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NATIONAL POLICE POWER UNDER THE POSTAL CLAUSE OF THE CONSTITUTION

If one were asked to explain and illustrate the doctrine of implied powers as it has functioned in the development of our constitutional law, there would probably be no easier way to do it than to point to the enormous expansion of the postal power of Congress. The clause in the federal constitution which grants to Congress the power "to establish Post Offices and Post Roads" was inserted almost without discussion. It seems to have appeared entirely innocuous even to the most suspicious and skeptical of those who feared that the new government would dangerously expand its powers at the expense of the states and the individual. And yet that government had hardly been set in operation before this brief grant of authority began to be subjected to a liberal and expansive construction under which our postal system has come to be our most picturesque symbol of the length and breadth and strength of national authority.

1 The subject of the expansion of the postal power of Congress has been fully treated in a very excellent monograph by Lindsay Rogers entitled "The Postal Power of Congress," Johns Hopkins University Studies in Historical and Political Science, 1916. The writer has drawn freely upon Professor Rogers' researches in the preparation of this article.

2 Art. I, Sec. 8, Cl. 7.

3 In its present form it was not debated at all. In the New Jersey Plan introduced into the Convention by Paterson on June 15 it was proposed to allow Congress to raise revenue, among other ways, "by a postage on all letters or packages passing through the general Post Office." Farrand, Records of the Federal Convention, I, 243. The history of the postal clause in the convention is traced in Rogers, op. cit., 23. It throws no light on the present problem.

4 Madison, in the 42nd number of the Federalist, dismissed the subject with the statement, "The power of establishing post roads, must, in every view, be a harmless power; and may, perhaps, by judicious management, become productive of great conveniency."

5 "Under that six-word grant of power the great postal system of this country has been built up, involving an annual revenue and expenditure of over five hundred millions of dollars, the maintenance of 60,000 post offices, with hundreds of thousands of employees, the carriage of more than fifteen billions of pieces of mail matter per year, weighing over two billions of pounds, the incorporation of railroads, the establishment of the rural free delivery system, the money order system, by which more than half a billion of dollars a year is transmitted from person to person, the postal savings bank, the parcel post, an aeroplane mail service, the suppression of lotteries, and a most efficient suppression of fraudulent and
This expansion of national authority under the postal power given to Congress has proceeded along two distinct but related lines. There has been, in the first place, a striking expansion of what may be called the collectivist or socialistic functions carried on through the post office. Here may be mentioned such enterprises as the postal money order system, the postal savings bank, the parcel post, and the use of the post office as an agency of publicity to aid in the marketing of farm products and in solving the problem of unemployment. In some countries, of course, the scope of the collectivist functions delegated to the post office is much broader than in the United States; but it seems highly probable that the American postal system has by no means reached the limit of its growth as an agency for positive service to the people. This interesting subject is not, however, the one under consideration in this article. In the second place, national authority under the postal power has developed in striking measure along the line of repression and regulation effected by the denial or forfeiture of postal privileges. Acting on the theory that the hand which bestows privileges may also withhold them, Congress has wielded the power of exclusion from the mails with a vigorous arm. It has refused to carry in the mails a long list of articles injurious in themselves or destined for injurious uses, has denied the use of postal privileges in aid of fraudulent transactions, and has seriously contemplated at times denying entirely all mail privileges as a penalty for certain acts on the part of the corporation or the individual which it would have no direct authority to punish. Congress has in this way generously extended the scope of its authority over many subjects which the framers of the constitution undoubtedly assumed they had criminal schemes, impossible to be reached in any other way." Read into the opinion of the Supreme Court from the brief for the government in Lewis Publishing Co. v. Morgan (1912) 229 U. S. 288, 57 L. Ed. 1190, 33 S. C. R. 867.

Rogers, op cit., 33.

Possible expansion of postal functions is suggested by the types of service rendered by the post office during the war as fiscal agent for the government through the handling of War Savings Stamps as well as other miscellaneous activities. The war-time control of the telegraph and telephone systems by the postmaster general was effected as an exercise of the war power, and no apparent effort was made to correlate the activities of those systems with those of the post office, as is done in some European countries. Whether Congress could, merely as an exercise of the postal power, acquire all the telegraph lines is a question which was referred to but left open by the Supreme Court in the case of Pensacola Telegraph Co. v. Western Union Telegraph Co., (1877) 96 U. S. 1, 24 L. Ed. 708.
succeeded in leaving to the exclusive jurisdiction of the states. In short, the national government has managed to make the seemingly matter-of-fact and innocent grant of authority to establish post offices and post roads serve as a "constitutional peg" upon which to hang a very substantial federal police power which may be employed to regulate and protect the national safety, good order, and morals. The postal power, therefore, forms a very important adjunct to the power to regulate commerce, and to tax, the three powers building up both by direction and indirection what, for want of a better term, may be called the police power of the national government. It is the purpose of this article to trace the various lines along which this national police power has developed under the postal clause of the constitution, to examine the conflicting views regarding the constitutional propriety of that development, and to determine, if possible, what are the true limits of the police power so derived.

The problem under consideration may be conveniently treated under four principal topics: (1) First, there are police regulations which Congress has enacted to protect the safety and efficiency of the postal system. Here may be placed such laws as those excluding poisons and explosives from the mails. (2) Second, there are those police regulations enacted to prevent the postal system from being used for purposes which are injurious to the public welfare or to encourage such uses of the postal system as are beneficial to the public welfare. The fraud order legislation and the obscene literature acts will fall into this group. (3) Third, may be mentioned those regulations which deny the right to use the mails for the purpose of violating or evading the laws of the states. The act forbidding the mailing of liquor advertisements into prohibition states exemplifies this type of statute. (4) Finally, there are proposals that conformity to general police regulations be made the price of the enjoyment of postal privileges. Here would be classed the recent proposal to deny the privileges of the United States mails to all persons employing child labor. Each of these types of police regulation under the postal power may be briefly examined.

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I. Police Regulations to Protect the Safety and Efficiency of the Mails

The right of Congress to pass such laws as are reasonably designed to protect the safety and efficiency of the postal system has at no time been seriously questioned, and is at present not questioned at all. Congress has been expressly granted the power to establish post offices; and it would be ridiculous to allege that the power to establish a governmental agency did not of necessity carry with it the power to preserve and protect it when once established. Congress has, in fact, exercised such power ever since our national postal system was created. The most obvious and natural form of postal protection has been, of course, the enactment of laws punishing various acts which are criminal in themselves. Some twenty sections of the United States Criminal Code are devoted to such offenses as robbing, destroying, or obstructing the mails, injuring mail property, counterfeiting money orders and stamps, or in any way defrauding the post office. But a consideration of these measures would not properly be included in a discussion of the national police power even if they raised, as they do not, any interesting or important questions of constitutional construction. There are, however, two types of legislation which Congress has passed for protecting the mail service and promoting its efficiency which may be classified as police regulations and upon which brief comment may be made. The first comprises the enactments designed to make the postal service a government monopoly; the second includes the laws excluding from the mails things which would imperil or

10 In developing his doctrine of implied powers Marshall used what he thought must be regarded as an entirely obvious illustration, the right of Congress to protect the post office. He said: "Take, for example the power to establish post offices and post roads. This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post road and from one post office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence." McCulloch v. Maryland, (1819) 4 Wheat. (U.S.) 316, 4 L. Ed. 579.

12 Ibid, Secs. 189-202, 205, 218-221, 227-228.
13 The enactment of ordinary criminal statutes is usually classified as an exercise of power outside the scope of the police power. See Freund, Police Power, Secs. 4-8.
injure the mails themselves, or postal property, or postal employees.

1. *Regulations to Insure Postal Monopoly.* The national postal system was made a government monopoly in 1792\(^{14}\) and has remained so ever since.\(^{15}\) Although the grant of postal power to Congress did not by its terms create a government monopoly and although there is judicial authority for the view that the monopolistic character of the postal system results not from the postal clause but from the legislation enacted under it,\(^{16}\) there would seem to be some reason to believe that the framers of the constitution expected that the new post office would become a monopoly in the hands of the government. There was plenty of precedent as well as public policy\(^{17}\) to support such a principle. The British post office had long been a government monopoly\(^{18}\) and Blackstone had emphasized the paramount necessity for such exclusive control.\(^{19}\) Thus while many questions have from time to time arisen as to the correct interpretation to be placed upon the acts of Congress penalizing the private carrying of the mails,\(^{20}\) there has been no serious attack made upon the constitutional right of Congress to pass those laws.\(^{21}\) The recent action

\(^{14}\) Act of Feb. 20, 1792, 1 Stat. at L. 232. In 1782 the Congress of the Confederation had passed "An Ordinance for Regulating the Post Office of the United States of America." By one of the provisions of this Ordinance, Congress attempted to create and maintain a postal monopoly. 7 Journals of Congress 383. For summary of this entire act, see Rogers, op. cit., 17 ff.


\(^{16}\) "But the monopoly of the government is an optional, not an essential part of its postal system. The mere existence of a postal department of the government is not an establishment of the monopoly." United States v. Kochersperger, (1860) Fed. Cas. No. 15,541.

\(^{17}\) "The post office monopoly is primarily an institution for the public benefit which must exclude competition from its profitable business in order to carry on the unprofitable business," Freund, Police Power, Sec. 666. If the post office were to be used as a means of raising revenue as suggested in the Convention of 1787 (supra, note 3), another ground for monopoly would exist.

