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You've Got Mail: USPS and the Fundamental Right to Postal Service

Introduction	144
I. Access to Prompt, Reliable, and Efficient Postal Services ...	145
II. The Doctrinal Process for Recognizing a Fundamental Right.....	153
III. The Fundamental Right to Postal Service.....	156
A. The Right to Postal Service Is Historically Rooted in Our Nation's Founding	157
B. Americans in the Ratification Era Understood the Right to Postal Service as Fundamental	161
C. Post-Ratification Scholars Understood the Right to Postal Service as Fundamental	164
D. Nineteenth-Century Jurisprudence Understood the Right to Postal Service as Fundamental	168
E. The Post-Civil War Congress Understood the Right to Postal Service as Fundamental	171
F. Post-Civil War Scholars Understood the Right to Postal Service as Fundamental	174
IV. Defining the Scope of the Right to Postal Service.....	177
Conclusion	179

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*The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people.*¹

INTRODUCTION

For the past century, postal service in the United States has faced a relentless cycle of budget crises, survived drastic reductions in mail volume, and endured multiple attempts to privatize the service. While the United States Postal Service (USPS) continues to be widely regarded as an essential service for the public, the combination of financial challenges and service cutbacks have threatened the ability of the USPS to fulfill its current universal service mandate. Congress requires the USPS to “provide prompt, reliable, and efficient services to patrons in all areas and [] render postal services to all communities.”² In 2019, the USPS recorded a net loss of \$8.8 billion and a cumulative net loss of \$31.6 billion between 2014 and 2019—losses primarily attributed to the USPS’s inability to fully fund pension and retiree benefits.³ According to the USPS Office of Inspector General (USPS OIG), the USPS has failed to meet a majority of its service performance

¹ 39 U.S.C. § 101(a).

² *Id.*

³ U.S. POSTAL SERV. OFF. INSPECTOR GEN., SEMIANNUAL REPORT TO CONGRESS: FALL 2020, at 24 (2020), https://www.uspsoig.gov/sites/default/files/document-library-files/2020/SARC_Fall_2020.pdf [<https://perma.cc/98L5-G4DJ>]. *But see* Anderson et al., *How Congress Manufactured a Postal Crisis – And How to Fix It*, INST. FOR POL’Y STUD. (July 15, 2019), <https://ips-dc.org/how-congress-manufactured-a-postal-crisis-and-how-to-fix-it> [<https://perma.cc/TM2M-63GY>]; Zaid Jilani, *A Manufactured ‘Crisis’: Congress Can Let the Post Office Save Itself Without Mass Layoffs or Service Reductions*, THINK PROGRESS (Sept. 28, 2011, 3:40 PM), <https://thinkprogress.org/a-manufactured-crisis-congress-can-let-the-post-office-save-itself-without-mass-layoffs-or-service-4da965b2bc63> [<https://perma.cc/M5DH-CCHK>]. A Republican amendment to the Postal Accountability and Enhancement Act of 2006 forced the USPS “to ‘prefund its future health care benefit payments to retirees for the next 75 years in an astonishing ten-year time span’—meaning that it had to put aside billions of dollars to pay for the health benefits of employees it *hasn’t even hired yet*, something ‘that no other government or private corporation is required to do.’” *Id.* (quoting Letter from Ralph Nader to Senator Joseph Lieberman & Congressman Darrell Issa (Sept. 21, 2011) (on file at Nader.org), <https://nader.org/uploads/USPS-ltr.pdf> [<https://perma.cc/YX5C-2T7K>]).

targets in the past five years.⁴ In the face of declining mail volumes,⁵ USPS leadership has repeatedly chosen to cut services, such as restricting overtime for some postal workers, eliminating Saturday mail processing in certain situations, and cutting delivery and retail service hours.⁶ While service cutbacks have not solved the ongoing financial crises, they have resulted in serious harm to patrons who depend on the USPS to deliver medication, livestock, benefit checks, and more.⁷ In order to protect access to prompt, reliable, and efficient postal services, the U.S. Supreme Court must recognize the fundamental right to postal service.

