JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 56, at 670-79; Mar. 1782 Ordinance, reprinted in 22 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 56, at 121-27; supra Part I.B.1, this content-based distinction had a substantial impact on those whose content was effectively disfavored, i.e. letter-writers. One might even see the postal subsidies for newspapers as the first example of Congress favoring political over commercial speech, since most letter-writers were merchants sending market information. See John, supra note 8, at 157-58. This distinction between “public” and “commercial” information remained a crucial part of postal subsidies throughout American history. See Richard B. Kielbowicz, Origins of the Second-Class Mail Category and the Business of Policymaking, 1863-1879, 96 JOURNALISM MONOGRAPHS 1, 13-14 (1986) [hereinafter Kielbowicz, Origins] (noting that one of the motivations for passage of the 1879 Act establishing the four classes of mail was to eliminate advertisers’ usage of subsidized rates for periodicals); Richard B. Kielbowicz, Postal Subsidies for the Press and the Business of Mass Culture, 1880-1920, 64 Bus. Hist. Rev. 451, 464 (1990) (describing policy debates about postal subsidies at the turn of the twentieth century involving attempts to “distinguish between . . . periodicals . . . providing public information with some advertising and those providing advertising with some public information”); id. at 477 (discussing the passage of a 1917 law that restructured the second-class rate to tie periodicals’ rates to the amount of advertising content in a publication).

¹⁰⁵ These subsidies were by no means trivial in actual impact. In 1794, only 3% of postal revenue
espoused by Rush, Washington, Madison, Jefferson, and others: if the "people" are to be sovereign, it is vital that they be informed about public affairs, and it is part of the government's affirmative responsibility to ensure that the people can in fact secure access to such information. Providing a communications network to transmit that information was of course only one way to do this. But, through this means, the federal government created, as historian Richard R. John has put it, a "national market for information sixty years before a comparable national market would emerge for goods." Moreover, it was an information market with a nationalizing tendency because it "link[ed] together the far-flung population of the United States." This development, culminating with the embedding of newspaper subsidies into the law regulating the Post Office, had a profound impact on the First Amendment. As I argue in Part II.A, our modern notion of First Amendment restrictions on government spending began with the Court's recognition of constitutional limits on the allocation of postal subsidies for the press.

In the following Part, I turn to a second important characteristic of the early Post Office, its monopoly on long distance communication. As with postal subsidies for the press, the postal monopoly was established in the early years of the Post Office, and it too had a role in shaping the modern First Amendment.

B. THE POST OFFICE'S LEGAL AND PRACTICAL MONOPOLY

Two different types of policies contributed to the Post Office's monopoly on long distance communication. The first is the most obvious. From the beginning, the American Post Office was a legal monopoly; the law prohibited the delivery of letters outside of the government Post Office. The second is less obvious, but no less important for these purposes: over time, the legal monopoly was strengthened as a monopoly in practice by a whole host of other factors. One of those factors was a seed planted by the drafters of the 1792 Act. When Congress passed that statute, it rejected attempts to delegate the power to designate postal routes to the Executive, instead retaining that power for itself, and by doing so created the most ubiquitous communications network in the

came from newspapers, while 70% of the weight was newspapers. John, supra note 8, at 38. By 1832, postal revenue from newspapers had increased to 15%, but the weight had increased to 95%. Id. at 37.

106. Id. at 37.

107. Id. at 13; see also Kielbowicz, supra note 26, at 50 ("News in the mail . . . played a substantial part in sustaining the republic a period of fragile national unity."). It is worth further noting that, by creating a national market for information, postal policy also "fostered the growth of communities of interest that operated outside of traditional geographic boundaries." Peter J. Wosh, supra note 97, at 224-25. This is of course precisely what the Internet is both lauded and criticized for. Compare Cass Sunstein, Republic.com 51-62, 71-75 (2001), with Chris Anderson, The Long Tail, Wired 12.10 (Oct. 2004), available at http://www.wired.com/wired/archive/12.10/tail.html.
world. Together, these policies helped establish what Justice Holmes later would call the "practical dependence of the public upon the [P]ost [O]ffice."\textsuperscript{108} As I argue in Part II.B, this functional monopoly became an institutional characteristic of the Post Office that shaped the modern First Amendment.

1. Legal Monopoly

From the beginning of the republic, federal law has provided the American Post Office with a monopoly over the delivery of "letters." In this subpart, I briefly describe the way in which the American Post Office acquired its monopoly. This brief survey demonstrates the way in which federal law consciously incorporated the monopoly into the structure of the American Post Office as an institution. As Professor George Priest has put it, "The tradition of government-managed postal monopoly is deep-laid in the United States."\textsuperscript{109} Understanding the fact of that monopoly and its origins is, as I argue in Part II.B, crucial for understanding the origins of one of the most important tenets of the modern First Amendment: the “right to receive ideas.”

As I described at the beginning of Part I.A.i, the British Post Office was a monopoly, and this attribute was key to one of its underlying purposes: making money for the Crown. When the Continental Congress took over William Goddard’s network in 1775 to become the American Post Office,\textsuperscript{110} it followed in the British tradition. Although the initial establishment of the American Post Office did not indicate that it was to be a monopoly, in part because the colonial Post Office was still in operation (albeit on its last legs),\textsuperscript{111} the Continental Congress soon thereafter explicitly gave itself a monopoly over postal delivery. The Articles of Confederation, the relevant portions of which were drafted in 1776, gave the Congress the “sole and exclusive right [of]... establishing and 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 expences [sic] of the said office.”\textsuperscript{112} Although the power to establish a monopoly was limited to

\begin{itemize}
\item 108. Leach v. Carlile, 258 U.S. 138, 141 (1922) (Holmes, J., dissenting).
\item 109. See Priest, supra note 13, at 33.
\item 110. See supra text accompanying notes 36–59.
\item 111. See supra text accompanying note 53; see also Rogers, supra note 49 (noting that in July 1775 when Continental Congress took over Goddard’s postal network, it was not meant to be a monopoly).
\item 112. Articles of Confederation, art. IX (Nov. 15, 1777), reprinted in 9 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, supra note 59, at 919; accord Second Draft of Articles of Confederation, art. XIV (Aug. 20, 1776), reprinted in 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, supra note 59, at 674, 681–82 (same, albeit with some letter-case differences). If we trace the drafting of the Articles, it is clear that a postal power of some sort was envisioned right from the very beginning, but that the Continental Congress’s assertion of a monopoly power occurred somewhere between 1775 and 1776. The first relevant draft of a proposed document establishing a confederation was Benjamin Franklin’s, penned in 1775. See Franklin’s Articles of Confederation (July
interstate communication, the postal power was thus among the exclusive powers the Congress gave itself. Exercising that power, the Continental Congress promulgated the 1782 postal ordinance (the relevant portion of which was drafted as early as 1776),\(^{113}\) and in so doing, explicitly established the postal monopoly as a legal matter.\(^{114}\)

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21, 1775), reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 59, at 195-99. Franklin's draft simply provided for a postal power without any monopoly provision. See id. art. V, at 196 ("The Congress shall ... make such general Ordinances as tho' necessary to the General Welfare, particular Assemblies cannot be competent to: viz. those that may relate ... to the Establishment of Posts ... "). In June 1776, nearly a year later, Congress appointed a committee to draft proposed Articles, and though the draft differs significantly from Franklin's draft, it is clear that the committee members had access to Franklin's draft because "[s]everal passages from Franklin's plan can be found verbatim in the [committee's] drafts, and many others survive with only slight variations." See JENSEN, supra note 68, at 126; Commentary on the Dickinson Committee Drafts (June 17, 1776), in 4 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 252 (Paul H. Smith et al., eds., 1776) ("[T]here can be no doubt that the members of the committee began their work with a copy of [Franklin's draft]."). (Note: I am ignoring Silas Deane's proposal for a confederation and what historians refer to as the Connecticut Plan, because the language of these two drafts was never incorporated into the Dickinson draft which formed the basis of the final version of the Articles. See generally JACK RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 138 (1979).) John Dickinson of Pennsylvania did the principal drafting in that committee, and both his original draft, prior to committee input, and the final draft produced by the committee provided that Congress would have the "sole and exclusive Power and Right of ... Establishing and Regulating Post-Offices." See Dickinson First Draft, Art. 19, reprinted in LETTERS OF DELEGATES TO CONGRESS, 1774-1789, supra at 233, 242-43; accord Dickinson Committee draft, art. XVIII (July 12, 1776), reprinted in 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 59, at 550-51 ("The United States assembled shall have the sole and exclusive Right and Power of ... Establishing and Regulating Post-Offices throughout all the United Colonies, on the Lines of Communications from one Colony to another "). The committee presented its draft to Congress on July 12, 1776, and Congress debated the Articles that year until August 20 and again the following year. The language of the postal power found in the actual Articles was finalized by August 20, 1776. See Second Draft of Articles of Confederation, art. XIV (Aug. 20, 1776), reprinted in 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 59, at 674, 681-82. As noted in the text the "sole and exclusive" language remained from the Dickinson Committee draft presented to Congress on July 12, 1776 through to the version adopted by Congress on November 15, 1777. It is worth noting that the committee did make one change in Dickinson's original draft, a change that arguably had great significance years later. As had Franklin's draft before it, Dickinson's original draft did not limit Congress's postal power to interstate communication, but instead simply provided for the power to "establish[] and regulate[e] Post-Offices throughout all the United Colonies." Dickinson Committee draft, art. XIX, reprinted in 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 59, at 551. In contrast, the committee's draft and the final version both appear to contain an interstate limitation. The committee draft limited Congress to the power and right of "establishing and regulating Post-Offices throughout all the Unite[d] Colonies, on the Lines of Communication from one Colony to another," and the final version of the Articles likewise defines the power as that of "establishing and regulating post offices from one State to another throughout all the United States." 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 59, at 681-82 (emphasis added). One might see this change as a limitation on the national government's authority to establish intrastate postal communication lines.

113. Mar. 1782 Ordinance, reprinted in 22 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 56, at 123 ("[N]o person whatsoever, except the stated Post Riders in Public Service, shall carry any Letters or Packets upon the Post Road ... upon penalty of one hundred Spanish Milled Dollars for each offence ... ").