\(^{18}\) The development of the British Post Office as a government monopoly is traced at length by Hemmion, The History of the British Post Office, Ch. IX.

\(^{19}\) "Penalties were enacted in order to confine the carriage of letters to the public office only, except in some few cases: a provision which is absolutely necessary; for nothing but an exclusive right can support an office of this sort: many rival independent offices would only serve to ruin one another." Cooley's Blackstone, I, 323.

\(^{20}\) Rogers, op. cit., 41 ff.

\(^{21}\) "To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter . . . ." Ex
of the federal authorities to prevent under the terms of the Criminal Code the transportation of telegraphic night letters by train instead of by wire, indicates that the statutes under consideration are adequate to cope with new and unusual forms of competition against the United States mails.\textsuperscript{22}

2. Exclusion of Articles Injurious to the Postal Service. If Congress in the exercise of its power to regulate interstate commerce may exclude from that commerce commodities which would endanger or injure the agencies by which it is carried on,\textsuperscript{23} then, a fortiori, it must follow that Congress may provide similar protection to a postal system which it not merely regulates but establishes and conducts. While it is highly desirable that Congress should require that adequate safety devices should be installed on interstate trains and that reasonable regulations be complied with in transporting explosives or other dangerous materials, the fact remains that the federal government itself does not serve as a common carrier and its responsibility for the physical safety of interstate commerce is, perhaps, a secondary responsibility.\textsuperscript{24} The public which rides or which ships goods in interstate commerce would be loath to part with the protection guaranteed by federal laws; but their plight, were that protection removed, would be no different from that of the patrons of the wholly intrastate carriers which are not subject to federal authority. With the postal service, however, the case is very different. In respect to it Congress must assume a very definite and primary responsibility. In fact, there are at least four cogent reasons for the congressional exclusion of dangerous and injurious articles from the mails which do not apply to the exclusion of similar commodities from the channels of interstate commerce. In the first place, Congress has a proprietary interest in the postal system which it does not have in interstate commerce. In passing the laws in question Congress is but taking reasonable precautions for the protection of the property of the federal government. In the second place, in conducting its mail
service the federal government offers itself as a carrier of other people's property. Letters and property are confided to its possession and control; indeed the laws, as has been seen, forbid all persons to confide mail matter to any one but the postal authorities. It follows, therefore, that the government must take every reasonable precaution to insure the safety of the property it not only permits but virtually requires to be confided to its care. If it fails to guarantee such safety there is no one else to whom the person who suffers the loss or injury of his property may look for reparation. In the third place, Congress should recognize a clear responsibility to provide adequately for the safety of its postal employees and to see that they are not exposed to avoidable dangers. Finally, since Congress has created the postal system and is the author and source of all postal privileges, the exercise of the power to deny those privileges to dangerous or injurious articles could not be attacked, as the congressional exclusions from interstate commerce have sometimes been attacked, on the ground that Congress is denying a right or privilege which it did not create and which it has the authority merely to regulate and not to destroy.

Enough has been said to indicate that there can be no question of the constitutional power of Congress to exclude dangerous and injurious articles from the mails. It is not only the right of Congress to pass such legislation but it is also its duty. This duty has been fulfilled by the insertion into the Criminal Code of a substantial list of articles which are declared non-mailable because of their injurious character, and by the delegation to the postmaster general of the authority to expand that list. Not only has the validity of this legislation never been questioned, but the courts have not infrequently alluded to these laws as examples of the legitimate exercise of the postal power delegated to Congress. Needless to say, this is a type of legislation which

26 For discussion of this distinction see infra, p. 423.
29 "It [Congress] may also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employees or injurious to other mail matter carried in the same packages. The postal regulations of this country issued in pursuance of act of Congress contain a long list of prohibited articles dangerous in their nature, or to other articles with which they may come in contact, such, for instance, as liquids, poisons, explosives and
other countries have also enacted in order to provide adequate protection to their mails.\textsuperscript{30}

II. Classifications of Mailing Privileges to Prevent Harmful and to Encourage Beneficial Uses of Postal System

It requires no argument to prove that the vast postal system of the United States, rendering as it does its many varieties of service and reaching practically every home, is an instrumentality for promoting and spreading civilization and culture. It is an enormous agency for good. The characteristics which make it an agency for good, however, also make it an agency for evil unless measures are taken to prevent its misuse. To prevent the postal service from being used as a conduit for dumping injurious and harmful matter into millions of homes, and to keep it from serving as a means of consummating fraudulent and unlawful acts, Congress has passed a substantial body of legislation. These laws are manifestly designed for the protection of the public and not of the postal service itself. They are designed to protect the public from the misuse of the mails. They are unmistakably police regulations for they aim squarely at the protection of the public health, morals, safety, and good order. This legislation may be briefly analyzed and described before an examination of its constitutional basis and limits is entered upon.

1. Obscene Literature. Since the regulation of private morals is by the division of power between the nation and the states left to the latter, there was, of course, no reason why Congress should concern itself with the problem of obscene literature until it became clear that the mails or the channels of commerce were being used as a means of circulating the obnoxious matter. Federal legislation relating to obscene literature began with the Tariff of 1842, a provision of which forbade the importation into this country of obscene literature or pictures.\textsuperscript{31}

\textsuperscript{30} For summary of articles, which, under the laws of foreign countries, may not be sent through the mails into such countries, see U. S. Official Postal Guide, 1919, 137 ff.

\textsuperscript{31} Act of Aug. 30, 1842, 5 Stat. at L. 562, Sec. 28. For the development of the policy of excluding obscene literature from interstate commerce see Cushman, op. cit., 3 MINNESOTA LAW REVIEW 388.
It was not until 1865 that Congress took steps to exclude matter of this description from the mails; and the first really effective legislation for this purpose seems to have been the Act of March 3, 1873. Various amendments to this law have been passed extending its scope and strengthening its provisions. At the present time there are two sections of the United States Criminal Code dealing with this subject. By the first of these provisions obscene and indecent writings, letters, pictures, or printed matter of any sort are declared to be unmailable as well as all contraceptive devices and information. Such matter may not be conveyed in the mails nor delivered by any post office employee. To deposit such matter in or to take it from the mails is made a criminal offense. The second provision makes non-mailable under severe penalties any mail matter on the outside cover of which is found any obscene, scurrilous, libelous, or defamatory inscriptions which would reflect injuriously upon the character or conduct of another. While the postal authorities are not permitted to receive or deliver mail matter known by them to be in violation of the provisions just described, they are rigidly forbidden to open sealed matter. While authority is given to exclude non-mailable matter, there is no power to prevent the subsequent circulation through the mails of later issues of the

33 17 Stat. at L. 599.
36 "And the term 'indecent' within the intendment of this section shall include matter of a character tending to incite arson, murder, or assassination." Sec. 211, U.S. Criminal Code. The prohibitions of the act have been construed as applicable to the veiled advertisements of prostitutes. United States v. Dunlop, (1897) 165 U. S. 486, 41 L. Ed. 799, 17 S. C. R. 375.
37 This provision is applicable to the sending of threatening or dunning inscriptions on packages or cards. United States v. Smith, (1895) 69 Fed. 971; United States v. Davis, (1889) 38 Fed. 326; United States v. Elliott, (1892) 51 Fed. 807; United States v. Simmons, (1894) 61 Fed. 640.
38 The inviolability of sealed mail matter from government invasion is guaranteed by the fourth amendment to the United States Constitution which provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ." "No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the Fourth Amendment of the Constitution." Ex parte Jackson, (1877) 96 U. S. 727, 733, 24 L. Ed. 877.
excluded publication or to forbid the subsequent use of the mails to any persons who have violated these provisions.\(^{39}\)

While some persons have appeared from time to time to question the constitutionality of the obscene literature acts\(^{40}\) and numerous petitions have been presented to Congress urging their repeal ostensibly on constitutional grounds,\(^{41}\) there has never been any substantial body of opinion to doubt the authority of Congress to pass them. There has been a considerable number of cases in which these acts have been construed and interpreted\(^{42}\) and a number of the lower federal courts have declared them to be constitutional,\(^{43}\) but their validity has never been attacked before the Supreme Court.\(^{44}\)

2. Lottery Tickets and Circulars. Although Congress as well as the state legislatures at first regarded the lottery as a legitimate method of public finance,\(^{45}\) public sentiment condemning the institution soon began to make itself felt. In 1827 Congress passed its last act authorizing a lottery\(^{46}\) and its first act hostile to lotteries.\(^{47}\) This latter statute, however, was not a serious blow to lottery enterprises since it merely provided:

\(^{39}\) The annual report of the postmaster general for 1914 comments upon the many requests which come to the post office department for action of this sort and points out the limitations upon the power of the department in respect thereto; p. 48.

\(^{40}\) Schroeder, Obscene Literature and Constitutional Law, passim. See also Free Speech Anthology, by the same author.

\(^{41}\) On February 26, 1878, Congressman Benjamin F. Butler (Mass.) presented to the House of Representatives a petition signed by 50,000 persons protesting against the Obscene Literature Acts and asking their amendment in such a manner “that they cannot be used to abridge the freedom of the press or of conscience, or to destroy the liberty and equality of the people before the law and departments of the government on account of any religious, moral, political, medical or commercial grounds or pretexts whatsoever.” Congressional Rec. Vol. VII, p. 1340. Sixty-three petitions similar in character were presented during the first

\(^{42}\) See Thomas, Non-mailable Matter, Ch. V; Rogers, op. cit., 48 ff.


\(^{44}\) Rogers, op. cit., 48 ff.