This Comment proceeds in five parts to outline the necessity and practicality of recognizing the fundamental right to postal service. Part I details the importance of equal access to prompt, reliable, and efficient postal services. Part II examines the Supreme Court's current doctrinal process for recognizing a fundamental right. Part III applies the recognition process to the right to postal service. Part IV examines the scope and original purpose of the right to postal service, offering a substantive standard for the right.

I

ACCESS TO PROMPT, RELIABLE, AND EFFICIENT POSTAL SERVICES

The United States Postal Service (USPS) has a statutory mandate to “provide prompt, reliable, and efficient services to patrons in all areas and . . . render postal services to all communities.”⁸ Even so, the ability to access postal services has never been guaranteed to all patrons. For example, access to postal services has necessarily depended on an individual's ability to read and write.⁹ Prior to emancipation in the

⁴ U.S. POSTAL SERV. OFF. INSPECTOR GEN., *supra* note 3, at 25.

⁵ Due in large part to the increasing use of email, online bill pay, and digital advertising, the USPS has seen a forty percent decline in First Class mail volume and a twenty-four percent decline in Marketing mail volume since 2006. *Id.*

⁶ U.S. POSTAL SERV. OFF. INSPECTOR GEN., REP. NO. 20-292-R21, OPERATIONAL CHANGES TO MAIL DELIVERY 8–16, 33 (2020), <https://www.uspsoig.gov/sites/default/files/document-library-files/2020/20-292-R21.pdf> [<https://perma.cc/K2N2-L5ZB>] [hereinafter USPS OIG REPORT, Oct. 2020].

⁷ See *infra* Part I; see also U.S. Postal Serv., *Introduction*, POSTAL FACTS, <https://facts.usps.com/> [<https://perma.cc/6XG6-CY4W>] (last visited Aug. 12, 2021) (stating that customers depend upon the USPS for “medications, supplies, benefit checks, letters[,] and other correspondence and products.”).

⁸ 39 U.S.C. § 101(a).

⁹ Access to the franchise similarly depended on an individual's ability to read and write: In the mid-nineteenth century, voting intelligently required a relatively high level of literacy. Given the primitive methods of travel and communication of the time,

nineteenth century, more than eighty percent of the white population in the South was literate, whereas the Black people enslaved by this white population had estimated literacy rates of around ten percent.¹⁰ Racist anti-literacy laws, which included local ordinances, customs, and cruel punishments, ensured the vast majority of enslaved people would remain illiterate.¹¹ During this time, the freedom of the press was curtailed by the laws and customs designed to censor the mail and prevent abolitionist materials from circulating.¹² When the cost of postage began decreasing in the nineteenth century, abolitionists focused on distributing their literature via post offices.¹³ A proslavery mob in Charleston, South Carolina, responded by raiding the local post office and burning bundles of abolitionist newspapers—with the assistance of the city postmaster.¹⁴

Modern barriers to postal service in the United States fall along a spectrum from minor administrative complaints to egregious constitutional violations. For example, on one end of the spectrum, complaints regarding how an individual's mail is delivered could be seen as trivial.¹⁵ An administrative law judge (ALJ) with the Postal Regulatory Commission was asked to determine whether the USPS refusing to deliver mail to a front porch mailbox due to a safety hazard—a German shepherd named Cookie—and requiring the

the written word was the only way that the vast majority of citizens could access even the most basic information about their state and federal governments.

Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1068 (2019).

¹⁰ Beth Barton Schweiger, *The Literate South: Reading Before Emancipation*, 3 J. CIVIL WAR ERA 331, 331 (2013).

¹¹ *Id.* at 333.