114. An Ordinance for Regulating the Post Office of the United States of America (Oct. 18, 1782), reprinted in 23 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 56, at 672-73 ("And
Like the Articles of Confederation before it, the Constitution gave a postal power to Congress, but it rates barely a mention in histories of the Constitution’s drafting. By the time of the Constitutional Convention, the Post Office simply was not high on the drafters’ list of concerns because it was well-accepted that the national government would have a power to continue its postal operations. The only controversy at the Convention was whether to include a power to establish “post roads” in addition to the power to establish post offices. That proposal was agreed to by a vote of six to five during the Convention, and the provision was untouched thereafter. When the Constitution was sent to the States for ratification, again the postal power was barely noticed. The only mention of the power in the Federalist Papers consists of Madison’s single mention in Federalist No. 42 that the power was likely to be “harmless.” The state ratifying conventions likewise ignored it almost entirely.

be it further ordained . . . that . . . no [person other than the Postmaster General . . . and his authorized agents] shall have the receiving, taking up, ordering, dispatching, sending post or with speed, carrying and delivering of any letters, packets or other despatches [sic] from any place within these United States for hire, reward or other profit or advantage for receiving, carrying or delivering such letters or packets respectively; and any other person or persons presuming so to do shall forfeit and pay for every such offence, twenty dollars . . . ."

Moreover, just to be clear, Madison is referring specifically at this point only to the power to establish post roads, not post offices. See The Federalist No. 42 (James Madison) (J.R. Pole ed. 2005) (“The 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.”). There is not a single reference in the entire Federalist Papers to the power to establish post offices and a network of postal delivery. As I explain in Part II.B.2, it is difficult to understated how wrong Madison’s statement turned out to be, given how important the postal power was to become through the nineteenth century. As Justice Story wrote in his Commentaries less than fifty years after the Constitutional Convention,

One cannot but feel, at the present time, an inclination to smile at the guarded caution of these expressions, and the hesitating avowal of the importance of the [postal] power. It affords, perhaps, one of the most striking proofs, how much the growth and prosperity of the country have outstripped the most sanguine anticipations of our most enlightened patriots.

Joseph Story, 3 Commentaries on the Constitution, ch. 18, § 1119 (1833). Whether Madison and other federalists were purposely understating the importance of the postal power as part of what anti-federalist Thomas Waite called the entire Constitution’s “studied ambiguity,” see Letter from Thomas B. Waite to George Thatcher (Jan. 8, 1788), in Jackson Turner Main, The Antifederalist: Critics of the Constitution, 1781-1788, at 153 (1961), remains an unanswered question, but Chief Justice Marshall was of course far less circumspect when he famously used a broad—and, by then, well-accepted—understanding of the postal power to justify an expansive interpretation of the Necessary and Proper Clause in M’Culloch v. Maryland, 17 U.S. 316, 417 (1819).

See Rogers, supra note 49, at 25 (“In the state conventions there was practically no discussion of the postal power. Its innocuousness was granted. Mr. Jones of New York was alone in finding a latent aggression.”). The principal concern in the state ratification debates was in fact not with the postal power per se but rather with the power to construct post roads. See 2 Elliot’s Debates 406 (Jonathan Elliot ed., 1836) (motion to amend the postal power, so as to include language stating that “the power of Congress to establish post-offices and post-roads is not to be construed to extend to the laying out, making, altering, or repairing highways, in any state, without the consent of the legislature.
Interestingly, though, the language of the Constitution appears more limited than the equivalent language in the Articles. The Constitution only gives Congress the power "to establish Post Offices and post Roads." Therefore, although the Constitution added the power to establish post-roads, the language in the Constitution is striking by what is omitted from what the Articles of Confederation contained: Congress was not given the "sole and exclusive" power; there was no power to "regulate" those post offices and no power to "exact postage," (and thus no mention that the power included the authority to exact as much postage "as may be requisite to defray the expenses of such office"). Either the constitutional drafters were trying to change the power that the Continental Congress had or someone was sloppy in the drafting. Yet, there is no evidence of either. Indeed, as I noted earlier, the only mention of the power in the Federalist Papers comes in Federalist No. 42, an essay that Madison used to discuss in detail the differences between powers in the Constitution and those in the Articles. Even there, Madison made nothing of the stark difference in language between the postal power in the Constitution and that found in the Articles. Despite those significant differences in text and despite the occasional challenge, both actual and academic, there has never been a serious constitutional attack on the postal monopoly. When Congress passed the 1792 Act, it followed directly from the 1782 Ordinance and prohibited mail delivery outside of the federal government Post Office. That monopoly, though changed in many ways, survives to this day.

118. During the 1840s and 1850s, a number of private mail services arose. Christina M. Bates, From 34 Cents to 37 Cents: the Unconstitutionality of the Postal Monopoly, 68 Mo. L. Rev. 123, 137-38 (2003). The most well-known among them was Lysander Spooner's American Letter Mail Company, which the government effectively forced out of business in less than a year. Id. The brief (illegal) competition did in fact spur, as any economist would expect, a reduction in rates. Id. In 1845 and then again in 1851, the Post Office reduced rates, and did so to such an extent that private mail services were effectively priced out of the market. Id.
119. See Priest, supra note 13, at 46; see also United States v. Kochersperger, 26 F. Cas. 803, 803 (C.C.E.D. Pa. 1860) (No. 15,541) ("No government has ever organized a system of posts without securing to itself, to some extent, a monopoly of the carriage of letters and mailable packets. The policy of such an exclusive system is a subject of legislative, not of judicial, inquiry."); United States v. Hall, 26 F. Cas. 75, 77 (C.C.E.D. Pa. 1844) (No. 15,281) (upholding prohibition on private delivery of letters after concluding that there is not "such a 'clear and strong incompatibility' between the constitution and the act of congress so construed as will authorize me to declare the act void"); United States v. Thompson, 28 F. Cas. 97, 98 (C.C.E.D. Pa. 1800) (No. 16,489) ("charg[ing] the jury ... that the law in question was constitutional" in criminal case for unauthorized delivery of mail).
120. See 1792 Post Office Act, ch. 7, § 14, 1 Stat. 232, 236 (expired 1794).
121. Opponents of the monopoly in the United States will no doubt find a certain irony in the fact that, in anticipation of the need to comply with European Union regulations, the British government has ended the Royal Mail's monopoly on the delivery of letters in the United Kingdom. See Royal Mail Loses Postal Monopoly, BBC News, Feb. 18, 2005, available at http://news.bbc.co.uk/1/s1/hil/business/4274335.stm.
2. Effective Monopoly

How the "practical dependence of the public upon the [P]ost [O]ffice," as Justice Holmes put it in 1922, came about is a complex historical question. Although I cannot answer it in full here, I focus on one important way in which early postal policymakers contributed to the Post Office's ubiquity, a ubiquity that ultimately strengthened the effectiveness of the legal monopoly. In my initial discussion of the "educational rationale," I mentioned Benjamin Rush's 1787 "Address." Recall that the second of his proposals was to extend the postal network into the interior of the country. This indeed occurred. In the formative years of the U.S. Post Office, many different policies together contributed to this unprecedented expansion of the postal network, and consequently communication flows, to the far reaches of the country.

In the remainder of this Part, I will discuss the one policy choice that, more than any other, was responsible for this expansion. That choice was whether Congress would retain the power to designate new post offices and postal routes or would delegate that power to the Executive. This seemingly trivial question was part of the early struggle within Congress as to how much authority it would exercise over what we would today call "administrative decisions." More importantly for my purposes, this debate had profound implications for the growth of the postal network.

On five occasions prior to the eventual passage of the 1792 Act, Congress struggled with the question of whether Congress or the Executive should have the authority to designate post roads and offices. In January 1790, when Postmaster General Samuel Osgood first proposed a comprehensive law addressing the Post Office, among the things he recommended was a clause authorizing the Postmaster General "[t]o establish and open new Post Offices and new post roads, whenever and wherever they may be found necessary, within certain limits marked out by the acts of Congress." Early in discussion of the proposed bill,

123. See supra text accompanying note 69.
125. Though the Congressional policy debates did not manifest much indication of the huge impact that was to result, many at the time may have understood that Congressional control over route designation would in fact likely result in an expansion of the network to the south and west. See John & Young, supra note 37, at 128, 132 (noting that the expansion was "a product less of happenstance than of deliberate design").
126. AMERICAN STATE PAPERS: POST OFFICE 7 (Walter Lowrie & Walter S. Franklin eds., 1834). This was in keeping with the basic policy in place at the time, which was to have the Postmaster General
the House eliminated that provision, arguing that it violated the Constitution because the "power was vested in Congress by an express clause in the Constitution, and therefore cannot be delegated to any person." When the House Committee that drafted the next iteration presented it to the whole House two months later, the bill included a list of particular routes by which the mail was to be carried. It was then that Representative Theodore Sedgwick, a Congressman from Massachusetts who was later affiliated with the Federalists, moved to replace that section with a clause authorizing the Postmaster General to establish the post roads, in essence returning to Osgood's proposal. Besides the question of the constitutionality of such a delegation, those who opposed Sedgwick's motion argued that Congress was more competent to designate the post roads because congressmen knew the relevant geographical areas better than did the Postmaster General. Representative Sedgwick's motion was defeated "by a great majority." Once again, a month later, when the bill came back to the House from the Senate with a proposal for an amendment similar to Sedgwick's, the House again debated the proposal. The same debate returned in the following session of the First Congress, this time with Representative John Steele from North Carolina, also later a Federalist, proposing the language to delegate power to the President. With Congress unable to resolve this issue, no statute passed. This struggle was one of the principal reasons Congress failed to pass substantive postal legislation in the First Congress.

When the Second Congress addressed postal issues, authority to designate routes again came to the fore. The key debate took place on

choose postal routes that crossed state lines and to have local postmasters choose intra-state routes. See John & Young, supra note 37, at 122.
127. 2 ANNALS OF CONG., supra note 93, at 1579.
128. See id. at 1697.
129. Sedgwick was later Speaker of the House and then a judge on the Supreme Judicial Court of Massachusetts. See Richard E. Welch, Jr., Theodore Sedgwick, Federalist: A Political Portrait (1965).
130. See 2 ANNALS OF CONG., supra note 93, at 1697.
131. Id.
132. Id.
133. Id. at 1734-35.
134. Id. at 1936-37.
135. Id. at 1940.
136. See John, supra note 8, at 46; see also, e.g., 2 ANNALS OF CONG., supra note 93, at 1937. In each of the three sessions of the First Congress, Congress passed laws designed simply to keep postal policy in a holding pattern pending resolution of the thorny unresolved issues. See Act of Mar. 3, 1791, 3 Stat. 218, ch. 23, § 1 (1791) (expired 1792) (providing for a Postmaster General and that the regulations of the post-office shall be the same as they last were under the resolutions and ordinances of the late Congress but only "until the end of the next session of Congress, and no longer"); Act of Aug. 4, 1790, ch. 36, 1 Stat. 178 (1790) (expired 1791) (same); Act of Sept. 22, 1789, ch. 16, 1 Stat. 70 (1789) (expired 1790) (same).
December 6th and 7th, 1791, when Representative Sedgwick again proposed his amendment to delegate the power to the President. The debate over these two days reads like a modern American civics lesson, with discussion of democracy, representation, and the Constitution flying furiously. Little changed in the attitudes of the House members, however, and the House again rejected Sedgwick’s motion. The law passed with a detailed list of post offices and post roads, and the power to designate them remained in Congress’s hands.