\(^{45}\) “For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law, we believe, has never been attacked.” Public Clearing House v. Coyne, (1903) 194 U. S. 497, 48 L. Ed. 1092, 24 S. C. R. 789. In an earlier opinion the Supreme Court referred to the Obscene Literature Act of 1873 with apparent approval and said, “All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles...” Ex parte Jackson, (1877) 96 U. S. 727, 736, 24 L. Ed. 877.

\(^{46}\) For summary of this early legislation see Thomas, op. cit., Secs. 1-4.

\(^{47}\) Act of March 2, 1827, 4 Stat. at L. 238.
"That no postmaster or assistant postmaster shall act as agent for lottery offices or under any color of purchase, or otherwise, send lottery tickets; nor shall any postmaster receive free of postage or frank lottery schemes, circulars, or tickets."

This mild law, however, very definitely suggests the constitutional principle upon which our present vigorous anti-lottery statutes rest: namely, that Congress may refuse to lend its postal facilities or agents in furtherance of lottery enterprises. The next congressional attack on lotteries did not occur until 1868, when an act was passed providing:

"That it shall not be lawful to deposit in a post office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts or similar enterprises, offering prizes of any kind on any pretext whatever."

This act, however, provided no adequate means of enforcement and proved ineffective. In 1872 an act was passed which made it unlawful to deposit in the mail or to send by mail any letters or circulars concerning illegal lotteries, so-called gift concerts, or other similar enterprises, and the postmaster general was authorized to issue a fraud order against any person who conducted a fraudulent lottery, gift concert, etc. Four years later this act was amended by striking out the word "illegal" before lotteries and making the exclusion applicable to all lotteries whether forbidden by state law or not. The word "fraudulent" was retained, however, in the section relating to fraud orders. In 1890 the law was amended so as to include lottery advertisements in newspapers within its prohibition and to eliminate the word "fraudulent" from the clause just mentioned. Under this legislation the postmaster general was authorized to prevent by the issuance of a fraud order the delivery of registered letters or the payment of money orders to persons known to be conducting lotteries or fraudulent schemes. By Act of 1895 the department was given power in such cases to withhold ordinary sealed mail matter as well as registered letters. The anti-lottery legislation has never

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49 There was no penalty provided for its violation and no appropriation to cover the cost of administration.
51 Act of July 12, 1876, 19 Stat. at L. 90.
52 This was construed to mean that a fraud order could be issued against only such lotteries as were actually fraudulent in character. Opinion of Attorney-General McVeagh, (1881) 17 Op. Atty. Gen. 77.
54 Act of March 2, 1895, 28 Stat. of L. 964.
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attempted to prohibit the operators of these enterprises from sending innocent matter through the mails.

While the constitutionality of this legislation has been bitterly attacked on various grounds,\(^55\) it has been sustained by numerous federal courts\(^56\) and by the United States Supreme Court in two important cases\(^57\) the principles of which will be discussed at a later point in this article.\(^58\)

3. Fraudulent Matter. The first attempt made by Congress to prevent the use of the mails for the circulation of correspondence relating to fraudulent schemes and enterprises was in 1872.\(^59\) This act subjected to severe penalty any person who devised any scheme or artifice to defraud to be carried on by means of correspondence through the mails and who so used the mails in furtherance of such project. It authorized the postmaster general to withhold registered letters and payment on money orders from those who he had reason to believe were using the mails for the forbidden purposes mentioned. This law was expanded and strengthened by amendment in 1889\(^60\) by elaborating the list of schemes brought within the prohibition\(^61\) and by forbidding persons engaged in the proscribed enterprises to use the mails

\(^{55}\) For a very able presentation of the case against this legislation see the argument of Mr. James C. Carter for the defendants in the case of In re Rapier, (1892) 143 U. S. 110, 113, 36 L. Ed. 90, 12 S. C. R. 353. See also brief for defendants in Ex parte Jackson, (1877) 96 U. S. 727, 24 L. Ed. 877. Also article by Mr. Hannis Taylor entitled, "A Blow at the Freedom of the Press," (1892) 155 North American Review 694. Mr. Taylor's attack is based largely on the fact that in the Lottery Act of 1890 the test of the immoral or injurious character of the matter excluded was not left to a jury but was determined by tests which Congress established in the act itself.


\(^{57}\) Ex parte Jackson, (1877) 96 U. S. 727, 24 L. Ed. 877; In re Rapier, (1892) 143 U. S. 110, 36 L. Ed. 90, 12 S. C. R. 353.

\(^{58}\) Infra, p. 419 ff.

\(^{59}\) Act of June 8, 1872, 17 Stat. at L. 283.

\(^{60}\) Act of March 2, 1889, 25 Stat. at L. 873.

\(^{61}\) The prohibitions of the act were extended to apply to those who used the mails "to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use, any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence by what is commonly called the 'sawdust swindle,' or 'counterfeit money fraud' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' spurious Treasury notes; 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles."
under an assumed name. In 1895 the scope of the fraud orders issued was extended to include all first class mail. While post office officials have from time to time recommended the further amendment of the anti-fraud statutes to embrace within their provisions enterprises not now included, the present legislation has proved adequate to put an end to thousands of cheating and swindling schemes which had used the mails as the indispensable means of getting into touch with their victims.

As in the case of the acts already examined, there has been a large amount of litigation over the construction of the anti-fraud acts and their applicability to specific schemes or enterprises. There have been attacks upon the constitutionality of the statutes on the ground of the procedure provided for the issuance of fraud orders and the courts have laid down certain rules respecting the scope and finality of the postmaster general's discretion in the matter. Both lower federal courts and the

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62 By a section of this act, the postmaster general is authorized to require the personal identification of persons receiving mail matter when he has reason to believe that the names or addresses on such matter are fictitious.

63 Act of March 2, 1895, 28 Stat. at L. 964.

64 The annual reports of the postmaster general in recent years have repeatedly urged the inclusion within the prohibitions of the law of all gambling devices or paraphernalia of any sort. For the text of this proposed legislation see Report of the Postmaster General for 1914, p. 81.

65 Data regarding the operation of the law is summarized yearly in greater or less detail in the report of the postmaster general. See report for 1918, p. 58.

66 These questions are discussed in detail in Thomas, op. cit., Ch. IV. See also Rogers, op. cit., 56. It may be noted that schemes which may be included within the prohibitions of the act as "fraudulent" are not merely those which would be held fraudulent at common law as involving actual misrepresentation as to a past or existing fact, but extend to "everything designed to defraud by representations as to the past or present or suggestions and promises as to the future." It was with the purpose of protecting the public against all such intentional efforts to despoil and prevent the post office from being used to carry them into effect that this statute was passed; and it would strip it of its value to confine it to such cases as disclosed an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise." Durland v. United States, (1896) 161 U. S. 306, 314, 40 L. Ed. 712, 16 S. C. R. 508.

67 It has been held by the Supreme Court that the judgment of the postmaster general with reference to the issuance of fraud orders must be based on facts supported by evidence as to the fraudulent nature of the enterprise concerned and may not be based merely upon his personal belief that the scheme is fraudulent. A fraud order was held unlawfully issued against a concern which claimed to cure disease by the influence of the mind because "there is no exact standard of absolute truth by which to prove the assertion false and a fraud. . . . We may not believe in the efficacy of the treatment to the extent claimed by the complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but a matter of opinion in any court." American School of
United States Supreme Court have held that Congress enjoys power under the constitution to pass the legislation in question, which does not after all differ in principle from the acts relating to obscene literature and lotteries.

4. Prize Fight Films. By a statute passed in 1912 it is made a criminal offense to import from abroad for purposes of public exhibition pictures or moving picture films of prize fights or to send them in or to receive them from interstate commerce or the mails. The only litigation to date respecting the validity of this act concerns the provision against importation. There can be no doubt whatever that that portion of the act which authorizes the exclusion from the mails would be sustained by the Supreme Court should its constitutionality be questioned.

5. Seditious and Treasonable Publications. It will be recalled that one of the reasons which led England and other countries to make their post offices government monopolies was the desire to use the mail facilities for an official espionage on private correspondence with a view to discovering who were the enemies of the sovereign or his ministers. It is quite natural that this


For criticism of the broad powers conferred upon the postmaster general by this legislation see Pierce, Federal Usurpation, p. 354.


See Cushman, op. cit., 3 MINNESOTA LAW REVIEW 392.

Hemme, op. cit. points out that the proclamation of 1591 making the British foreign post a monopoly was issued "in order that the government might be able to discover any treasonable or seditious correspondence." History of British Post Office, 190. Freund states: "In a royal grant of the office of postmaster to foreign parts (July 19, 1632, XIX Rymer's Foedera 385) the monopoly is justified by the consideration, how much it imports to the state of the King and this realm that the secrecy thereof be not disclosed to foreign nations, which cannot be prevented if a promiscuous use of transmitting or taking up of foreign letters and packets should be suffered." Cromwell spoke of the Post Office as the best means to discover and prevent dangerous and wicked designs against the commonwealth," Police Power, Sec. 666, note. See also May, Constitutional History of England, II, 245 ff.