¹² *Id.*

¹³ Smithsonian National Postal Museum, *Abolition and the Mail*, FREEDOM JUST AROUND THE CORNER: BLACK AMERICA FROM CIVIL WAR TO CIVIL RIGHTS, <https://postalmuseum.si.edu/exhibition/freedom-just-around-the-corner-abolition-and-the-mail> [<https://perma.cc/3EJB-6C5R>].

¹⁴ *Id.*

¹⁵ Although nontrivial examples exist, such as the complaint of a 1950s African American family:

A few days [after moving in], the U.S. Post Office mail carrier, a federal government employee performing his official duties, noticed that he was delivering mail to an African American family. As he made his rounds, he shouted, "Niggers have moved into Levittown!" As many as 600 white demonstrators assembled in front of the house and pelted the family and its house with rocks

The federal government did not discipline or reprimand the mail carrier.

RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 141–42 (2017).

recipient to relocate their mailbox to the curb was discriminatory.¹⁶ The ALJ determined the controversy to be moot, as delivery to the front porch mailbox had already been reinstated.¹⁷ This seemingly minor administrative dispute was the culmination of four frustrating years of random, intermittent postal service for one patron.¹⁸

On the other end of the spectrum, a complete ban on an individual's access to postal services is seen as simply egregious; in fact, such a prohibition has been deemed a violation of the First Amendment.¹⁹ In his widely quoted dissent, Justice Oliver Wendell Holmes articulated what would become the cornerstone of First Amendment jurisprudence as related to the mails: "The United States may give up the post office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues"²⁰ Falling somewhere in the middle of our current spectrum are those barriers to access that, while egregious, fall short of violating the First Amendment. Barriers faced by individuals without a permanent mailing address, such as unhoused individuals,²¹ are a prime example, as illustrated in the Ninth Circuit case, *Currier v. Potter*.²²

In 2000, Carl Currier, David Bar, and Willard Johnson—three unhoused individuals in Seattle, Washington—inquired about their ability to access different postal services: a post office box (PO Box), a no-fee PO Box, and General Delivery.²³ At the time, the USPS required individuals without a physical address to provide a driver's license, provide a point of contact (like a shelter), or be personally

¹⁶ Randall Ehrlich, C2020-1/6 Postal Regul. Comm'n 113330 (June 2, 2020), <https://www.prc.gov/dockets/document/113330> [<https://perma.cc/X4ET-RWA5>].

¹⁷ *Id.* at 10.

¹⁸ See Randall Ehrlich, C2020-1 Postal Regul. Comm'n 111518, 4–13 (Dec. 23, 2019), <https://www.prc.gov/dockets/document/111518> [<https://perma.cc/56UN-PCAR>] (outlining the postal services received by Mr. Randall Ehrlich between 2015 and 2019).

¹⁹ See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 80 (1983) (Rehnquist, J., concurring); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156 (1946).

²⁰ *United States ex rel. Milwaukee Soc. Democratic Publ'g Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J. dissenting).

²¹ See *Is There Mail Service for the Homeless?*, U.S. POSTAL SERV.: FAQ, <https://faq.usps.com/s/article/Is-there-mail-service-for-the-homeless> [<https://perma.cc/48B9-MGEG>]. The USPS allows unhoused individuals to apply for a PO Box if the individual is known to the window clerk or Postmaster or if an unknown individual has proper ID, and the individual can provide a verifiable point of contact. *Id.* Unhoused individuals unable to meet these requirements may be eligible to receive indefinite General Delivery service if approved. *Id.*

²² 379 F.3d 716 (2004).