Beyond the inter-branch power struggle that the debate represented, the resulting defeat of Sedgwick’s motion had important practical implications for the Post Office. By leaving the power to designate routes in Congress’s hands, the 1792 Act set the country on a course of rapid expansion of the Post Office. More importantly, it encouraged geographic extension of the Post Office throughout the country, in particular the transappalachian West. By leaving the authority in Congress’s hands, the 1792 Act helped change the assumption, prevalent in Great Britain and continental Europe at the time, that each postal route had to be self-supporting. That assumption had to be abandoned as the power to designate post offices and post roads became the first opportunity to dispense what we would today call congressional pork. In essence, the structure of the House ensured that the postal network would expand on the basis of population rather than commercial need since a post road and Post Office was something tangible that every federal Representative could bring his constituents.

In short, the 1792 Act established a new baseline that eliminated profitability of the route as the principal criterion for determining whether to establish a new route.

The impact over the next half-century of this two-day debate over the Sedgwick amendment was dramatic. In 1790, the United States had one post office for every 52,000 inhabitants and a total of 1875 miles of

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137. See 2 Annals of Cong., supra note 93, at 229.
138. Id. at 241.
139. John, supra note 8, at 49; Priest, supra note 13, at 54 (“Obtaining a new postal route became an expected perquisite, a simple means for any Congressman to endear himself to his constituents.”).
140. Given the history of the Post Office as a British institution, profitability had previously been important, including at the level of individual routes. Indeed, in the 1780s, most of the “cross-posts” (i.e., those that provided service to towns in the interior of the country) were run privately by contractors who were given seven-year regulated-rate monopolies on a particular route, with the proviso that they would take whatever profits or losses the route generated. See Rich, supra note 17, at 62. This system eliminated the government’s risk of a financial loss. Id. Further supporting this point, as recently as 1782, the Postmaster General had proposed an explicit provision requiring the discontinuance of money-losing routes. See Mar. 1782 Draft Ordinance, reprinted in 22 Journals of the Continental Congress, 1774–1789, supra note 56, at 122. The provision was not included in the final version of the Ordinance that eventually passed. See An Ordinance for Regulating the Post Office of the United States of America (Oct. 18, 1782), reprinted in 22 Journals of the Continental Congress. 1774–1789, supra note 56, at 670–78.
post roads.\textsuperscript{141} By 1815, there was one post office for every 2800 persons and 43,966 miles of post roads.\textsuperscript{142} The well-known fact that many of these routes, particularly in the South and the West, were losing money was a direct consequence of Congress's rejection of the Sedgwick amendment.\textsuperscript{143} Indeed, Congressional control over postal routes resulted in a level of detail in postal legislation unmatched in federal law at the time. For example, one federal law was so specific that it mandated that a new postal route in North Carolina pass by the house of either John Anders or William H. Beaty.\textsuperscript{144} In short, decentralization of the principal communication network of the early nineteenth century resulted in part from a decision about the allocation of power between the executive and the legislature.

Perhaps the easiest way to see the importance of the 1792 Act to the geographical growth of the postal network is to compare the American development with that in other countries. As historian Richard R. John has pointed out, remote areas in both Great Britain and France—highly advanced countries with far more developed economies—were not nearly as well served as in the United States. By 1828, for example, the American postal system had twice the number of offices as found in Britain and more than five times the number in France. On a per capita basis, the United States had seventy-four post offices for every one hundred thousand inhabitants, while Britain had seventeen and France had four.\textsuperscript{145}

In sum, the legal monopoly was augmented by a seemingly unrelated policy choice, one that embedded the Post Office into the social fabric of virtually every American community. Together, these early policy choices set the Post Office on a course towards which, as a practical matter, “habit and law combine[d] to exclude every other” means of long-distance communication.\textsuperscript{146} This result, as we will see in Part II,

\textsuperscript{141} KIELBOWICZ, supra note 26, at 46. These numbers probably include Native Americans and blacks since Richard R. John provides figures that are somewhat different, and his exclude those two populations. See John, supra note 8, at 53. The total number of post offices rose from seventy-five in 1790 to 4500 in 1820 and then to 13,468 in 1840.

\textsuperscript{142} KIELBOWICZ, supra note 26, at 46.

\textsuperscript{143} See John, supra note 8, at 49. This assumption was so well-entrenched that in 1844 when Congress revamped postal laws, partly to counter the threats from private delivery services, “Congress unanimously believed that the government had a duty to provide postal service to non-paying frontier and rural areas.” Priest, supra note 13, at 65. Congressional authority over postal routes was finally abandoned in 1884. See John & Young, supra note 37, at 121.

\textsuperscript{144} Act of Apr. 23, 1800, ch. 32, 2 Stat. 42, 43 (1800) (obsolete); accord John & Young, supra note 37, at 131. The reader can be forgiven for not having the foggiest idea who Anders or Beaty were. It seems likely that their only importance lay in their close friendship with a Congressman at the time.

\textsuperscript{145} JOHN, supra note 8, at 5, 51–52; John & Young, supra note 37, at 133.

\textsuperscript{146} Leach v. Carfile, 258 U.S. 138, 141 (1922) (Holmes, J., dissenting). Of course, in a literal sense, Justice Holmes was far more wrong in 1922 than he would have been earlier. The telegraph and telephone were both available, and even the “wireless” (i.e., radio) was in its infancy in 1922.
impacted the modern First Amendment profoundly, by creating the conditions necessary for the Court to establish a right to receive ideas.

II. EMBEDDING THE POST OFFICE’S INSTITUTIONAL CHARACTERISTICS INTO THE CONSTITUTION

In Part I, I gave a history of the formation of the American Post Office with a focus on two specific clusters of policies that shaped the Post Office as a national communications network. Over time, both—subsidization of newspaper delivery, and the legal and functional monopoly over long-distance communication throughout the country—became institutional characteristics of the Post Office. In this Part, I turn to the way in which the Supreme Court recognized these institutional characteristics in the early formation of First Amendment doctrine.

In Part II.A, I describe the way in which the Court effectively incorporated postal subsidies for the press into constitutional law. In two cases in the first half of the twentieth century, the Court addressed the constitutionality of denying subsidized postal rates to a periodical based on its content. When the Court in 1946 rejected the Postmaster General’s attempt to deny subsidized rates to the men’s magazine *Esquire* because of its sexually explicit content, the Court constitutionalized what we might call the “network neutrality” characteristic of the early postal subsidies. As I explained in Part I.A, early postal policymakers allocated subsidies in a neutral way, and this choice eventually, in the *Esquire* case, became a constitutional mandate. Statutory law effectively became constitutional law, and the fact that the early statutes had embedded the principle into the legal fabric of the Post Office was crucial to that process.

In Part II.B, I turn to the fact that the Post Office was a monopoly provider for long distance communication, the institutional characteristic I described in Part I.B. In contrast to the principle of neutrality of postal subsidization, the Court never explicitly constitutionalized the government postal monopoly. The postal monopoly did, however, play a crucial role in the 1965 case *Lamont v. Postmaster General*, the Court’s first opinion holding that the Constitution protects a “right to receive ideas.” As we will see, the principle of a “right to receive ideas” had to be tied not only to a communications medium that embodied a form of “network neutrality,” but also to one with monopoly characteristics. Thus, the existence of the postal monopoly—a creation of legislation, not the Constitution—enabled the Court to put the principle of a “right to receive ideas” into the First Amendment.

Before discussing the details of the origins of these two doctrines, I should clarify what I am not saying. Although I do argue that the Post Office’s characteristics were embedded into the fabric of constitutional doctrine, I am not arguing that we would not have these two doctrines
today without their origins in postal policy. First Amendment issues raised by government spending were bound to arise as a direct result of government’s increased role in the economy, and claims based on some variation of a “right to receive” were intertwined with the ideas of the most prominent First Amendment theorist of the post-war era, Alexander Meiklejohn, from as early as the late 1940s with the publication of his seminal book *Free Speech and Its Relation to Self-Government*. It is clear, however, that it was the Court’s understanding of the Post Office—an understanding shaped by the Post Office’s historical development—that effected those doctrines in the first place.

A. CONSTITUTIONALIZING POSTAL SUBSIDIES FOR PERIODICALS: THE MILWAUKEE LEADER CASE AND HANNEGAN V. ESQUIRE

One of the most important First Amendment questions faced by the courts in the past twenty years is the issue of First Amendment restraints on government when it acts as an allocator of resources. This broader question plays itself out most clearly in exercises of the government’s spending power. The federal government now racks up annual budgets of well over a trillion dollars. With such huge numbers, the government can now impact speech and the press far more easily through spending than it can as a direct regulator of behavior, whether through the criminal law or otherwise. The doctrine that has developed to address First Amendment constraints on government spending is known as the “unconstitutional conditions” doctrine. Under this doctrine, “the government ‘may not deny a benefit to a person on a basis that infringes

147. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). I am indebted to Vince Blasi for this point. For background about the writing and publication of, and an in-depth description of the contemporary reaction to the book, see ADAM NELSON, EDUCATION AND DEMOCRACY: THE MEANING OF ALEXANDER MEIKLEJOHN, 1872–1964, at 263–95 (2001).
his constitutionally protected . . . freedom of speech’ even if he has no entitlement to that benefit.”

The Court has struggled mightily with the abstract problem of whether, and if so when, it should invalidate exercises of government spending that might detrimentally impact free speech and press rights. Indeed, the problem has so bedeviled the Court that in its most recent encounter with the question, it completely reframed the case so as to avoid dealing with the issue of government spending. The doctrine remains a muddle, probably in part because of changes in the Court’s membership but also because of a broader conceptual confusion about what it might mean for government spending to “abridge” free speech rights.