"The post office is no longer regarded in England as a means of detecting conspiracies. Letters passing through the mails may nevertheless be opened on the warrant of the secretary of state, but the occurrence is
early purpose should not be entirely forgotten even in those countries in which the secrecy of the mail is now preserved, and that in critical times efforts should be taken to prevent the use of mail facilities for treasonable or seditious purposes.® No government can be expected to lend positive aid to those who are seeking to accomplish its destruction. It would, of course, be unnecessary to forbid specifically the use of the mails for the actual execution of a treasonable plot or conspiracy.® In time of war, however, the United States government has taken steps to prevent the circulation through the mails of matter which would tend even indirectly to interfere with the success of the military preparations or campaigns of the government. During the Civil War the exclusion of objectionable matter from mails was carried on by the executive arm of the government® without the authority of any statute but with the acquiescence of Congress.® While there was protest from those subjected to this treatment,® there seems to have been no litigation arising from these executive acts, which were apparently regarded as part of the military policy of the government.® When the Obscene Literature Act of 1872 was passed Congress included in its description of proscribed matter "any letter upon the envelope of which, or postal card upon which scurrilous epithets may have

very rare, and would be sanctioned by public opinion only in extreme cases." Cooley's Blackstone, Book I, 323, note.
® See provisions of the recent Trading with the Enemy Act establishing a censorship of foreign mail and forbidden communications to foreign countries during the period of the war except through the mails. Act of Oct. 6, 1917, 40 Stat. at L. 412.
® "The overt act of putting a letter into the post office of the United States is a matter that Congress may regulate. . . . Intent may make an otherwise innocent act criminal, if it is the step in a plot." Badders v. United States, (1916) 240 U. S. 391, 36 S. C. R. 367.
® These exclusions do not seem to have been carried out by the post office department exclusively. This power was exercised by the secretary of state on some occasions. This officer withdrew mail privileges from the New York Staats Zeitung and from the National Zeitung (New York) in 1861. Official Records of War of Rebellion, 2nd Series, Vol. 2, 494, 501. For instances of such exclusion of newspapers from the mails by military authority see Sen. Doc. No. 19, 37 Cong., 3d Sess. The writer is indebted to Professor James G. Randall for this data.
® An investigation into the alleged arbitrary acts of the postmaster general was conducted in 1862 and 1863 by the Judiciary Committee of the House of Representatives. The power claimed by the postmaster general was sustained by the committee and no action was taken. Burgess, The Civil War and the Constitution, II, 222-3.
® An editorial in the New York World for August 18, 1864, denounced the espionage upon private correspondence by postal authorities.
® See the valuable article by Professor James G. Randall, "The Newspaper Problem in Its Bearing upon Military Secrecy During the Civil War, (1918) 23 Am. Hist. Rev., 303.
been written or printed or disloyal devices printed or engraved thereon." When this act was amended and broadened in scope the next year, however, the phrase relating to "disloyal devices" was omitted. The first effective legislation which Congress enacted dealing with this problem is found in the Espionage Act of 1917. In addition to its general prohibitions the law provides that any mail matter which is in violation of any provisions of the statute is non-mailable, that any matter "urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared non-mailable." A heavy penalty is inflicted upon those who use or attempt to use the mails for the transmission of any matter thus declared non-mailable. In 1918 this act was amended so as to extend to the postmaster general during the period of the war authority to order all mail matter to be withheld from persons who, "upon evidence satisfactory to him," he concludes are using the mails in violation of any of the provisions mentioned above.

This legislation has been much discussed both from the standpoint of public policy and from that of constitutional law. It seems clear, however, that most of the attacks which have been made upon it have been directed in reality not so much at the validity of the statute itself as at the administration of it and its proper applicability to concrete cases. On the point of constitutional power to pass the acts in question there can be no serious disagreement. The Obscene Literature Acts and the Anti-Fraud Acts afford clear precedents; and the lower federal courts which have passed upon the constitutionality of these clauses of the Espionage Act have uniformly upheld them.

6. Denial of Postal Facilities Used for Violating Federal Law. In at least two of the statutes which have been mentioned, Congress has legislated upon the theory that it was proper to refuse to allow the postal facilities to be used as an agency in the violation of federal law. The Anti-Fraud Act at the present time includes within its prohibitions the use of the mails to dis-

80 Act of March 3, 1873, 17 Stat. at L. 599.
82 The provision in the Trading with the Enemy Act for the licensing by the postmaster general under direction of the president of foreign language newspapers is not primarily a postal regulation, since the right was denied to unlicensed papers not merely to mail but to publish or circulate in any other way. Act of Oct. 6, 1917, 40 Stat. at L. 425.
83 Act of May 16, 1918, 40 Stat. at L. 553.
pose of, circulate, or procure counterfeit money or securities of
the United States.\textsuperscript{85} Congress possesses, of course, adequate
power to punish the counterfeiting of its own currency and securi-
ties and those of foreign countries and has long since exercised
this power.\textsuperscript{86} By the provision dealing with the transmission of
counterfeit money or securities through the mails, Congress has
merely refused to permit the United States Post Office to act as
an unwitting accomplice of those committing or intending to
commit a crime against the laws of the United States. In the
same way it will be recalled Congress made it unlawful to trans-
mit through the mails any matter which was in violation of any
provision of the Espionage Act.\textsuperscript{87} Upon the same theory rests
the statutory provision declaring non-mailable any publication
which violates any copyright granted by the United States.\textsuperscript{88}

It would, of course, be possible to expand very greatly the
amount of this type of legislation and there have been proposals
from time to time to that effect.\textsuperscript{89} It would be entirely possible
to penalize the use of the mails as an aid in the violation of the
prohibition amendment, the Sherman Act, or for the purpose of
soliciting unlawful campaign contributions in congressional
elections. It is difficult to imagine any offense against the United
States government in the furtherance of which the criminal might
not make use of the facilities of the postal service. The power
of Congress to punish the use of the mails for these unlawful
purposes seems to be quite unassailable. As a matter of practical
expediency, however, this sort of legislation is not apt to be
resorted to unless the systematic use of the postal facilities is
so vital to the accomplishment of the crime that under normal
circumstances the post office affords a more or less effective
means for its detection or prevention.\textsuperscript{90}

\textsuperscript{85} Supra, note 61.
\textsuperscript{86} These prohibitions are to be found in Chapter VII of the United
\textsuperscript{87} Supra, p. 417. It is also made a criminal offense to send through the
mails any threats against the life of the president of the United States.
The same provision penalizes the making of such threats orally or in any
\textsuperscript{88} Act of March 3, 1879, 20 Stat. at L. 359. Section 320 of the Crimi-
nal Code makes it a penal offense to import from abroad through the
mails any publication which violates copyright laws or infringes rights
\textsuperscript{89} It has been proposed, for example, to penalize the use of the mails
for the purpose of securing false witnesses, suborning perjury and like
offenses. A bill to this effect was introduced in the Senate in 1917. See
\textsuperscript{90} No useful purpose would be served by making it a crime to mail a
letter in furtherance of such an offense against the criminal laws of the
The Question of Constitutionality

The foregoing analysis has sketched briefly the principal types of statutes by which Congress has sought to prevent the federal postal system from being used as a means of distributing injurious matter or of aiding the consummation of injurious and illicit transactions. In every case in which the constitutionality of any of these acts has been passed upon by a court it has been sustained; and there can be no doubt but that those acts which have not been subjected to judicial scrutiny rest upon the same or equally firm constitutional grounds. The very unanimity with which the courts have declared that Congress has not gone too far in enacting these laws has, of course, precluded the making of any authoritative judicial pronouncement as to just how far Congress may still go in the exercise of this power. The question whether Congress has exhausted its authority in this particular legislative field remains open for speculation. It is a question which may conveniently be dealt with under two headings: first, the constitutional basis for the power now under consideration; this will involve a review of the various theories advanced in support of that power; and second, the constitutional limitations within which the power must be exercised. Consideration of these two problems may aid in reaching a conclusion as to whether Congress may go still further in prohibiting the use of the mails as an agency for evil or undesirable ends, or in encouraging such use for purposes beneficial to the public welfare.

1. Constitutional Basis of Legislation. Opinions regarding the power of Congress to exclude different classes of things from the mails range all the way from the view that Congress has no power to exclude anything which was mailable at the time the federal constitution was formed to the equally extreme view that Congress may exclude from the mails anything it pleases. But the theories on which the right of exclusion has most commonly been sustained are two in number.

United States as peonage, or piracy, or other crimes where the use of postal facilities would form a rare or very minor means of criminal accomplishment.

91 "So long as the duty of carrying the mails is imposed upon Congress, a letter or a packet which was confessedly mailable matter at the time of the adoption of the constitution, cannot be excluded by them, provided the postage be paid and other regulations be observed." Brief for defendants in Ex parte Jackson, (1877) 96 U. S., 727, 24 L. Ed. 877. The view was expressed, however, that matter which had become mailable since that time could be excluded.