²³ *Id.* at 722.

known by the local postmaster in order to secure a PO Box.²⁴ No-fee PO Boxes were available only to individuals ineligible for carrier delivery service and thus were not available in large cities like Seattle.²⁵ General Delivery service permitted a person to receive mail addressed to them with the words “General Delivery” and the name of the city in place of a physical address written on the envelope.²⁶ In Seattle, as in other large cities at the time, all General Delivery mail was sent to one primary facility and held for up to thirty days.²⁷

Currier, Bar, and Johnson each applied to rent PO Boxes.²⁸ The USPS denied Currier’s and Bar’s applications as they lacked physical addresses, even though Currier presented a shelter-issued identification card.²⁹ After presenting a valid driver’s license, Johnson was eventually permitted to rent a PO Box.³⁰ All three individuals were deemed ineligible for no-fee PO Boxes and were offered General Delivery services accessible only at the downtown Seattle post office.³¹ Aided by an advocacy group, Currier, Bar, and Johnson (hereinafter Currier) brought suit against the USPS and former and current postal officials alleging that the USPS had violated the First Amendment’s Free Speech Clause, the equal protection component of the Fifth Amendment’s Due Process Clause, and the Postal Reorganization Act.³²

In *Currier v. Potter*, the Ninth Circuit held that the USPS did not violate Currier’s First Amendment rights, determining that no-fee PO Boxes and General Delivery services did not constitute public fora.³³ The Ninth Circuit further held that Currier’s equal protection claim under the Fifth Amendment necessarily failed because no fundamental right of access had been violated under the First Amendment.³⁴ In performing a rational-basis review of the regulations surrounding the

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 722–23.

²⁹ *Id.*

³⁰ *Id.* at 723.

³¹ *Id.*

³² *Id.* The Postal Reorganization Act is codified at 39 U.S.C. § 101 *et seq.* The district court determined it had jurisdiction to consider Currier’s claim under the Postal Service’s antidiscrimination provision, codified at 39 U.S.C. § 493(c); the Ninth Circuit agreed. *Id.* at 726.

³³ *Id.* at 728–31.

³⁴ *Id.* at 731–32.

no-fee PO Boxes and General Delivery services, the Ninth Circuit found that “limit[ing] general delivery service [was] a rational response to inefficiencies and increased costs that would result from expanding general delivery to branch offices,” and that offering no-fee PO Boxes to patrons with addresses could “eliminate some disparities between customers who receive carrier delivery and those who do not.”³⁵

In a notable dissent to the opinion, Judge Gould explained that in rejecting the facial challenge to the General Delivery regulation the Ninth Circuit left open the question of “whether the Post Office’s general delivery regulations are constitutionally permissible if, in application to an individual person, they substantially burden that person’s right to receive mail.”³⁶ Gould agreed with the majority that the issue was not properly raised in the complaint nor in the proceedings on appeal and offered his dissent to assist the USPS as well as potential future litigants on the matter.³⁷

[Gould] would hold that, although the Post Office need not routinely make general delivery available at all branch post offices for all persons who are homeless, the Postal Service’s regulations, to comply with the First Amendment, must make due provision for general delivery to a homeless person at a branch office when that person has shown undue hardship in retrieving mail at the main post office.³⁸

The most notable change in the USPS’s General Delivery regulations since the early 2000s is that postmasters now can “authorize more than one facility to offer general delivery service in accordance with customer and operational needs.”³⁹ This language is likely a direct response by the USPS to Judge Gould’s dissent in *Currier v. Potter* in an attempt to avoid further litigation on the matter. While postmasters across the United States now have the authority to expand General Delivery services in their cities,⁴⁰ the ability to access postal services should not be contingent on the generosity of local postmasters.

Above all, the most pervasive modern barrier to postal service is the slow drip of privatization, which has eroded access to postal services

³⁵ *Id.* at 732.

³⁶ *Id.*

³⁷ *Id.* at 733.

³⁸ *Id.*

³⁹ U.S. POSTAL SERV., MAILING STANDARDS OF THE UNITED STATES POSTAL SERVICE: DOMESTIC MAIL MANUAL (DMM) § 508.6.2 (2021), <https://pe.usps.com/text/dmm300/508.htm> [<https://perma.cc/CNA6-ZLU3>].