Justice Scalia is probably the most well-known proponent of what must be the simplest approach to the problem: deny that any exercise of government spending can “abridge” freedom of speech. Such an approach clearly has a superficial appeal and eliminates many of the difficulties associated with the problem, but it has made little headway as actual doctrine. A diametrically opposite approach, to treat conditions on government funding as the equivalent of penalties for the exercise of First Amendment rights, thereby importing ordinary First Amendment principles such as “viewpoint discrimination,” also has its adherents. This approach, too, has had little success in garnering a Court majority.

The confusion has multiplied many times over since government spending can be viewed as a subset of government acting as an allocator of resources in general, thereby conflating the government spending question with government as property owner (the “public forum” doctrine) or employer (the so-called Pickering “public concern” test). We might think, for example, of Justice Holmes’s famous quip that a person “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman” as either limited to the context of government employment or as a broader point about the power of government to condition its allocative powers (here the power to allocate its own employment) on the waiver of constitutional rights. Not

154. See Finley, 524 U.S. at 595-96 (Scalia, J., concurring).
155. Am. Library Ass’n, 539 U.S. at 220 (Stevens, J., dissenting); Finley, 524 U.S. at 601 (Souter, J., dissenting).
156. See McAuliffe v. City of New Bedford, 29 N.E. 517, 517 (1892). Of course, whether one sees it in narrow or broad terms, Justice Holmes’s conclusion here is simply a form of the argument made by Justice Scalia in cases involving government as allocator. See Finley, 524 U.S. at 595-96 (Scalia, J.,...
surprisingly, then, the Court's doctrine remains a mess,\textsuperscript{157} though the Court has generally been extremely accommodating when the government has used funding in ways that affect speech and the press.\textsuperscript{158}

Given this confusion, it should come as no surprise that scholars have attempted to make some sense of the chaos, and, indeed, those who have addressed the issue are among the most distinguished constitutional theorists of our day.\textsuperscript{159} At this point, a scholar would have to have an unremitting faith in his/her own intellect or be relatively unread (or both) to venture a new theoretical approach to the normative questions raised by government spending and freedom of speech.

While scholars have struggled with these normative questions, the historical origins of the doctrine in the First Amendment context remain unexplored. In this Part, I intend to fill that gap. My claim here is purely descriptive. When the Court first ruled that an exercise of government spending violated the First Amendment, it did so by simply enforcing longstanding postal policy against a government attempt to undo that historical legacy. The Court simply constitutionalized the century-and-a-half old legislative policy of postal subsidies for the press that had been embedded into the institutional structure of the Post Office. It is certainly the case that the Court had normative reasons for its holding, but as we will see its normative framework was premised on a conception of the institutional role that a postal network should play in the free flow of information, not on any abstract theory about the relationship between government spending and free speech.\textsuperscript{160} One might see the longstanding postal policy that the Court constitutionalized as a paradigmatic example of a historical "baseline," as Professor Seth Kreimer has put it,\textsuperscript{161} against which the constitutionality of an exercise of

\textsuperscript{157} For a summary of the doctrine, see Eugene Volokh, The First Amendment and Related Statutes: Problems, Cases and Policy Arguments 400–01 (3d ed. 2005).

\textsuperscript{158} Except where the Court saw discrimination against religion, see Rosenberger v. Rector, 515 U.S. 819, 822–23, 837 (1995), the only case in the past twenty years to invalidate an exercise of the government spending power on First Amendment grounds is Legal Services Corporation v. Velázquez, 531 U.S. 533 (2001). But cf. Am. Library Ass'n, 539 U.S. 194; Finley, 524 U.S. 569; Rust, 500 U.S. 173.

\textsuperscript{159} Fiss, supra note 148, at 27–49; Larry Alexander, Impossible, 72 DENVER U. L. REV. 1007 (1995); Kreimer, supra note 85 passim; Sunstein, Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. REV. 593 (1990); Post, supra note 150, at 151; Redish & Kessler, supra note 150; Frederick Schauer, Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency, 72 DENVER U. L. REV. 989 (1995); Sullivan, supra note 150. As Professor Berman has put it, albeit referring to the broader "unconstitutional conditions" question, "Anything approaching a comprehensive list of this voluminous literature would consume pages." Berman, supra note 150, at 5 n.20.

\textsuperscript{160} Cf. Post, supra note 150, at 194 ("[T]he doctrines of unconstitutional conditions and viewpoint discrimination are incoherent because they are excessively abstract and formal, detached from the actual levers of decision.").

\textsuperscript{161} Kreimer, supra note 85, at 1359–63. Kreimer does not explicitly use second-class mailing rates as an example, though he does briefly cite to Justice Holmes's dissents in Leach v. Carlile and the
government spending was judged.162

Let me turn, then, to the Court's earliest foray into the "subsidized speech" problem, two cases in the first half of the twentieth century involving what is known as the second-class mailing category. Second-class rates are far below those of any other category of mail and, like the early newspaper subsidies, are far below the cost of delivery. They are, in short, government subsidies for the circulation of certain types of postal material.

As I explained in Part I.A, the early newspaper subsidies represented an ideological shift from the Post Office as a government mouthpiece to the Post Office as a neutral conduit through which all newspaper publishers, including those opposing the government, could communicate. This shift marked the Post Office as an institution in a way that reverberates to this day. The Court's eventual answer to the "subsidized speech" question turned not on abstract First Amendment principles such as content or viewpoint neutrality, but rather on the Court's understanding of a very specific aspect of the Post Office's institutional structure: the legacy of the early postal policymakers' decision to subsidize newspapers.

Two cases that address this question, the World War I era Milwaukee Leader case163 and the post World War II case Hannegan v. Esquire,164 answered it in very different ways. Both cases involved actions taken by the Postmaster General under the Classification Act of 1879, the law that created the four classes of postage and prescribed the eligibility criteria for each class of mail.165 In the Milwaukee Leader case, the Court held that second-class rates were a "privilege" and that "the power to suspend or revoke such second-class privilege was a necessary incident to the power to grant it."166 The Esquire Court, in contrast, characterized a denial of second-class rates as "censorship" and went so far as to say that "grave constitutional questions are immediately raised" by giving the Postmaster General the right to deny a publication the

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162. Let me emphasize again that I am not making a normative argument. Professor Kreimer's trilogy of "baselines" has been subjected to a whole host of criticisms as normative criteria for determining when to invalidate an exercise of the spending power. To borrow Professor Kenneth Simons's terms, I am not getting an "ought" from an "is." Kenneth W. Simons, Offers, Threats, and Unconstitutional Conditions, 26 SAN DIEGO L. REV. 289, 310 (1989).

163. U.S. ex rel. Milwaukee Soc. Dem. Pub. Co. v. Burleson, 255 U.S. 407 (1921). Most scholars have used "Burleson" as the short form for the case. I refer to the case as the "Milwaukee Leader" case in part to remind the reader of the fact that the case involved a newspaper. I am comforted in my choice by the fact that scholars as distinguished as Zechariah Chafee and David Rabban both refer to the case in the same way. See ZECHARIAH CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 296, 298, 307 (1947); DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 152 (1997).

164. 327 U.S. 146 (1946).

165. Id. at 147-50; Milwaukee Leader, 255 U.S. at 410-12.

166. 255 U.S. at 410.
second-class rates as long as the publication was of the general format and type eligible for those rates.\footnote{167} The Court's move from the Milwaukee Leader case in 1921 to Esquire in 1946 was a shift towards a Court that recognized the subsidies as an embedded institutional characteristic. The First Amendment itself had traveled a long way in that period,\footnote{168} and we see that development reflected in the Esquire case. A comparison of the rhetoric of the Milwaukee Leader case with that of Esquire shows a different attitude towards the actions being challenged, not a change in the social meaning of the Post Office or of the second-class rate category. In short, the Esquire Court incorporated into the First Amendment a long-standing institutional attribute of the Post Office, while the Milwaukee Leader Court did not.\footnote{169}

The Milwaukee Leader case involved a challenge to a Postmaster General order denying second-class mailing status to the Leader, a prominent socialist newspaper published and edited by Victor Berger.\footnote{170} After a hearing, the Postmaster General determined that several articles published in the Leader violated the Espionage Act, rendering the paper "nonmailable" under a separate provision in the statute.\footnote{171} The Postmaster General then revoked the Leader's second-class status on the grounds that, because the paper was not mailable matter under the Espionage Act, it was thus "not a 'newspaper or other periodical

\footnote{167} 327 U.S. at 153.
\footnote{169} The Court had addressed the constitutionality of the Classification Act once before the Milwaukee Leader case. In the 1913 case Lewis Publishing v. Morgan, 229 U.S. 288, 313 (1913), the Court upheld the Newspaper Publicity Act, a statute that conditioned the subsidized second-class rates on the requirement that publishers provide the Post Office with details of the periodical's ownership. For a discussion of the Newspaper Publicity Act and the Lewis Publishing case, see LINDA LAWSON, TRUTH IN PUBLISHING: FEDERAL REGULATION OF THE PRESS'S BUSINESS PRACTICES, 1880–1920, at 85–90, 147 (1993).
\footnote{170} 255 U.S. at 408. In addition to his life as a prominent socialist newspaperman, Berger served as a Congressman from Milwaukee. WISCONSIN HISTORICAL SOCIETY, DICTIONARY OF WISCONSIN HISTORY (2003), available at http://www.wisconsinhistory.org/dictionary/ (search "by Keyword" for "Victor Berger"; then follow "Berger, Victor Louis" hyperlink). In 1910, he became the first member of the Socialist party ever elected to Congress, serving from 1911 to 1913. Id. In February 1918, he was indicted under the criminal provisions of the Espionage Act. Id. Later that year, Milwaukee voters elected to send him back to Congress, but Congress refused to seat him. Id. In January 1919, he was convicted and sentenced to twenty years in prison. Id. While his case was on appeal, he was re-elected to Congress in December 1919 in a special election. Id. Congress again refused to seat him. Id. In January 1921, the Supreme Court reversed his conviction on the grounds that the trial judge failed to recuse himself in compliance with a statute that required him to do so. See Berger v. United States, 255 U.S. 22, 36 (1921). Berger was then elected to Congress again in 1922 and served from 1923 to 1929. WISCONSIN HISTORICAL SOCIETY, supra.
\footnote{171} Milwaukee Leader, 255 U.S. at 408-09.
publication’ within the meaning of the law governing mailable matter of the second class.’”