92 See infra, p. 421.
(a) In the first place, there has been a general recognition of the fact that a very special duty and responsibility rests upon Congress to protect the public from certain types of evils or injuries to which the very existence of an efficient postal system would otherwise expose them. As has been pointed out elsewhere, Congress has long since recognized and assumed a similar responsibility in respect to foreign and interstate commerce.\(^9\) If Congress possesses such police power by reason of its authority over a commerce which it does not create but merely regulates, it cannot be doubted that equal or even greater authority would be derived from the power to "create" or "establish" a postal system. It may be urged, in fact, that while the constitutional authority arising from the commerce and postal clauses is ample in both cases to support this type of legislation, a much stronger moral obligation rests upon Congress to protect the public health, morals, safety, and general welfare from the misuse of the mails than from the misuse of the facilities of interstate commerce. Two considerations support this view. The first is that the responsibilities arising from the fact of creation, ownership, and operation of an institution may be reasonably regarded as greater than those arising from a power merely to "regulate" a system or institution which Congress did not create, does not own nor operate, and cannot destroy. The second is that the ordinary individual is in a much better position to protect himself from the misuse of interstate commerce than from the misuse of the mails. This is due to the essential differences between the two systems. Under normal circumstances the participation of the individual in the transactions of interstate commerce and his relations to interstate carriers result from a voluntary contractual relationship. Spurious or even harmful products may be sent to him, but rarely without his having bargained for the shipment of any products at all. A very different situation exists with respect to the postal system. At practically negligible cost to the sender, grossly indecent letters or papers could be brought several times a day to the door of any person by an employee of the United States government and this without the previous knowledge and against the wishes of the recipient. Without depriving himself of all the conveniences arising from the regular visits of the postman a person might be quite unable to protect himself against this sort of abuse. It is not unreasonable to

\(^9\) Cushman, op. cit., 3 MINNESOTA LAW REVIEW 381 ff.
assert that the governmental authority which thus penetrates daily the very homes of the people must recognize a commensurate duty of protecting those homes from the distribution of noxious matter. Even those who have been solicitous that the national government should not attempt to extend its authority over subjects commonly left to state control have looked upon the sort of national police regulations now under consideration as not only harmless but highly desirable. Assuming for the sake of argument that every citizen enjoys a well-protected constitutional right to the unrestricted and equal use of the mails, it would be useless to argue that the regulations in question unconstitutionally abridge that right, since no one can be said to have a right to circulate matter which is injurious to the public health, morals, or safety. Most of the court decisions in which the validity of this type of legislation has been considered have laid strong emphasis upon the right and duty of Congress to protect the public welfare from the abuse of mail privileges.

(b) There are those, however, who go beyond this admittedly conservative view of the power of Congress to exclude various types of matter from the mails which has just been discussed. They take the position that Congress may not only make it unlawful to send through the mails such things as are dangerous to health, morals, or safety, either intrinsically or in the use to which they are to be put, but may also deny mail privileges to things or to transactions which do not conform to congressional views of public policy. In other words, the power of exclusion is held to extend not only to things which are actually or potentially injurious or dangerous but to those the circulation of which in the judgment of Congress would be undesirable or unwise.

94 See discussion of Mr. Bryan's views on this point, infra p. 436.
96 United States v. Journal Co., (1912) 197 Fed. 415; Knowles v. United States, (1909) 170 Fed. 409; In Jeffersonian Publishing Co. v. West, (1917) 245 Fed. 595, the court said in respect to the exclusion of mail matter in violation of the Espionage Act, "Had the postmaster general longer permitted the use of the postal system which he controls for the dissemination of such poison, it would have been to forego the opportunity to serve his country afforded by his lofty station."
97 An extreme statement of this view is found in the argument for the government in Lewis Publishing Co. v. Morgan, (1913) 229 U. S. 288, 57 L. Ed. 1190; 33 S. C. R. 867.
98 It was stated in substance that the postal power is one which "conveys an absolute right of legislative selection as to what shall be carried in the mails, and which therefore is not in any wise subject to judicial control,"
The considerations advanced in support of this position may be briefly reviewed.

At the outset it must be admitted that Congress in establishing a postal system must of necessity determine what is to be regarded as mail matter and what is not. Obviously not everything need be transmitted through the mails unless the post office is to perform all the functions of a common carrier. This necessity of determining what shall constitute mail matter carries with it the power and duty of setting up classifications as to various types of matter. No positive obligation rests upon the government to carry any particular class of articles. Should Congress decide that nothing but sealed letters of a certain size and weight may be sent through the mails, there could be no doubt of its constitutional authority so to legislate. The Supreme Court has recognized that Congress in establishing a postal system may properly set up classifications of matter in respect to mailing privileges.

"In establishing such a system, Congress may restrict its use to letters and deny it to periodicals; it may include periodicals and exclude books; it may admit books to the mails and refuse to admit merchandise; or it may include all of these and fail to embrace within its regulations telegrams or large parcels of merchandise, although in most civilized countries of Europe these are also made a part of the postal service." 9

This power of classification arises from the fact that Congress creates, owns, and operates the postal system and that in exercising this power of classification Congress may properly give effect to its own conceptions of public policy. Its position is that of a proprietor; and it is under no obligation to lend the use of its property for purposes which it regards as unwise and undesirable, nor is it prohibited from extending the use of its mail facilities on especially favorable terms to those who will make use of them for the promotion of constructive ideas of public policy. In short, Congress may not only discourage certain uses of the mails which it deems contrary to public policy but it may also stimulate and encourage other uses of the mails which it regards as helpful or beneficial to the national welfare. From the practical point of view, the latter method would of the two seem to

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be easier of execution as well as less open to criticism; and Congress has employed it in numerous instances. The most conspicuous examples are the special privileges extended to periodical literature under the statutes creating second class mailing privileges, the extension of the franking privilege to the speeches of members of Congress printed in the Congressional Record, and the act providing for the free transmission through the mails of reading matter printed in raised characters for the use of the blind.

If it is true that the relationship of the government to the post office partakes largely of proprietorship, it would follow that the use of the mail service by the individual is a privilege rather than a constitutional right. This seems to be recognized by the decisions of the courts either directly or by implication. It constitutes an important difference between the rights of the individual to engage in interstate commerce and to use the mails. There is without question a constitutionally protected right of the citizen to engage in interstate commerce, subject, of course, to such rules and provisions as Congress may impose by virtue of its power to regulate that commerce. Congress may control the exercise of that right; but it may not destroy it entirely. The postal facilities, however, come into being only at the discretion of Congress; and neither the refusal of Congress to create them or expand them nor its complete withdrawal of them would violate an affirmative right guaranteed by the constitution.

It was this distinction between the relation of the individual to the postal service and to interstate commerce which the Supreme

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91 Act of March 3, 1875, 18 Stat. at L. 343.
92 Act of April 27, 1904, 33 Stat. at L. 313. It permits the free transmission of literature in raised characters to and from public institutions or libraries. Act of Aug. 24, 1912, 37 Stat. at L. 551 extended the privilege to all periodicals in raised characters irrespective of destination.
93 For valuable theoretical discussion of distinction between “rights” and “privileges,” see Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, (1913) 23 Yale Law Journal 16.
96 There is no decision of the Supreme Court squarely on this point since Congress has never tried to exercise such power of destruction. The reasoning of the Supreme Court in United States v. Del. & Hudson Co., supra, certainly lends support to this view.
97 “A citizen of the United States as such has a right to participate in foreign and interstate commerce, to have the benefit of the postal laws . . . Cooley, Principles of Constitutional Law, 273. Italics are the writer's.
Court apparently had in mind in the Jackson case, when, after upholding the authority of Congress to exclude lottery circulars from the mails, it declared: 107

"But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails."

This important distinction between a privilege and a right is one which is clearly recognized in our constitutional law; and there is plenty of precedent and authority for the view that in dispensing privileges which it has a right to withhold entirely the government may classify the recipients in order to give effect to its views respecting public policy, even though such classifications would be open to constitutional attack if applied to those enjoying a constitutional right. In the disposal of public lands Congress may properly pursue a constructive policy of encouraging homestead development. 108 Aliens seeking admission to the United States or seeking the privileges of American citizenship may be classified by Congress in ways which would seem arbitrary if the persons subjected to such discriminations had any constitutional right to demand of this government the thing they were seeking. 109 It is well established that since no one has a right to perform work for the United States government Congress may provide that those who do enjoy that privilege may be subjected to the requirement of the eight-hour day for employees, 110 although the right of a state to establish a general eight-hour day for all labor as an exercise of the police power must still be regarded as open to the most serious question. 111 The establishment of similar classifications by the various states in respect to public work has been sustained. 112 The United States Supreme Court has held, in fact, that while a state may not under its

107 (1877) 96 U. S. 727, 735, 24 L. Ed. 877.
108 See the Homestead Act of May 20, 1862, and subsequent legislation of similar nature.
109 See pamphlet, "Naturalization Laws and Regulations" revised to October 10, 1919, published by United States Dept. of Labor. It is not intended to suggest, however, that aliens applying for citizenship may not be classified along lines much more arbitrary than would be permissible if they were citizens applying for some other privilege.
111 This would seem to be suggested by the fact that regulations of the hours of labor are still upheld, if at all, mainly upon grounds of protection to health. See Bunting v. Oregon, (1917) 243 U. S. 426, 37 S. C. R. 435, 61 L. Ed. 830 upholding the Oregon Ten Hour Law. It is doubtful if an eight hour law could be sustained on this basis.
police power prevent the employment of aliens by private employers of labor.\textsuperscript{113} It may discriminate against aliens when it comes to work done for the state itself.\textsuperscript{114} The right to contract freely with other persons for the performance of labor is a right which cannot be denied by the state; but the right to be employed on the public work of the state itself is not a right at all, but a privilege.

Enough has been said to make clear that the power of Congress over the postal system is broader and more complete than over an institution or a system in respect to which its relation is not that of creator, owner, and operator. It is equally obvious that the so-called right of the individual to use the mails is not a right guaranteed to him by the constitution, such as the right to engage in interstate commerce or the right to be tried for crime only by a jury of his peers; it is a privilege the length and breadth of which is determined by a congressional discretion broad enough to allow general considerations of public policy to dictate the terms upon which it may be enjoyed.