⁴⁰ *Id.*

since the 1970s.⁴¹ The appointment of Postmaster General Louis DeJoy in June of 2020 and the subsequent announcement and implementation of new operational and organizational changes in the months that followed blatantly exacerbated existing barriers with yet another push toward privatization.⁴² Driven by concerns of the looming 2020 presidential election and the anticipated largest ever use of vote-by-mail, the U.S. House of Representatives convened in spite of its summer recess to address concerns about USPS service reductions.⁴³ The House passed legislation designed to block the operational changes and provide additional funding for the postal service.⁴⁴ The House additionally requested a report from the USPS OIG detailing the impacts of the service cutbacks.⁴⁵

The resulting October 2020 report found that postal executives had simultaneously launched fifty-seven initiatives in July of 2020 to enact “transformational changes” in USPS operations.⁴⁶ In reviewing the collective impact of these initiatives, the USPS OIG reported a significant decline in service performance indicators for all mail products in the month of July alone.⁴⁷ Amidst intense pressure from Congress and mounting legal battles, Postmaster General DeJoy announced the decision to temporarily suspend operational changes, at least until after the 2020 election.⁴⁸ The decision to simply postpone

⁴¹ See, e.g., Joseph W. Belluck, *Increasing Citizen Participation in U.S. Postal Service Policy Making*, 42 BUFF. L. REV. 253, 267–77 (1994).

The only way to end the rate spiral, preserve and expand postal services, and prevent the privatization of the Postal Service is for Congress to facilitate the organization of residential postal users. . . . If Congress fails to act, it will encourage the demise of one of our country’s most vital public services by failing to guarantee the future of an affordable and accessible mail delivery system for every resident of the United States.

Id. at 294.

⁴² These new operational and organizational changes included restricting overtime for some postal workers, eliminating Saturday mail processing in certain situations, and cutting delivery and retail service hours. USPS OIG REPORT, Oct. 2020, *supra* note 6, at 10.

⁴³ Nicholas Fandos & Emily Cochrane, *House Votes to Block Postal Changes and Allocate Funds for Mail*, N.Y. TIMES (Aug. 22, 2020), <https://www.nytimes.com/2020/08/22/us/politics/usps-bill-congress-vote.html> [<https://perma.cc/FHJ6-HF24>].

⁴⁴ Delivering for America Act, H.R. 8015, 116th Cong. §§ 2, 3 (2020).

⁴⁵ USPS OIG REPORT, Oct. 2020, *supra* note 6, at 1.

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* at 3.

⁴⁸ See Press Release, Louis DeJoy, Postmaster Gen., U.S. Postal Serv., Postmaster General Louis DeJoy Statement (Aug. 18, 2020), <https://about.usps.com/newsroom/national-releases/2020/0818-postmaster-general-louis-dejoy-statement.pdf> [<https://perma.cc/84TC-E68C>].

rather than eliminate these operational changes will not provide the necessary long-term relief to Americans still reeling from the impacts of the resulting delivery delays.

The operational changes implemented under Postmaster General DeJoy negatively affected a wide swath of Americans. In most rural communities, the USPS has long been the sole provider of numerous critical delivery services.⁴⁹ Beyond what urban mail recipients might typically find on their doorsteps, the USPS delivers a range of plants and small animals to farms and families in rural areas, including a large number of day-old chicks.⁵⁰ Farmers have reported chicks spending days on trucks or being lost in warehouses as a result of service cutbacks.⁵¹ When shipments do eventually arrive, farmers are met with the eerie silence of the few surviving chicks.⁵² According to *The New York Times*, “This is what happens when the mail suddenly becomes unreliable in rural towns and stretches of countryside where there are scant FedEx or UPS deliveries, and where people rely on the post office as an irreplaceable hub of commerce and connection.”⁵³

While service cutbacks have been uniquely felt in rural communities, other life-threatening consequences have bridged the urban-rural divide. In 2020, one-in-five Americans relied on the mail to deliver prescribed medications, and of those, about one-quarter experienced delays or no delivery at all.⁵⁴ In the midst of the pandemic, mail-order prescriptions have been on the rise.⁵⁵ “Many of the drugs shipped are critical medicines for people with chronic conditions like diabetes or high blood pressure,” others are for children with complex medical needs whose medication may not be available at the local drugstore.⁵⁶ One online pharmacy reported a fivefold increase in rates

⁴⁹ U.S. POSTAL SERV., PUB. 100, USPS: AN AMERICAN HISTORY 30–33 (2020) [hereinafter USPS, PUB. 100].