In most histories of the modern First Amendment, the Milwaukee Leader case is treated as a footnote of sorts. Decided in 1921, it is often seen as simply following in the wake of the more well-known Espionage Act cases from 1919. Like Abrams v. United States, Justice Clarke wrote the majority opinion and, like Abrams, Justices Brandeis and Holmes dissented. Seen in this light, the Milwaukee Leader case is simply one in a string of post-Abrams cases in which Justices Holmes and Brandeis stake out the “enlightened” First Amendment position that the Court eventually adopted.

But the Milwaukee Leader case is something more and, in many ways, something completely different. Unlike the earlier Espionage Act cases, the Milwaukee Leader case is better seen as an early “unconstitutional conditions” or “subsidized speech” case. It is the first case in which a Supreme Court Justice voted to invalidate a use of federal spending on First Amendment grounds. Moreover, it is not simply a First Amendment case in the sense of Abrams and the earlier Espionage Act cases. It is instead a case about the unique First

172. Id. at 418 (Brandeis, J., dissenting).
174. Here I am referring to the trilogy of Espionage Act cases decided in March 1919, Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); and Abrams v. United States, 250 U.S. 616 (1919), decided in November of the same year.
175. 250 U.S. 616.
176. Milwaukee Leader, 255 U.S. at 417, 436 (Brandeis & Holmes, JJ., dissenting).
177. See G. Edward White, Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension, 80 Cal. L. Rev. 391, 443–44 (1992) (comparing Justice Holmes’s dissent in the Milwaukee Leader case with his 1892 opinion in McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892), in which Holmes famously noted that a man “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman”).
178. The first case in which the Court addressed whether federal spending violated the First Amendment also involved the Post Office. In Ex parte Jackson, 96 U.S. 727 (1878), and a few other cases over the following quarter-century, the Court addressed the constitutionality of statutes that created categories of unmailable matter based on content. While strictly speaking these cases did not explicitly involve spending, they were resolved on the grounds that the Post Office is a government operation and the government had no obligation to “assist” in the circulation of materials that it found objectionable. See, e.g., id. at 736–37.
179. Here I am referring solely to cases in the United States Supreme Court. Judge Hand’s now-famous exposition of the “direct incitement” test in 1917 also involved the Post Office; in that case, Judge Hand granted the publisher of The Masses an injunction preventing the Postmaster from barring certain issues of the paper from the mails, interpreting the Espionage Act narrowly in light of First Amendment principles not to cover what the Postmaster sought to bar. See Masses Publ’g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), rev’d, 246 F. 24 (2d Cir. 1917).
The Supreme Court rejected Berger’s constitutional challenge to the Postmaster General’s action. Justice Clarke’s opinion for the majority noted that the Court had already upheld the constitutionality of the Espionage Act two years earlier and then framed the question as simply whether “substantial evidence” existed to support the Postmaster General’s order. The Court gave some examples of articles the paper had published and agreed that they violated the Espionage Act. The Court then concluded, “When, for more than five months, a paper had contained, almost daily, articles which, under the express terms of the statute, rendered it ‘non-mailable,’ it was reasonable to conclude that it would continue its disloyal publications.” Adding one final point, the Court implied that the Postmaster General was being gracious to simply revoke the paper’s second-class status rather than deny the paper use of the mails altogether. In essence, the Court applied the very logic of the Postmaster General. Nonmailability implied ineligibility for second-class rates: if the newspaper cannot be sent through the mails, surely the Post Office need not allow it to be sent at subsidized rates.

Justice Brandeis’s dissent attacked the conflation of nonmailability with second-class mailing status. He first concluded that the power given to the Postmaster General by the Espionage Act, like the many other statutes establishing nonmailable matter, was limited to excluding the particular matter that violates the Act and does not extend to “future issues of a newspaper.” Justice Brandeis then noted that the Espionage Act and the Classification Act were two completely different statutes, and that nothing in the Espionage Act granted the Postmaster General power to deny second-class status to future issues of a newspaper based on a past violation of the Espionage Act. The determination of second-class status was based solely on the Classification Act.

Having concluded that the statute did not confer upon the Postmaster General the power he exercised, Justice Brandeis stated that “even if the statutes were less clear in this respect” he would interpret the statutes in that manner to avoid a “succession of constitutional doubts.” Brandeis concluded that a statute that gave the Postmaster
General such power would violate the First Amendment.\textsuperscript{187} The government had argued that the second-class rate was a subsidy and that the denial of the reduced rates had nothing to do with "liberty of circulation."\textsuperscript{188} Justice Brandeis's response was to characterize the denial of the subsidy as a penalty or a fine:

The Government might, of course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of the service; and it would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service, and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression.\textsuperscript{189}

Notice that this argument appears at first blush to be about discrimination in general, independent of the specifics of the Post Office. The government is not obligated to distribute newspapers at subsidized rates, but it cannot discriminate against a paper "of the same general character"—what we today might call "viewpoint discrimination." The "censorship" thus derives from the discrimination, not any particular characteristics of the Post Office. On its face, then, the argument is rooted in an abstract logic, not history or institutional specificity. In some ways, then, we have a debate about the characterization of the second-class rate subsidy at a very abstract level. In the eyes of the majority, the power to deny the subsidy was a necessary corollary of the power not to deliver the newspaper at all, a "greater includes the lesser" argument.\textsuperscript{190}

For Justice Brandeis, the denial of the subsidy was a penalty and the equivalent of a sanction.\textsuperscript{191}

\textsuperscript{187} Milwaukee Leader, 255 U.S. at 431. In what must have been the most extensive litany of constitutional violations found in a single statute, Justice Brandeis concluded that giving the Postmaster General such power would also violate virtually every provision of the Bill of Rights, and more. See id. at 432–33 (Brandeis, J., dissenting) (Due Process Clause and Equal Protection Clause); id. at 434 (Article III); id. at 434–35 (Sixth Amendment); id. at 435 (Eighth Amendment).

\textsuperscript{188} Id. at 431.

\textsuperscript{189} See Sunstein, Minimalism at War, 2004 SuP. Cr. Rev. 47, 87 (discussing the Milwaukee Leader case as an example of Justices Brandeis and Holmes interpreting statutes narrowly to avoid constitutional doubt).

\textsuperscript{190} Of course, such arguments remain of importance in the First Amendment. Compare Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345–46 (1986) ("[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . . ."), with Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 511 (1996) (plurality opinion) ("Although we do not dispute the proposition that greater powers include lesser ones, we fail to see how that syllogism requires the conclusion that the State's power to regulate commercial activity is 'greater' than its power to ban truthful, nonmisleading commercial speech.").

\textsuperscript{191} This debate persists today. Compare Am. Library Ass'n v. United States, 539 U.S. 194, 212 (2003) (plurality opinion) (noting that Children's Internet Protection Act, which conditions funds to public schools and libraries on their placing filters on Internet terminals, does not "penalize" libraries


But there is more in Justice Brandeis's dissent; it seems likely that he was thinking about the unique attributes of the Post Office and its relationship to the press. Consider how Justice Brandeis determined that such discrimination would prove to be "an effective censorship." In a footnote at the end of the portion I quoted above, he quoted Harvard professor Zechariah Chafee's book, *Freedom of Speech*, for the proposition that "'[a] newspaper editor fears being put out of business by the administrative denial of the second-class mailing privilege much more than the prospect of prison subject to a jury trial.'\textsuperscript{92} In other words, denial of second-class rates should be treated as censorship due to the actual impact of that denial in a world in which postal subsidies had become assumed into the costs of doing business in the broader market for periodicals.\textsuperscript{93} As I noted in Part I.A, those subsidies had a long-standing historical pedigree as a mechanism by which the Post Office as an institution became a neutral, nondiscriminatory conduit for the dissemination of news. Justice Brandeis did not rely explicitly on that pedigree, but he did touch on reasons why viewpoint discrimination in this particular institutional context was the equivalent of "censorship."

Justice Holmes's shorter dissent rested entirely on Justice Brandeis's interpretation of the statutes and avoided addressing the constitutional question altogether. Nonetheless, the opinion is noteworthy because of Justice Holmes's famous aphorism that "[t]he United States may give up the [P]ostoffice when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues,"\textsuperscript{94} an obvious recognition that there is something unique about the Post Office. Like Justice Brandeis, moreover, Justice Holmes touched briefly on the practical importance of the second-class rate: "To refuse the second-class rate to a newspaper is to make its circulation impossible . . . ."\textsuperscript{95} Although Justice Holmes felt no need to address the constitutional question directly, he too made clear that the case involved the unique nature of the Post Office as a First Amendment institution.

The Holmes quotation is justifiably famous simply as a rhetorical device,\textsuperscript{196} but before I turn to the case that effectively overruled the

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\textsuperscript{92} *Milwaukee Leader*, 255 U.S. at 431 n.14 (Brandeis, J., dissenting) (quoting *ZECHARIAH CHAFE, JR., FREEDOM OF SPEECH* 199 (1920)).

\textsuperscript{93} Robert Post has hypothesized that our intuitive sense that a statute that denied second-class mailing status to "indecent" magazines would be unconstitutional is due to the fact that such a law "would as a practical matter function to disable magazines." Post, supra note 150, at 179. In this, Professor Post's views appear to be consonant with those of Chafee and Brandeis.

\textsuperscript{94} *Milwaukee Leader*, 255 U.S. at 437 (Holmes, J., dissenting).

\textsuperscript{95} Id.

\textsuperscript{96} Indeed, even the concession Justice Holmes claimed to make—that the government may give...
Milwaukee Leader case, I want to focus on the substance of Justice Holmes's aphorism for a moment longer because, in some ways, it is the perfect embodiment of the notion of an institutional First Amendment. One way to see this is to compare the Post Office to a public educational institution such as a university. At first blush, the two do not seem comparable, but the premise underlying Justice Holmes's statement—that the mere creation and maintenance of a post office entails government responsibilities that are constrained by First Amendment principles—is precisely what underlay some of the early seminal public university First Amendment cases.

In his historical review of academic freedom and the First Amendment, constitutional scholar and former President of the American Association of University Professors, William Van Alstyne, has noted this comparison. He points, for example, to Justice Frankfurter's concurrence in Wieman v. Updegraff, one of the earliest Supreme Court opinions to articulate a specific vision of educational institutions as First Amendment institutions. In Wieman, the Court invalidated an Oklahoma law requiring all state employees to take a broad "loyalty" oath. Justice Frankfurter wrote separately to emphasize that academic freedom principles meant that the law was particularly odious when applied to teachers. Professor Van Alstyne points out that

Frankfurter's position in Wieman was no different with respect to public educational institutions than ... Holmes's discussion of the Post Office. ... [T]he government may give up public education whenever it likes, yet [may] not conduct it other than according to conditions of academic freedom so long as it stays in the business of education."