It would, however, be entirely erroneous to assume that because Congress may for reasons of public policy set up classifications as to the purposes for which it is willing to allow the postal service to be used, it may make any and all classifications it chooses, no matter how arbitrary. The fact that Congress is under no constitutional compulsion to create a postal system at all does not mean that it may refuse to transmit in the system it has created the literature of one religious sect, or a particular political party. If it allowed the mailing of letters at all, it could not exclude love-letters and admit letters relating to the business of coal-mining. This is, of course, merely to say that although in the exercise of its power over the postal system Congress may give effect to its views of public policy, it must at all times keep its legislation within certain constitutional limits. The character and operation of those constitutional limits may now be examined.

Constitutional Limitations Upon Legislation\textsuperscript{115}

In classifying the uses and purposes to which it is willing to extend the privileges of the mails, Congress is subject to two im-

\textsuperscript{113} Truax v. Raich, (1915) 239 U. S. 33, 36, S. C. R. 7, 60 L. Ed. 131.
\textsuperscript{114} Heim v. McCall, (1915) 239 U. S. 175, 60 L. Ed. 200, 36 S. C. R. 78.
\textsuperscript{115} The constitutional prohibition in the fourth amendment against unreasonable searches and seizures (supra, p. 410) is of course a limitation
portant constitutional limitations. One of these is the prohibition against the passing of any law abridging the freedom of religion or the press; the other is the more general prohibition against deprivation of liberty or property without due process of law.

1. Freedom of Religion and the Press. It must be borne in mind that Congress is forbidden by the first amendment to the constitution not merely to interfere by direct and positive action with freedom of religion and of the press, but it is forbidden also to use its granted powers in such a way as to abridge those fundamental rights. It does not matter, therefore, how absolute or unlimited the power of Congress over the postal service might be, that power cannot be exercised to abridge religious freedom or to limit the freedom of the press. It does not, however, follow that no restraint may be placed upon the circulation of matter through the mails because of a possible abridgment of these rights. Neither freedom of religion nor freedom of the press is an absolute and unqualified right which may be set up against every conceivable governmental encroachment. They are both alike subject to reasonable restrictions in the interests of the public safety and morals and general welfare. Religion may not act as a cloak to protect polygamy from being attacked as subversive of public morals; and the exclusion from the mails of matter designed to promote the spread of polygamy on grounds of religion could no more be attacked as an abridgment of religious freedom than could a direct law which suppressed polygamy entirely as immoral be attacked as such an abridgment. So also the same power which justifies the penalizing of treasonable or seditious utterances or publications would naturally extend to the denial of mail facilities to matter of this character, nor could there be alleged any interference with the freedom of the press.

upon every exercise of the postal power. This point need not be further discussed as it has no peculiar bearing upon the topic under consideration.

116 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press. . . ." U. S. Const. Amendment I.

117 "Nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U. S. Const. Amend. V.


119 Freund, Police Power, Secs. 467, 468; Willoughby, Constitution, II, 841; Hall, Constitutional Law, 90.

120 Reynolds v. United States, (1878) 98 U. S. 145, 163, 25 L. Ed. 244.

121 In Schenck v. United States, (1919) 249 U. S. 47, 39 S. C. R. 247, the Espionage Act was upheld by the Supreme Court as against the criti-
If, however, Congress should attempt to exclude from the mails the literature devoted to the propagation of Christian Science or Catholicism, or if it should enact that sectarian journals should be transmitted free or at lower rates than other religious periodicals, there is no doubt but that such legislation would be held to violate the freedom of religion. In like manner, if a Republican Congress should exclude Democratic campaign literature from the mails or refuse to carry it on equal terms with other matter of the same class, there would no less certainly be a denial of freedom of the press. What the precise outside limits may be on the power of Congress to make postal regulations affecting the two fundamental rights under discussion is a question which is not easy to answer. It is a question, however, a detailed discussion of which is beyond the limits of this article.

It may in general be said that postal regulations excluding matter from the mails or establishing a preferred class of mail matter and founded upon a sound basis of public policy cannot be successfully attacked under the first amendment unless there is manifest in such legislation an intention unjustifiably to abridge the freedom of religion or of the press or unless such would be the natural result of its operation.

2. *Due Process of Law*. While the declaration in the fifth amendment that Congress shall not deprive any person of life, liberty, and property without due process of law is less definite in meaning than the prohibitions upon congressional power which have just been discussed, it is a no less effective limitation upon Congress in the exercise of all its delegated powers including the postal power. It might on casual thought be urged that since the government is under no obligation to provide any mail facilities at all for the use of the people, no person could conceivably

122 "There is not complete religious liberty where any one sect is favored by the state and given an advantage by law over other sects." Cooley, *Constitutional Limitations* (7th Ed.) 663.


124 "In excluding various articles from the mails, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals." *Ex parte Jackson*, (1877) 96 U. S. 727, 24 L. Ed. 877.
claim that he had been deprived of liberty or property by a statute which forbade him the right to use the mails for a specified purpose. This theory rests upon the supposed axiom that the greater power must include the lesser; and that the power to withhold all mail privileges must therefore include the power to withhold some or all of those privileges for any reason whatsoever or for no reason at all. There is a certain plausibility to this argument which arises from the fact that a private person engaged in a purely private business certainly does possess exactly this power and may discriminate amongst his patrons or among those to whom he desires to extend any privilege in any manner which seems to him desirable.125

It is hardly necessary to point out, however, that the government as a dispenser of privileges which may constitutionally be withheld does not enjoy the arbitrary and uncontrolled discretion just alluded to. While a person may not be in a position to compel the government to extend a privilege at all, he does have a constitutional right to enjoy it on equal terms with others who stand in the same general relation to the government as he does. It may not be a “liberty” within the meaning of the due process clause to be able to mail a letter or a book provided nobody else can do so. But if the government has created facilities for mailing letters and books it is a “liberty” within the meaning of the due process clause to use those facilities on equal terms with other persons in the same class.126 It is in this sense of the word that the use of the postal system has been declared to be part of the “liberty” secured by the fourteenth amendment against deprivation without due process of law.127 In short, the due process clause operates as a limitation upon the power of Con-

125 A soon as a business comes to take on a public character or becomes “affected with a public interest” this arbitrary power of the proprietor to discriminate amongst his patrons ceases to exist.

126 It seems clear that the “equal protection of the law” or protection against arbitrary discrimination is an essential part of the guarantee of due process of law. “Due process of law within the meaning of the Amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.” Giozza v. Tiernan, (1893) 148 U. S. 657, 13 S. C. R. 721, 37 L. Ed. 599. Freund, Police Power, Sec. 611. See 6 Ruling Case Law, Sec. 367, 437; 12 Corpus Juris 1190.

127 Allgeyer v. Louisiana, (1897) 165 U. S. 578, 41 L. Ed. 382, 17 S. C. R. 427. Cf. Statement in Hoover v. McChesney, (1897) 81 Fed. 472, “We think the right to use the mails though in degree much less valuable than the use of the transportation lines, would be equally a property right, and one which could not be taken away without due process of law.”
gress to make classifications which are arbitrary in character in respect to the enjoyment of mail privileges.\textsuperscript{128}

This calls for a brief discussion of what sort of classification is to be regarded as arbitrary; for quite obviously many classifications are not only legitimate but necessary. While there has been a great deal of difficulty in deciding in concrete cases the precise character of the equality of treatment to which persons are constitutionally entitled, there is substantial agreement with reference to certain tests by which the validity of statutory classifications is to be judged. No one will question, in the first place, that no classification would be constitutional in which the members of the class singled out for distinctive treatment did not differ in some substantial manner from those not included in such class.\textsuperscript{129} Congress is not apt to violate this principle in classifying mailing privileges. But if one could imagine a requirement that letters going from New York to Chicago should pay three cents postage while those going from Chicago to New York should pay two cents postage, or a requirement that morning newspapers should enjoy postal privileges denied to evening papers, there would be no hesitancy in concluding that such classifications rested upon no discernible differences between those inside and outside the class created. In the second place, there is equally unanimous agreement that when a class is created by law, the basis of classification must bear some reasonable relation to the object sought to be accomplished by the act which creates it.\textsuperscript{130} Congress could not, for example, provide that newspapers printed in foreign languages should be forbidden to circulate obscene matter but that papers printed in English should be exempt from such prohibition. Such discrimination would be void because the basis of the classification, namely, the language

\textsuperscript{128}This view is supported by analogy in the rule which restricts the right of states or municipalities to discriminate in favor of union labor employed on public work. This is held a denial of the equal protection of the law even though no one has a right to work for the state. Miller v. Des Moines, (1909) 143 Ia. 409, 122 N. W. 226, 21 Ann. Cas. 207, 23 L. R. A. (N.S.) 815; Fiske v. People, (1900) 188 Ill. 206, 58 N. E. 985, 22 L. R. A. 291.


in which newspapers are printed, bears no relation whatever to the purpose which the statute seeks to serve, the suppression of the circulation of indecent matter through the mails. It is not enough that the distinction which marks the line of classification is one which may properly be made the basis of class legislation; there must be a relevancy between the basis of the classification and the particular purpose of the statute which creates that classification.\textsuperscript{131}

These two protections against arbitrary class legislation have, however, a broader application to the classification of mailing privileges than the somewhat extreme illustrations used above would suggest. It must at all times be borne in mind that the power which Congress is exercising in setting up these classifications is, after all, the power derived from the clause authorizing the establishment of post offices and post roads. Statutes which aim to protect the national health, safety, and morals by excluding various things from the mails are postal regulations first and police regulations second. It follows, therefore, that when a person is forbidden to use the postal service for a certain purpose, he has a right to demand that the basis of classification bear a reasonable and substantial relationship not primarily to the general welfare of the country but to such aspects of the general welfare of the country as may properly be affected by Congress in the exercise of its postal power. When the Supreme Court declared that a postal regulation in order to be constitutional must treat alike "those who stand in the same relation to the government,"\textsuperscript{132} it meant the "same relation" in respect to the power of the government to exercise the postal authority and not in respect to liability to military service, the payment of federal taxes, or any other irrelevant consideration.