⁵⁰ Jack Healy, *The Chick's in the Mail? Rural America Faces New Worries with Postal Crisis*, N.Y. TIMES (Aug. 21, 2020), <https://www.nytimes.com/2020/08/21/us/postal-service-mail-rural.html> [https://perma.cc/8Q8L-ZC35].

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Reed Abelson, *U.S. Mail Delays Slow Delivery of Medicines*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/health/Covid-us-mail-prescription-drugs.html> [https://perma.cc/AVJ3-5HCL].

⁵⁵ *Id.*

⁵⁶ *Id.*

of lost packages and an increase in the average shipping time of First-Class packages from four to eleven days.⁵⁷

Among the most publicized service cutbacks were those affecting vote-by-mail as the primary elections began to spread throughout the country in tandem with the COVID-19 pandemic. According to the Pew Research Center, in the thirty-seven states reporting vote-by-mail data, mail-in ballots accounted for over half of all votes cast in the 2020 primary election.⁵⁸ An NPR analysis of primary ballots cast before July 2020 found that over 50,000 mail-in ballots had arrived late and were not counted.⁵⁹ Heightening the tension around the upcoming election, the USPS sent letters to all states warning that it could neither guarantee specific delivery dates of election mail nor alter standards to align with state election laws.⁶⁰

In the months leading up to the 2020 presidential election, three-quarters of Americans were eligible to cast their vote via mail.⁶¹ In spite of the scores of misinformation, flurry of legal challenges, and last-minute judicial orders,⁶² a record-breaking 158 million Americans

⁵⁷ *Id.*

⁵⁸ Drew Desilver, *Mail-In Voting Became Much More Common in 2020 Primaries as COVID-19 Spread*, PEW RESEARCH CENTER (Oct. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/10/13/mail-in-voting-became-much-more-common-in-2020-primaries-as-covid-19-spread> [<https://perma.cc/DGW2-KJG9>].

⁵⁹ Pam Fessler & Elena Moore, *Signed, Sealed, Undelivered: Thousands of Mail-In Ballots Rejected for Tardiness*, NPR (Jul. 13, 2020), <https://www.npr.org/2020/07/13/889751095/signed-sealed-undelivered-thousands-of-mail-in-ballots-rejected-for-tardiness> [<https://perma.cc/C353-CERN>].

⁶⁰ Letter from Thomas Marshall, Gen. Couns, U.S. Postal Serv., Re: Election Mail (May 29, 2020), <https://about.usps.com/newsroom/national-releases/2020/2020-05-29-marshall-to-election-officials-re-election-mail.pdf> [<https://perma.cc/5YW8-WL8W>].

⁶¹ Juliette Love et al., *Where Americans Can Vote by Mail in the 2020 Elections*, N.Y. TIMES (Aug. 14, 2020), <https://www.nytimes.com/interactive/2020/08/11/us/politics/vote-by-mail-us-states.html> [<https://perma.cc/WPZ5-MXEP>].