Surveying a series of cases from Wieman in 1952 through the late 1960s, Van Alstyne concludes that the Court's characterization of

up the Post Office if it likes—is hardly a concession at all, since Justice Holmes knew full well that the government could not, and would not, give up the Post Office because of its importance to the social and economic fabric of the nation.

197. As I will discuss in further detail, the Esquire case did not literally overrule the Milwaukee Leader case as standing for the narrow proposition that second-class status could be denied to a publication that had violated the Espionage Act (or even one that had violated any other statute prohibiting the mailing of certain matter). See Zechariah Chafee, Government and Mass Communications 304 n.29 (1947) (noting that while Justice Douglas's opinion for the Esquire Court did cite the Milwaukee Leader dissent of Justices Holmes and Brandeis favorably, the opinion "was careful to confine the protection of the Esquire decision to 'mailable' periodicals"). If, however, we see the Milwaukee Leader case instead as simply representing the broad principle that second-class mailing status is a "privilege" that Congress and/or the Postmaster General can withhold without constitutional constraint, the Esquire case clearly repudiated that notion.

198. 344 U.S. 183, 184 (1952).
199. id. at 183.
200. Id. at 194-95 (Frankfurter, J., concurring).
educational institutions directly parallels the Post Office. "[L]ike the post," Van Alstyne writes, "the state may give up public education when it chooses; but while carrying it on, the state is not sole master of what students are free to learn, whether on their own initiative or in interaction with those free to teach." Justice Holmes's use of the Post Office anticipated the Court's later approach to public educational institutions, and thus served as the first brick in what Professor Schauer calls an "institutional First Amendment."

Fast forward twenty-five years from the Milwaukee Leader case to Hannegan v. Esquire, where the Court considered a variation of the question it answered in the Milwaukee Leader case: what is the role of the Postmaster General in the scheme set forth in the Classification Act? Esquire was another case involving statutory interpretation laced with a First Amendment trim. Under the Classification Act, one of the requirements for eligibility for the second-class rates was that the periodical "be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, the arts, or some special industry." In Esquire, the Postmaster General determined that the men's magazine, Esquire, did not satisfy that requirement because the magazine contained matter that was "said to reflect the smoking-room type of humor, featuring, in the main, sex.

Justice Douglas, writing for the Court, looked at the legislative history of the Classification Act and concluded that the Postmaster General lacked the power to determine that Esquire was not entitled to second-class rates because of its sexually explicit matter. To give the Postmaster General the power to prescribe standards for literature or art would amount to censorship; thus, the provision would have to be interpreted in a way that would "supply standards which relate to the format of the publication and to the nature of its contents, but not to their quality, worth, or value." In short, Congress did not give the Postmaster General the power to decide that a particular publication was a contribution to the public welfare.

But the Court went one step beyond statutory interpretation, arguing that "grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or

202. Id. at 120.
203. See supra text accompanying note 9.
204. 327 U.S. 146 (1946).
206. Esquire, 327 U.S. at 151.
207. Id. at 151-52.
208. Id. at 153 (emphasis added).
withheld on any grounds whatsoever.\textsuperscript{209} Though the Court did not state explicitly that a statute that discriminated on the basis of either content or viewpoint in the allocation of subsidized postal rates would violate the First Amendment, the implication was clear: giving a government official the power to determine "[w]hat is good literature, what has educational value, what is refined public information, [or] what is good art . . . smacks of an ideology foreign to our system."\textsuperscript{210}

Taken out of its institutional context of the Post Office, however, Douglas's implication would of course be flat out wrong. We do give certain government officials the power to determine "[w]hat is good literature, what has educational value, what is refined public information, [and] what is good art" all the time. None of those government officials work in the Post Office, of course. The government officials who do this are instead state university professors, secondary and primary school teachers, and even (to a lesser extent) librarians. These individuals are often hired by the government precisely to make such decisions.

The Court did not say this, but it made clear in other ways that its interpretation was made in light of an understanding about the Post Office, an understanding that the Court saw as rooted in the origins and history of postal subsidies. The Court emphasized that the statutory provision "would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions.\textsuperscript{\textit{\textast}}} While the Court's reference to "our traditions," a phrase that appears twice in the opinion,\textsuperscript{211} likely meant to include "First Amendment traditions," the Court clearly also meant our "post office traditions." Immediately after stating that a power to determine eligibility for second-class rates on the basis of the objectionable nature of a periodical's content is "so abhorrent to our traditions that a purpose to grant it should not be easily inferred," the Court noted that subsidized rates for "certain classes of publications" date back to "the beginning," citing to the 1792 Post Office Act as well as the 1863 and 1879 statutes establishing the second-class category.\textsuperscript{213} Moreover, in the footnote immediately after the word "traditions," the Court cited portions of a law review article which exclusively discussed the relationship between the Post Office and the First Amendment.\textsuperscript{214} In other words, the "tradition" was not simply a

\textsuperscript{209} Id. at 156. Although Justice Douglas was still speaking for the Court at this point, Justice Frankfurter's concurrence made clear that he thought it unnecessary for the Court to address the constitutional question. Id. at 160 (Frankfurter J., concurring). So, although the Court's decision in \textit{Esquire} was unanimous, this part of the Court's decision probably is best characterized as 8–1.

\textsuperscript{210} Id. at 157–58.

\textsuperscript{211} Id. at 156.

\textsuperscript{212} Id. at 151, 156.

\textsuperscript{213} Id. at 151. See generally Kielbowicz, \textit{Origins}, supra note 104, at 1.

tradition of freedom of expression/press, but rather a tradition of press freedom in the specific form of postal subsidies. In what today we might characterize as a form of "subsidized speech" raising an "unconstitutional conditions" question, the Court was making an argument rooted in institutional specificity. "[O]ur traditions," the Court stated, included 150 years of postal subsidies granted without reference to the "quality, worth, or value" of a particular publication, and the First Amendment cannot be understood without incorporating that fact into the constitutional analysis.

In sum, the decision of the early postal policymakers to embed postal subsidies for news into the institutional structure of the Post Office had a direct impact on the Court's understanding of those postal subsidies when interpreting the First Amendment more than 150 years later. The point is not to suggest that the Court's interpretation of the First Amendment was correct in *Esquire* and incorrect in the *Milwaukee Leader* case, but rather simply to say that we cannot understand these early "unconstitutional conditions" cases without understanding the institutional context in which the interpretation of the First Amendment took place.

B. THE POST OFFICE'S MONOPOLY AND THE ORIGINS OF THE "RIGHT TO RECEIVE IDEAS": LAMONT V. POSTMASTER GENERAL

In Part I.A, I focused on the way in which early postal policymakers established subsidized rates for newspapers. Then, in Part II.A, I explained how the constitutional principle embodied in the Holmes and Brandeis dissents in the *Milwaukee Leader* case, and finally accepted by a majority of the Court in *Esquire*, ultimately represented the constitutionalizing of that policy choice.

Throughout Part II.A, though, I also touched on the Post Office's most obvious institutional characteristic: its monopoly over long distance communication. As I explained in Part I.B, the origins of this monopoly, like the subsidized rates, can be found in law in the early days of the republic, particularly the monopoly that the Continental Congress gave to the national Post Office in the 1782 Post Office Ordinance. Moreover, the monopoly derived not simply from the explicit legal prohibition on the use of post roads for delivering "letters" but also from the ubiquity of the Post Office, a ubiquity that was fostered in the unique context of American geography by Congress's decision in the 1792 Post Office Act to retain the authority to designate post roads rather than delegating that authority to the Executive. It was this ubiquity, more than the law alone,
that led to Holmes’s oft-quoted statement in the Milwaukee Leader case,\textsuperscript{218} as his dissent a year later in Leach v. Carlile makes clear.\textsuperscript{219} The monopoly over long distance communication was both a legal and factual reality throughout much of the nineteenth century and was still crucial for understanding the Post Office—at least as Justice Holmes saw it—in the early 1920s.

In this Part, I turn to the way in which the existence of a postal monopoly shaped the modern First Amendment. In contrast to Part II.A, where the constitutional principle was borrowed directly from the legislative enactment, the Court did not constitutionalize the government’s monopoly over long-distance communication. What it did, however, was just as interesting. In the now nearly forgotten but exceedingly important case of Lamont v. Postmaster General,\textsuperscript{220} the Court shaped an important principle of freedom-of-speech jurisprudence—the right to receive ideas—around the fact that the Post Office was the principal means of long distance communication.

I will explain Lamont and the jurisprudential origins of the “right to receive ideas” below and explain how the case is—or at least ought to be seen as—an example of the type of institutional specificity advocated by Professor Schauer in his recent work on First Amendment institutions.\textsuperscript{221} In Lamont, the Court addressed the constitutionality of a statute allowing the Postmaster General to regulate the flow of “communist political propaganda” through the mails.\textsuperscript{222} The statute required the Postmaster General to review all materials coming from abroad (though, as a matter of practical implementation, only from certain foreign countries) and, according to his discretion, determine which constituted “communist political propaganda.”\textsuperscript{223} If the Postmaster General determined that the mail was “communist political propaganda,” the addressee would receive a “reply” postcard instead of the materials.\textsuperscript{224} The addressee could return the card to the Post Office indicating a desire to receive the materials, upon receipt of which the Post Office would


\textsuperscript{219} Leach v. Carlile, 258 U.S. 138, 141 (1922) (Holmes, J., dissenting) (“When habit and law combine to exclude every other means of transportation it seems to me that the First Amendment in terms forbids such control of the post as was exercised here.”); \textit{id.} (noting that the theoretical availability of other means of circulation would not eliminate “the practical dependence of the public upon the Postoffice”).

\textsuperscript{220} 381 U.S. 301 (1965).


\textsuperscript{222} Lamont, 381 U.S. at 302–03.

\textsuperscript{223} \textit{Id.} at 303.