This leads, then, to a brief consideration of what the tests of relevancy must be between the postal power of Congress and the classifications of postal privileges which Congress may set up for the purposes of formulating national public policy and exercising a national police power. There can be no doubt that any classification which aimed at the protection of the postal system from injury or obstruction or was designed to promote its efficiency would rest upon a basis intimately and immediately


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connected with the postal power. It is equally certain that discriminations which sought to protect the public from the circulation through the mails of noxious or dangerous matter or from the consummation of injurious transactions which thrive on postal facilities would also bear a definite relation to the postal power. In neither of these cases could one complain that he had been subjected to discrimination the basis of which was irrelevant to the postal power. It is the belief of the writer that Congress may go still further and may set up classifications in respect to the use of postal facilities which are based merely upon congressional ideas of public policy when that public policy is one which is related to the development of functions which a postal system may naturally and reasonably be expected to perform or of interests which it may properly be used to promote. The postal service must be regarded not merely as an agency which exists for the purpose of performing messenger boy service for individuals but as an institution which actively and positively promotes the spread of intelligence as to current affairs, as well as to other matters of general interest. This is the basis upon which the special second class mail privileges are to be justified, although the Supreme Court has expressed its belief that the conferring of these privileges was "at least in form, a discrimination against the public generally." In other words, the discrimination rested upon a basis definitely related to a public policy or benefit which it was natural and proper for Congress to promote through its postal system. It was in this light that the Supreme Court viewed the regulations imposed upon newspapers and periodicals by the Newspaper Publicity Act of 1912. One of the provisions of this statute will be discussed at a later point; but it may be noted here that the prohibitions placed upon publications enjoying second class mailing privileges against printing editorial or other reading matter for which money is received without marking it "advertisement" are regarded by the Court as part and parcel of the congressional policy that the privileges thus extended to publications should be used primarily

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It is on this basis that the special mailing privileges accorded literature for the blind (supra p. 1423) may be sustained: They serve to aid the dissemination of intelligence amongst a group otherwise restricted in respect to such advantages.


135 Infra, p. 438.
for the “dissemination of information regarding current events” and only incidentally for the circulation of advertising matter. It is, therefore, the kind of requirement that may properly be imposed. But should Congress attempt to promote in this manner a public policy unrelated to the natural and customary functions and purposes of the postal system, a classification so founded would be arbitrary and unreasonable and would in consequence violate due process of law,—as well as be an exercise by Congress of a power not conferred by the constitution.

By way of summary it may be suggested that by classifying the uses to which it will allow the mails to be put, Congress exercises a generous police power for the protection of the public welfare from such evils as would be fostered and promoted by an entirely unrestricted use of postal privileges. It also enables Congress to promote a constructive public policy in respect to such matters as fall within the range of national interests which the postal system may properly be expected to serve. In short, these classifications may be established to prevent the misuse and to promote the most beneficial use of the postal service. But any discrimination in respect to mail privileges, no matter how commendable in purpose, which is not based upon some actual difference between the classes created in their relation not to the national welfare but to the postal service, would be arbitrary and unconstitutional.

III. REGULATIONS DENYING THE USE OF MAILS FOR PURPOSES OF VIOLATING OR EVADING STATE LAW

It would seem fairly clear that if Congress may with propriety classify the uses to which the postal system may be put for the purposes which have just been examined, it would be equally legitimate to provide that those facilities should not be used for the purpose of evading or violating state law. Legislation analogous in character has been sustained as a proper exercise by Congress of the power to regulate interstate commerce, upon principles applying with equal or greater force to postal power.

The first proposal to adopt such a regulation of the mails seems to be that made by Calhoun at the time of the famous

136 Cf. statement of Cooley: “The power to establish postoffices includes everything essential to a complete postal system under federal control and management; and the power to protect the same by providing for the punishment as crimes of such acts as would tend to embarrass or defeat the purpose had in view in their establishment.” Principles of Constitutional Law, 95.

controversy in 1836 as to the power of Congress to exclude from the mails incendiary and abolitionist publications. Believing that the absolute exclusion from the mails of the objectionable matter would abridge the freedom of the press, Calhoun proposed it should be made unlawful for any postmaster to receive and send on through the mails any publication addressed to a destination in which its circulation was unlawful. It was made a penal offense to deliver such mail matter to any person not authorized by the local authorities to receive it. This bill was amended so as to make it unlawful for any postmaster to deliver publications the circulation of which was forbidden by local law. The bill failed of passage; but the discussions in Congress upon its constitutionality were long and interesting.

It has already been seen that the second statute excluding matter relating to lotteries from the mails confined its prohibition to "letters or circulars concerning illegal lotteries, so-called gift concerts, or other similar enterprises." The purpose here seems to have been to make the illegality of the transmission of this matter contingent upon the illegality under state law of the enterprise to which it related. Such transmission would be unlawful even though lotteries might not be prohibited either in the state in which the circulars were mailed or in the state into which they were sent. In other words, the law would be violated by sending from one state to another in both of which lotteries were lawful, matter relating to a lottery in a remote state where such an enterprise was forbidden. This is not a case, therefore, in which matter is excluded from the mails because of the illegality of its origin nor because it is to be used for unlawful purposes at its destination, but because the enterprise which

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138 On December 2, 1835, President Jackson had sent a message to Congress urging the passing of legislation to prevent the circulation through the mails in the slave states of abolitionist literature. It was felt that such reading matter might stir up slave insurrection. Richardson, Messages and Papers of the Presidents, III, 177. This called forth extended discussion of the entire problem.

139 12 Debates of Cong. 383.

140 12 Debates of Cong. 1720.

141 12 Debates of Cong. 26-23, 1103-1108, 1136-1153, 1155-1171. For a summary of this discussion see Rogers, op. cit., 103-115, Willoughby, op. cit., II, 786.


143 Act of May 25, 1900, 31 Stat. at L. 188, which excludes from interstate commerce game killed in violation of state law. See Cushman, op cit., 3 MINNE- 

144 As is the case in the Webb-Kenyon Act and the act excluding liquor advertisements from the mails when addressed to states forbidding their circulation. See note 146 infra.
certain states have forbidden is of such a character that it thrives
definitely and immediately upon the circulation through the mails
of matter advertising and promoting it, no matter what the pre-
cise locality may be in which that circulation takes place. The act
would, therefore, seem to fall squarely within the general prin-
ciple of the legislation aimed to prevent the mails being used as
an agency for the violation of state law.

Finally Congress has applied this same principle in its recent
act making unlawful the sending by mail of liquor advertisements
into states in which it is unlawful to advertise or solicit orders
for intoxicating liquor.\textsuperscript{145} While this act differs somewhat from
the Webb-Kenyon Act, the question of its constitutionality prob-
ably would be settled by the doctrine of the case in which the
earlier legislation was sustained.\textsuperscript{146} Its constitutionality has not
thus far been questioned.\textsuperscript{147}

IV. PROPOSALS THAT CONFORMITY TO GENERAL POLICE REGU-
LATIONS BE MADE PRICE OF ENJOYMENT
OF MAIL FACILITIES

In the discussion thus far there have been considered the
various classifications of postal privileges based upon the nature
of the matter excluded or the character of the uses to which the
postal facilities were to be put. A discussion of the police power
which Congress may exercise under the postal clause would be
incomplete without some comment upon the proposals which have
sometimes been made that postal facilities should be withheld
entirely or in large part from persons who would not conform
to various congressional mandates in respect to public policy and
national welfare. It is perfectly obvious that there is a great
difference between forbidding any person to send obscene litera-
ture through the mails and forbidding any person who publishes

\textsuperscript{145} Act of March 3, 1917, 39 Stat. at L. 1069.
\textsuperscript{146} The Webb-Kenyon Act made it unlawful to ship intoxicating
liquors in interstate commerce which are “intended, by any persons inter-
est therein, to be received, possessed, sold, or in any manner used” in
violation of the laws of the state of their destination. There was no
penalty, however, for violation; violators merely being placed at the mercy
of the state authorities. Violation of the Liquor Advertisement Act is
made a crime against the United States punishable by fine or imprison-
ment. The validity of the Webb-Kenyon Act was upheld by the Supreme
Court in Clark Distilling Co. v. Western Maryland Ry Co., (1917) 242 U.
S. 31, 61 L. Ed. 326, 37 S. C., R. 180. See, Cushman, op cit., 3 MINNE-
SOTA LAW REVIEW 406 ff.
\textsuperscript{147} For discussion of power of states to pass laws preventing various
uses of the United States mails, see Rogers, op. cit., Ch. 5.
obscene literature to use the mails for any purpose whatsoever. In
the first case Congress prevents a misuse of postal facilities; in the
second case Congress withholds postal privileges as a sort of pen-
alty for non-compliance with the congressional policy for the
suppression of obscene literature. It makes conformity to cer-
tain police requirements a condition precedent to the enjoyment
of the use of the mails.