⁶² See *Washington v. Trump*, No. 1:20-CV-03127-SAB (E.D. Wash. Sept. 17, 2020) (granting preliminary injunction to enjoin USPS from continuing policies slowing mail delivery as announced in July 2020); *New York v. Trump*, 490 F. Supp. 3d 225 (D.D.C. 2020) (granting preliminary injunction on USPS policies reducing number of mail sorting machines and extra/late mail delivery trips); *Pennsylvania v. DeJoy*, 490 F. Supp. 3d 833 (E.D. Pa. 2020) (granting preliminary injunction on USPS overtime restrictions); *Vote Forward v. DeJoy*, 490 F. Supp. 3d 110 (D.D.C. 2020) (granting preliminary injunction against USPS policy changes imposing undue burdens on the right to vote in violation of the First and Fifth Amendments); *Jones v. USPS*, 488 F. Supp. 3d 103 (S.D.N.Y. 2020) (seeking preliminary injunction against USPS mandating timely delivery of ballots); *Richardson v. Trump*, 496 F. Supp. 3d 165 (D.D.C. 2020) (granting in part preliminary injunction on USPS policies slowing mail delivery); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020) (Kavanaugh, J., in chambers) (declining to stay a decision by the 7th Circuit suspending a six-day extension of Wisconsin's absentee ballot receipt

voted,⁶³ and roughly 73 million (46%) reported voting by mail.⁶⁴ A 2020 post-election analysis by the USPS reported that 99.89% of ballots mailed by voters were delivered to election officials within seven days of mailing.⁶⁵ In temporarily halting and reversing service cutbacks, the USPS rose to the occasion and met the expectations of Americans during the 2020 election. With the election having come and gone, the question remains whether the USPS will be able to operate as a basic and fundamental government service as the push to cut costs and privatize continues.⁶⁶ In order to ensure prompt, reliable, and efficient postal services to all communities, the U.S. Supreme Court must recognize the fundamental right to postal service.

II

THE DOCTRINAL PROCESS FOR RECOGNIZING A FUNDAMENTAL RIGHT

In 1923, the U.S. Supreme Court invalidated a Nebraska state law prohibiting public and private schools from instructing in any language other than English.⁶⁷ The Supreme Court held that in prohibiting states from “depriv[ing] any person of life, liberty or property without due process of law,” the Fourteenth Amendment encompassed more than

deadline in light of the coronavirus pandemic); *Republican Party of Penn. v. Boockvar*, No. 20A84 (U.S. Nov. 6, 2020) (extending the deadline for ballots arriving after election to be counted separately); *NAACP v. USPS*, 496 F. Supp. 3d 1 (D.D.C. 2020) (ordering a sweep of mail-processing facilities to look for undelivered ballots by 3:00 PM election day).

⁶³ David Wasserman et al., *2020 National Popular Vote Tracker*, THE COOK POLITICAL REPORT, <https://cookpolitical.com/2020-national-popular-vote-tracker> [https://perma.cc/YW7M-CXEM] (last visited Jan. 2, 2021).

⁶⁴ PEW RESEARCH CENTER, SHARP DIVISIONS ON VOTE COUNTS, AS BIDEN GETS HIGH MARKS FOR HIS POST-ELECTION CONDUCT (Nov. 20, 2020), <https://www.pewresearch.org/politics/2020/11/20/the-voting-experience-in-2020> [https://perma.cc/J4H4-22GV].

⁶⁵ U.S. POSTAL SERV., 2020 POST-ELECTION ANALYSIS: DELIVERING THE NATION’S ELECTION MAIL IN AN EXTRAORDINARY YEAR (2020), https://about.usps.com/newsroom/national-releases/2020/USPS_PostElectionAnalysis_12_28_20.pdf [https://perma.cc/GH32-P69M].

⁶⁶ According to the USPS quarterly performance records for single-piece first-class mail, the last time the USPS was able to deliver above 90% of two-day first-class mail on time was the third quarter of FY2020, which coincided with Postmaster General DeJoy’s appointment. *See Serv. Performance Results*, U.S. POSTAL SERV., https://about.usps.com/what/performance/service-performance/historical_trends/index.html [https://perma.cc/M3MC-BVBH] (select “Table” under “Trends Display Mode,” then choose “Single-Piece First-Class Mail” from Mail Class dropdown) (last visited May 20, 2021). Throughout the second and third quarters of FY2020, which coincided with the first wave of the COVID-19 pandemic, service standards remained at 93 and 92.4%, respectively. *Id.*