\textsuperscript{224} \textit{Id.}
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If the addressee did nothing, the Post Office would not deliver the materials. The statute exempted sealed letters, materials sent pursuant to a subscription, and all mail sent to government agencies and educational institutions. Under the postal regulations implementing the statute, the reply card originally contained an area where a patron could, in addition to asking for delivery of the specific piece of mail, also request future delivery of all "similar publication[s]." The Post Office would thus keep a list of those who requested "communist political propaganda." While the constitutional challenge was pending in the Supreme Court, however, the Post Office changed the regulations so that a list would no longer be kept. This meant that addressees would need to return a reply card each time they were sent "communist political propaganda" that they wanted to receive.

After receiving a reply card, Corliss Lamont brought suit in the Southern District of New York, seeking to enjoin enforcement of the statute as a violation of the First Amendment.

The Court unanimously invalidated the statute. Justice Douglas, writing for the Court, reasoned that the statute violated the First Amendment "because it require[d] an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights." The Court concluded that the statute was "almost certain to have a deterrent effect, especially as respects those who have sensitive positions," and thus "amount[ed] to an unconstitutional abridgment of the addressee's First Amendment rights.

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225. Id.
226. Id.
227. Id. at 302-03. A contemporary article describing the background to the statute's passage is Meg Greenfield, How We Got Protected From Communist Propaganda, THE REPORTER, Oct. 25, 1962, at 22-25. Two distinguished law professors, Murray Schwartz and James Paul, had been instrumental in the 1950s and early 1960s in raising the First Amendment issues associated with postal censorship of communist propaganda in the mails. See generally Murray L. Schwartz and James C.N. Paul, Foreign Communist Propaganda in the Mails: A Report on Some Problems of Federal Censorship, 107 U. PA. L. REV. 621 (1959); Murray L. Schwartz, The Mail Must Not Go Through—Propaganda and Pornography, 11 UCLA L. REV. 805, 805-45 (1964). The second of those two articles contains an extremely detailed description of the legislative history of the statute, including the fact that the "detention and release upon request" approach to communist propaganda taken by the statute was a compromise between a bill that would have banned it from the mails altogether and one that would have merely required warning signs about communist propaganda in post offices. See Schwartz, supra, at 807-16. This middle-ground proposal, which eventually became law, was first proposed by Senator Bush, the grandfather of the current President. See id. at 813-14. See generally DOROTHY GANFIELD FOWLER, UNMAILABLE 153-57 (1977).
228. Lamont, 381 U.S. at 303.
229. Id.
230. Id.
231. Id.
232. Id. at 304.
233. Id. at 305.
234. Id.
Although the Court focused on what it referred to as the "affirmative obligation" imposed on the addressee as a condition of exercising his First Amendment rights, the Court, at one point early in its analysis, alluded to the unique nature of the Post Office as a medium of communication. But its institutional specificity was brief, nothing more than a mere quotation from Justice Holmes's famous statement that, "[t]he United States may give up the [P]ost [O]ffice when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues." Indeed, the Court went out of its way to analogize *Lamont* to cases involving licensing and registration requirements as a condition for the exercise of certain First Amendment rights, cases that had nothing to do with the Post Office: "Just as the licensing or taxing authorities in *Lovell* [v. *City of Griffin*], *Thomas* [v. *Collins*], and *Murdock* [v. *Pennsylvania*] sought to control the flow of ideas to the public, so here federal agencies regulate the flow of mail."

The Court certainly attempted to articulate its holding in what it viewed as "the narrow ground that the addressee . . . must request in writing that [his mail] be delivered," but, on its face, the supposed "narrowness" of the Court's decision in no way made the case a "post office" specific case.

In particular, the Court's opinion completely elided the significant matter of the addressee's First Amendment "right to receive" materials. Indeed, the Court's quotation from Justice Holmes ignored the fact that the persons asserting First Amendment rights in the case were receiving, rather than sending, materials through the mails. They were not seeking to exercise their "right to use [their] tongues" at all, but instead were claiming that the use of the mails was "as much a part of free speech as the right to use our" eyes or ears, a rather different analytical proposition. Be that as it may, Justice Brennan's concurrence tackled that issue head on. With broad language, Justice Brennan declared that "the right to receive publications is . . . a fundamental right," the protection of which is "necessary to make the express guarantees [of the

235. Id. at 307.
237. 303 U.S. 444 (1938).
238. 323 U.S. 516 (1945).
239. 319 U.S. 105 (1943).
241. Id. at 307 (emphasis added).
First Amendment] fully meaningful." Given the Court's holding, though, premised as it was on the recipient of the materials making the constitutional claim rather than the foreign sender (to avoid what would otherwise have been difficult questions of both third-party standing and First Amendment protection for political propaganda from foreign governments), it is clear that the entire Court was acknowledging a "right to receive," a fact that was understood at the time. In effect, the Court held for the first time that the First Amendment encompassed a right to receive, one of the bedrock principles of the modern First Amendment.

Besides this landmark doctrinal holding on the "right to receive," however, Lamont was remarkable in a number of other ways. Lamont was the first case in which the Supreme Court invalidated a federal statute under the Free Speech Clause. It is the first time that a Justice ever used the phrase "marketplace of ideas." Corliss Lamont was

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243. Lamont, 381 U.S. at 308 (Brennan, J., concurring).
244. See id. at 307-08 (citing Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) and Johnson v. Eisentrager, 339 U.S. 763, 781-85 (1950)).
245. See The Supreme Court, 1964 Term, 79 HARV. L. REV. 103, 156 (1965) (referring to the "Court's unanimous recognition of a right to receive publications" (emphasis added)).
246. Justice Brennan quoted language in Martin v. City of Struthers, but that language was clearly dicta. See Lamont, 381 U.S. at 308 (quoting 319 U.S. 141, 143 (1943)). Struthers involved a Jehovah Witness who challenged an ordinance that prohibited her from distributing literature by going door to door. 319 U.S. at 142; see also William E. Lee, The Supreme Court and the Right To Receive Expression, 1987 SUP. CT. REV. 303, 307.
247. See Fowler, supra note 227, at 159; Lucas A. Powe, Jr., The Warren Court and American Politics 315 (2000). It is worth further noting that Lamont was decided a year after what is perhaps the most celebrated First Amendment case in American history, New York Times v. Sullivan, 376 U.S. 254 (1964).
248. See Haig Bosmajian, Metaphor and Reason in Judicial Opinions 49 (1992); Vincent Blasi, Holmes and the Marketplace of Ideas, 2004 SUP. CT. REV. 1, 24, n. 80. Of course, Lamont was not the first time that a Justice expressed the theoretical notion underlying the phrase "marketplace of ideas." Most famously, Justice Holmes, dissenting in Abrams v. United States, wrote that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.
250 U.S. 616, 630 (1919) (Holmes, J., dissenting). But, as Professor Blasi has noted, "Holmes never used the phrase 'marketplace of ideas.' That is a paraphrase supplied by his interpreters." Blasi, supra at 24. Indeed, my sense is that the use of the "marketplace of ideas" phrase creates a subtle shift in our thinking about the theoretical basis of the Abrams dissent from the truth-seeking rationale that animated Holmes's "Victorian scientific positivism," in the context of a scientific enterprise, Thomas C. Grey, Holmes and Legal Pragmatism, 41 STAN. L. REV. 787, 795 (1989), to a theory that overemphasizes economic reasoning. Professor Coase's famous article on the First Amendment is perhaps the embodiment of this shift. See R. H. Coase, The Economics of the First Amendment: The Market for Goods and the Market for Ideas, 64 AM. ECON. REV. 384 (1974) (analogizing the "market for ideas" to the "market for goods"); id. at 389 (arguing that there ought not be any "distinction between the market for goods and the market for ideas" and that "we should use the same approach for all markets when deciding on public policy"); see also Richard A. Posner, Free Speech in an Economic Perspective, 20 SUFFOLK U. L. REV. 1, 2 (1986) (claiming that Holmes "discussed freedom of speech in terms of a market in ideas"); Peter J. Hammer, Free Speech and the "Acid Bath": An

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himself a moderately remarkable figure, a Columbia philosophy instructor and well known humanist. In addition, representing Lamont was probably the most well-known—and certainly one of the finest—constitutional lawyers in the country, Leonard Boudin. Boudin was the brother-in-law of iconoclastic journalist I.F. “Izzy” Stone, and he had a client list that reads like a mid-twentieth century list of leftist notables, including Fidel Castro, Benjamin Spock, Daniel Ellsberg, Paul Robeson, famed Cold War spy Judith Coplon, and more witnesses before the House Un-American Affairs Committee than any other lawyer in the country.

In short, Lamont was an important case, both for its recognition of what was in effect a new constitutional right and because the individuals involved were so prominent at the time. But the case’s holding cannot be divorced from the institutional context of the Post Office. While the Court might not have recognized it at the time, creating a “right to receive” in abstract terms divorced from the institutional context of the Post Office could create irresolvable tensions in doctrine. To see this, consider how the Court attempted to deal with the “right to receive” in a very different institutional context, the public school library. In doing so, we see that Lamont is not just a case about “the right to receive” materials, but is instead a case about the right to receive materials through the unique government institution of the Post Office.

Evaluation and Critique of Judge Richard Posner’s Economic Interpretation of the First Amendment, 87 Mich. L. Rev. 499, 499 (1988) (criticizing Posner’s analysis, but like Posner, assuming that Holmes invoked the “marketplace of ideas metaphor” and did so in economic terms). This is not to say that economics cannot provide valuable insights into free speech theory, see Hammer, supra; Posner, supra, nor is it to say that Justice Holmes did not see economics as an important aspect of his scientific positivism. See, e.g., Blasi, supra at 5 (discussing Holmes’s interest in economics and fascination with Malthus). My point is simply that the use of the phrase creates a subtle distortion in the words Holmes actually used, one that appears to give Holmes more of a neo-classical tint than he actually had. For an extensive collection of materials on the Abrams dissent, see generally Vincent Blasi, Ideas of the First Amendment 542-658 (2006).


251. In United States v. Coplon, the Second Circuit, deciding on statutory grounds, anticipated the Supreme Court’s important Fourth Amendment decision in United States v. Katz by almost twenty years. 185 F.2d 629, 636 (2d Cir. 1950). As a result of Coplon, President Truman almost fired FBI Director J. Edgar Hoover. Braudy, supra note 249, at 66.