While no statute of this type has yet been passed by Congress,
the desirability of enacting such laws has more than once been
urged in recent years by those whose views as to the constitu-
tional propriety of such legislation should be accorded respectful
consideration. Perhaps the most conspicuous of these proposals
and the one most widely discussed was the one made by the Pujo
Money Trust Committee in 1913. This congressional committee
proposed as a means of regulating and controlling stock exchange
speculation "that Congress prohibit the transmission by the mails
or by telegraph or telephone from one state to another of orders
to buy or sell quotations or other information concerning trans-
actions on any stock exchange, unless such exchange shall be a
body corporate of the state or territory in which it is located" and
unless it comply with other specified conditions. While
the denial of mail privileges herein proposed was not absolute,
it was nevertheless very substantial. The substance and effect of
the proposed law was to penalize stock exchanges which refused
to incorporate under the laws of any state by denying them mail
privileges which were accorded to others. One writer has pro-
posed a law similar in principle which would exclude from the
mails papers of any corporation which refused to make full re-
ports to the federal government respecting those aspects of its
affairs in regard to which Congress desired full publicity. Dean J. P. Hall expresses the view that "as a last resort, Con-
gress might deny the privileges of the mails to businesses, which,
though operating wholly within a state, persisted in practices that
Congress within a reasonable discretion saw fit to disapprove."
Mr. Bryan, in a newspaper debate with Senator Beveridge in 1907, in which he appeared as the champion of states rights, expressed the belief that Congress could properly deny all mail privileges to monopolistic corporations or trusts.  

In the autumn of 1918 two bills were introduced into Congress providing for a similar denial of postal privileges to those who employed children below a certain age.  

At the outset of any discussion of the constitutionality of this type of legislation, it would probably be admitted that Congress could deny mail privileges to persons as a penalty for crime. If Congress may constitutionally punish a criminal by depriving him of his citizenship, surely it could impose the lesser penalty of taking away a specific incident to that citizenship. It would make no difference what the offense was which was so punished, provided only that Congress had the constitutional authority to prohibit it and provided the denial of mail privileges was imposed as other criminal penalties are imposed after conviction in a court having jurisdiction. The imposition of such a penalty in any other manner would, of course, be a denial of liberty and property without due process of law. It would clearly be a type of authority which could not be delegated to an administrative officer.  

It may have been this rule which prompted the cautious language of the Supreme Court in sustaining the power conferred upon the postmaster general to refuse to deliver registered mail matter to persons shown to be using the mails for fraudulent purposes. The law authorized the withholding of all such mail, and not merely such as pertained to the fraudulent transactions. After commenting on the practical impossibility of determining whether sealed mail matter is innocent or not, the court went on to say:

“It is true it may occasionally happen that he [the postmaster general] would detain a letter having no relation to the

151 "Congress has power to control interstate commerce, and the decision of the Supreme Court in the Lottery Case leaves little doubt that that power can be so exercised as to withdraw the interstate railroads and telegraph lines and the mails from the corporations which control enough of the product of any article to give them an actual monopoly." The Reader, Vol. 9, p. 356.


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prohibited business; but where a person is engaged in an enterprise of this kind, receiving dozens and perhaps hundreds of letters every day containing remittances or correspondence connected with the prohibited business, it is not too much to assume that, prima facie, at least, all such letters are identified with such business. . . . Whether, in case a private registered letter was thus seized and detained, and damage was thereby occasioned to the addressee, an action would lie against the postmaster general, is not involved in this case."

The Court seemed to view with disfavor a construction of the law which would place in the hands of an administrative officer the power to deny to a person the right to receive innocent mail matter because he was found to be using the mails for forbidden purposes. Such a power would savor of the imposition of a penalty for crime by the postmaster general, whereas crime can legally be punished only by a court of law. It is the belief of the writer that the power exercised by the postmaster general to exclude permanently from second class mail privileges publications in the issues of which he has found non-mailable matter within the meaning of the Espionage Act, is open to various serious questions on the grounds just mentioned. It is one thing to allow an administrative officer the power to exclude non-mailable publications; it is a very different thing to allow him to keep on excluding the subsequent issues of such publications when in actual fact they might prove to be innocent in character. Such procedure raises, to say the least, a very close question of due process of law.

With such legislative proposals as those mentioned at the beginning of this section, however,—laws in which the denial of mail privileges is imposed as a penalty for acts of omission or commission which Congress has no power to punish directly,—the

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154 A like construction would presumably apply to the clause of the Espionage Act conferring similar authority upon the postmaster general.
155 The grounds upon which the postmaster general bases the propriety of his action in these cases are set forth by him as follows: "To be a 'newspaper or other periodical publication' within the meaning of the law governing second-class matter a publication must among other requirements, be composed in its entirety of mailable matter. A publication containing matter which is nonmailable is not a 'newspaper or other periodical publication' within the meaning of the law and therefore is not entitled to the second-class mail privilege. In administering the law governing second-class matter it has been found necessary to revoke the second-class mail privilege of some publications for the reason that their contents consisted more or less of matter which was nonmailable and which, therefore, removed them from the class of publications entitled under the law to that privilege." Report of the Postmaster General, 1917, p. 65.
question of constitutionality assumes a very different form. This is not so much the imposing of a penalty in the technical sense of the word as the setting up of an antecedent or even a continuing condition as the price of the enjoyment of mail privileges. The price of the privilege of using the mails is the abandonment of child labor, or the cessation of monopolistic practices, or the filing of reports regarding corporate business and activities. The test in the light of which the validity of these acts must be judged is, in the last analysis, the relevancy of the conditions thus imposed to the postal power and the interests and functions for the promotion of which that power may be used. This seems to be the test applied by the Supreme Court to the provision of the Newspaper Publicity Act of 1912 which denies the privileges of the mails to publications which fail to comply with the requirements of the law in respect to printing semi-annually certain facts respecting their ownership and control. In passing upon the validity of this act, the Supreme Court, after holding that the denial of mail privileges mentioned should be construed to mean second class privileges only, pointed out that the condition imposed on the publishers was intimately connected with the purposes for which second class mail privileges had been created and that it was within the scope of the postal power to extend those privileges "upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded." The implication is clear that if the condition thus imposed had not been thus related to the public policy which Congress under the postal power could properly promote, it would have been void.

If the conditions thus imposed as the price of the enjoyment of mail privileges are not thus relevant to the purposes of the postal power, as would seem to be the case with the proposed child labor law, the statutes creating them could be attacked

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159 The brief for the government had alleged that Congress possessed the most arbitrary power to classify mail privileges. See supra, note 197. The court concludes its opinion in this case with the following statement: "Finally, because there has developed no necessity of passing on that question, we do not wish even by the remotest implication to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of condition, embodied in the proposition of the government which we have previously stated."
upon two grounds. It could be urged, in the first place, that such laws were not in reality exercises of the postal power at all because the use of the mails has nothing whatever to do with the evil of the child labor which it is the object of the legislation to remedy. In the second place, such a statute would fail to meet the tests of due process of law. What has already been said upon the subject of due process of law in its application to arbitrary classifications of mail matter would apply with equal force to the classifications established by the acts now being considered. When persons are classified in respect to their privileges in the mails upon the basis of their employment or non-employment of children, they may properly urge that that classification is arbitrary and a denial of due process of law. It may further be suggested that the Supreme Court has declared in a well known case that a person is deprived of due process of law by being obliged to sacrifice a constitutional right as the price of securing a privilege which the government might withhold entirely in its discretion. This principle would seem to be applicable by way of analogy to the case of one who, as a condition of enjoying the privileges of the mails which Congress need not extend to any one, is required to do something which Congress could not make him do, or cease doing something which Congress could not forbid. It is the belief of the writer that the Supreme Court would not hesitate to declare such legislation unconstitutional on either or both of the grounds which have been mentioned.

CONCLUSION

It seems clear from the foregoing analysis that the postal power is one which may be wielded very effectively by Congress for the police purposes. That power extends to the adequate protection of the postal service from injury; it extends to the protection of the public from the various dangerous or harmful

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160 It was urged by the proponents of the Keating-Owen Act that there was a substantial relationship between child labor and interstate commerce for the reason that child labor "feeds" on interstate commerce and is stimulated thereby. For discussion of this point, see Cushman, op. cit., 3 MINNESOTA LAW REVIEW 471 ff. The connection between child labor and interstate commerce and the postal system is certainly much less substantial than between child labor and interstate commerce.

161 Supra, p. 427.


163 For development of this point, see Green, The Child Labor Law and the Constitution, Illinois Law Bulletin, April, 1917, p. 17; also Beck, Nullification by Indirection, (1910) 23 Harv. L. Rev. 441.
uses to which mail privileges may be put; it extends to the promotion of positive public policies related to the broad purposes for which the postal system exists; it extends to the withholding of postal privileges as a means of inducing persons to conform to reasonable requirements and regulations incidental to the privileges of the mails. But as soon as Congress begins to use its postal power as a lever or a club to compel people to do things or refrain from doing things which have no real or intimate relation to the postal system or any of the larger purposes which may properly be promoted by it, the line of constitutionality has been crossed and Congress has exceeded its powers. In exercising a police power under the postal clause, as under the powers to tax and to regulate commerce, the ultimate test of constitutionality must be, not whether the police regulation established is necessary or desirable for the protection of the national health, safety, or morals, but whether the evil which Congress is combatting has any real and practical connection with the particular delegated power which Congress is employing. Any other construction of the authority of Congress to exercise a police power would destroy the whole force of the doctrine of delegated national powers and allow Congress by a process of the most obvious indirection to deal with problems of purely local welfare.

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