252. Wilkes, supra note 250, at 53.

253. See Lee, supra note 246, at 309 (“A likely limitation on the contours of the right to receive comes from the fact that [Lamont] involved the postal system, a communications facility occupying a special position in our society.”); see also id. at 308 (“The unique context of Lamont, along with the
In *Board of Education v. Pico*, the Court addressed a constitutional challenge to a local school board’s decision to remove several books from a school library. In a splintered decision with seven of the nine Justices writing opinions, the Court held that summary judgment for the school board was inappropriate where there were factual disputes about the school board’s motivation for the removal. In the principal opinion, the important aspects of which only garnered three votes, Justice Brennan relied on *Lamont* and other cases for the “right to receive” principle for which *Lamont* is most often cited. Though Justice Brennan was able to cobble together a majority for the remand, six Justices rejected his attempt to apply *Lamont* and the other “right to receive” cases to the school library context. The other opinions in the case suggest that institutional attributes, including the institutional differences with the Post Office, played a role.

Consider the principal dissent, penned by Chief Justice Burger. On the surface, the opinion unequivocally rejects both the “right to receive” and institutional differences, but there are what Professor Schauer might call “hints” of an institutional approach. On the surface, Chief Justice Burger shows little but disdain for the “right to receive” as conceived by Justice Brennan, by denying that the right “carries with it the concomitant right to have those ideas affirmatively provided at a particular place by the government.” The distinction is thus clear: government cannot interfere with the “right to receive,” but it has no “obligation to aid a speaker or author in reaching an audience.” Otherwise, the “right to receive” would imply a right “to have public libraries as part of a new constitutional ‘right’ to continuing adult education.” In other words, Burger viewed *Pico* as an easy case: government officials get to decide what books they will provide because by removing a book, “the government does not ‘contract the spectrum of available knowledge.’”

But, because Justice Brennan had limited his holding to decisions to remove books from a school library rather than decisions to acquire...
books, the Chief Justice had another line of attack. This one focused on the institutional attributes of the school. Although *Pico*, including Burger's opinion, has been discussed extensively in the literature as it relates to schools and libraries, what interests me is the connection to *Lamont*, a decision not even mentioned in Burger's opinion. Burger included a section discussing "the unique environment of the local public schools," which began with the following statement: "Whatever role the government might play as a conduit of information, schools in particular ought not be made a slavish courier of the material of third parties." Notice the reference to schools as a possible "conduit" of information and as a "courier," the assumption being that Justice Brennan's opinion would result in treating schools as such a courier. Chief Justice Burger's earlier broad argument, denying a governmental "obligation" to facilitate a particular author's speech, clearly ignored *Lamont*'s holding that, if the government continues to provide postal service, it must distribute materials through that network evenhandedly. To put the holding of *Lamont* in Chief Justice Burger's words from *Pico*, we might say that *Lamont* held that the government, through its Post Office, must be "a slavish courier of the material of third parties." Implicit in Chief Justice Burger's discussion of public schools, then, is an institutional understanding that a school is not a post office because it is not a "courier." None of this should be too surprising, since it is of course true that a school is not a post office. Chief Justice Burger's opinion implicitly recognized this crucial real-world difference in the governmental role. In this sense, the "right to receive" depends on unique attributes of the Post Office.

Then-Associate Justice Rehnquist's dissent is even more explicit about the importance of understanding the unique characteristics of the school and the school library, though it contains an interesting twist. The principal point of Justice Rehnquist's opinion is that "government may act in other capacities than as sovereign, and when it does the First Amendment may speak with a different voice." Justice Rehnquist not only strikes the legal realist pose but also foreshadows Schauer's

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264 See, e.g., Stanley Ingber, *Socialization, Indoctrination, or the 'Pall of Orthodoxy': Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 52-77; Mark G. Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527, 541-53 (1984). One interesting article on *Pico* argues that Justice Blackmun's concurrence exemplifies the view that "where libraries are concerned, what the Constitution must protect is not some naked exercise of individualism, but rather a complex relationship among (at a minimum) the reader, the librarian, other patrons, the institution the library serves, and perhaps even the books themselves." Mark C. Rahdert, *Preserving the Archives of Freedom: Justice Blackmun and First Amendment Protections for Libraries*, 97 DICK. L. REV. 437, 441 (1993).
266 Id. at 889.
267 Id. at 908 (Rehnquist, J., dissenting).
institutional First Amendment. After rejecting a right to receive in the context of a public school, Justice Rehnquist stated, "the Court will far better serve the cause of First Amendment jurisprudence by candidly recognizing that the role of government as sovereign is subject to more stringent limitations than is the role of government as employer, property owner, or educator."\(^268\) Justice Rehnquist did not say that we should have, as Professor Schauer has suggested "(somewhat) separate bodies of free speech law for libraries, for schools, for elections, for broadcasting, for the fine arts, and so on."\(^269\) But, there is little question that characterizing the case as one about the public school—a particular government institution with specific characteristics—rather than an abstract government activity helped Justice Rehnquist’s argument.\(^270\)

For the purposes of understanding Lamont and the Court’s institutional characterization of the Post Office, Justice Rehnquist’s opinion also provides help. He criticized Justice Brennan’s reliance on precedents for a right to receive by stating that “every one of [the cases relied on by Justice Brennan] concerned the complete denial of access to the ideas sought.”\(^271\) Among these cases was Lamont. So, Justice

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268. *Id.* at 920; see also *id.* at 921 (O’Connor, J., dissenting) (citing to Justice Rehnquist’s opinion while noting that “the government is acting in its special role as educator”). _But cf._ Yudof, _supra_ note 264, at 545 (“The ‘right to know,’ as articulated by the Supreme Court, is no more than artistic camouflage to protect the interest of the willing speaker who seeks to communicate with a willing listener.”).

269. *Schauer, Principles, supra_ note 9, at 119. Recall also that Justice Rehnquist clerked for Justice Jackson, who famously said that “[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself.” _Kovacs v. Cooper_, 336 U.S. 77, 97 (1949) (Jackson, J., concurring).

270. See _Pico_, 457 U.S. at 919 (Rehnquist, J., dissenting) (“The inconsistencies and illogic [of Justice Brennan’s view] are emphasized because they illustrate that the right [to receive] is misplaced in the elementary and secondary school setting.”); see also *id.* at 914–15 (criticizing Justice Brennan’s use of cases involving public libraries and noting further “that the First Amendment right to receive information simply has no application to the one public institution which, by its very nature, is a place for the selective conveyance of ideas”).


271. _Pico_, 457 U.S. at 913 (Rehnquist, J., dissenting).
Rehnquist implicitly understood prohibitions on postal distribution as the functional equivalent of a "complete denial of access to the ideas sought."

Now, one should not overstate this. Surely, there is a little advocacy here. People can get foreign communist propaganda by traveling. While some countries are—at least as a matter of law—off limits (e.g., Cuba, North Korea), a citizen who traveled to Canada or Western Europe could easily get such materials. Moreover, if the material is brought into the country, it could be distributed via private delivery services. Finally, and perhaps most simply, the law at issue in Lamont had huge exceptions, including for U.S. government officials, public libraries, universities, and other institutions "for advanced studies." Another exception was for first-class mail. If the material was sealed in an envelope, it could be sent. So, literally, Justice Rehnquist was wrong.

Nonetheless, the basic point remains. In this, Justice Rehnquist certainly was correct. A restriction on postal distribution is far more like a "complete denial" than is the lack of a book in a school library's collection. The reason for this, though unarticulated by Justice Rehnquist, is obvious: the Post Office is not a school library. If courts recognize this distinction, then First Amendment jurisprudence will more accurately further the values underlying freedom of expression. As simple as this point might seem, this is exactly my argument: the American Post Office is a particular type of governmental institution. Specifically, it is a conduit that the Lamont Court understood to be a "monopoly" in some abstract sense notwithstanding the fact that the legal monopoly provisions were not at issue. Moreover, as Justice Rehnquist later concluded, the Post Office demanded a neutrality that was unwise in the context of a public school library. In this sense, as Justice Rehnquist rightly implied in Pico, the institution of the American Post Office is very different from a school library.

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273. These materials were not "letters" and thus not subject to the postal monopoly.

274. 39 U.S.C. § 4008(c), repealed by Postal Reorganization Act, 84 Stat. 719 (1970). As a peripheral point, this exception included any "official" at a university and thus it seems likely that Corliss Lamont could have received a copy of the Peking Review at his Columbia University office without completing a reply card. Given that fact, one might wonder whether Lamont would lack standing under current doctrine if the law had been challenged today.

275. I do not argue that school libraries—or indeed even public libraries in general—do not have a place in our understanding of the First Amendment. As Benjamin Franklin understood two and a half centuries ago, the library as an institution is important in furthering some of the goals we associate with the First Amendment, and the courts have certainly recognized that fact. The library's role in the First Amendment constellation is, however, different from that of the Post Office, and it is these differences that help explain the different treatment the library has received in the Court's interpretations of the Constitution. Cf. Robert C. Post, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 Harv. L. Rev. 4, 78–80 (2003) (describing American Library Ass'n v.
This neutrality was not natural, even if it feels that way now (and, indeed, probably did to the Court when it decided *Lamont* in 1965). It was created, as I explained in Part I, by early American lawmakers. The institutional attribute of neutrality was incorporated into the legal and social fabric of the Post Office in the eighteenth century by changing the Post Office from a governmental mouthpiece, as it had been in England, to a conduit for the delivery of materials from all sources equally. In the twentieth century, this neutrality combined with the fact that the Post Office was a monopoly to help the Court establish the landmark principle of the "right to receive ideas."

**CONCLUSION**

We are naturally familiar with the process by which the Constitution's drafters or the courts shape the meaning of the Constitution. What we often forget are the ways in which other institutions give meaning to the Constitution, even unbeknownst to those who create and maintain those institutions. The Post Office shaped the First Amendment: it gave us First Amendment restrictions on government spending and the right to receive ideas. But it wasn't just the Post Office as an abstract medium of communication. Rather, it was the specific American Post Office birthed during the Revolutionary Era and defined by policymakers who gave it particular attributes: a neutral conduit with subsidies for news, along with a legal and practical monopoly over long-distance communication. Those policymakers likely understood at some level the importance of their choices as a matter of communications policy, but it seems just as likely that they did not realize the impact their choices were going to have on First Amendment jurisprudence in the twentieth century. But, without those postal policy choices, the First Amendment might look different today. As we look to the First Amendment of tomorrow, then, today's policy debates—about, for example, "net neutrality"—might have far more impact on the future First Amendment than any current debate about the direction of First Amendment doctrine, because it is the underlying assumptions that are built into the communications infrastructure that will likely shape future judges' perception of the meaning of the First Amendment.

*United States*, 539 U.S. 194 (2003), as a case about "the social meaning of libraries").
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