⁶⁷ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

“merely freedom from bodily restraint.”⁶⁸ As a result, the Supreme Court recognized the implied fundamental right of parents to control the upbringing of their children.⁶⁹ In the last century, the Supreme Court has continued to recognize implied fundamental rights through the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments as “an enduring part of the judicial duty to interpret the Constitution.”⁷⁰ These rights include the right to privacy,⁷¹ the right to abortion,⁷² the right to marriage,⁷³ the right to same-sex marriage,⁷⁴ the right to custody of one’s children,⁷⁵ the right to keep the family together,⁷⁶ and the right to die.⁷⁷ While these constitute an impressive list, none of the aforementioned rights have developed without their respective limitations. According to constitutional scholar Erwin Chemerinsky, the emergence of implied fundamental rights over the past fifty years has been one of the most important developments in constitutional law.⁷⁸

The Supreme Court has reminded us that the responsibility to identify and protect fundamental rights “has not been reduced to any formula,” rather, courts are guided by history and tradition.⁷⁹ Fundamental rights are “deeply rooted in this Nation’s history and tradition”⁸⁰ and “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”⁸¹ While the Supreme Court has clearly stated that no formula exists for recognizing a fundamental right, a framework has emerged for

⁶⁸ *Id.* at 399.

⁶⁹ *Id.* at 400.

⁷⁰ *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015).

⁷¹ *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁷² *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

⁷³ *See Loving v. Virginia*, 388 U.S. 1 (1967).

⁷⁴ *See Obergefell*, 576 U.S. 644.

⁷⁵ *See Stanley v. Illinois*, 405 U.S. 645 (1972).

⁷⁶ *See Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

⁷⁷ *See Cruzan v. Director, Mo. Department of Health*, 497 U.S. 261 (1990); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁷⁸ Erwin Chemerinsky, *Fifty Years of Constitutional Law: What’s Changed?*, 2016 UTAH L. REV. 689, 689–92 (2016).

⁷⁹ *Obergefell*, 576 U.S. at 663–64 (quoting *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J. dissenting)).

⁸⁰ *Moore*, 431 U.S. at 503.

⁸¹ *Glucksberg*, 521 U.S. at 720–21 (internal quotation marks omitted).

examining whether a purported right is deeply rooted in American history and tradition.⁸²

In *District of Columbia v. Heller*, the Supreme Court analyzed the deeply rooted history and tradition of American gun ownership and confirmed that the Second Amendment codified a preexisting, fundamental right: the individual right to keep and bear arms.⁸³ Writing for the majority, Justice Scalia acknowledged that the text of the Second Amendment implicitly recognized the preexisting right by “declar[ing] only that it ‘shall not be infringed.’”⁸⁴ The opinion solidified the fundamental right by unearthing the history of gun rights in seventeenth-century England through the nation’s founding.⁸⁵ The opinion concluded the historical analysis by evaluating how the Second Amendment was interpreted from its ratification to the end of the nineteenth century.⁸⁶

In *Heller*, the Supreme Court’s evaluation of the historical evidence required to recognize a fundamental right can be traced through six inquiries: first, whether the right is historically rooted in our nation’s founding and the societies that preceded it;⁸⁷ second, whether Americans during the ratification era would have believed the right to be fundamental and whether states during the same period sought to protect the right;⁸⁸ third, whether post-ratification legal scholars understood the right to be fundamental;⁸⁹ fourth, whether nineteenth-century cases and case law interpreted the right as fundamental;⁹⁰ fifth, whether the post-Civil War Congress drafted legislation with an understanding of the right as fundamental;⁹¹ and sixth, whether post-Civil War legal scholars continued to understand the right as fundamental.⁹²

⁸² See Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1063–70 (2019). “In *McDonald v. City of Chicago*, the Court methodically examined the historical evidence necessary to recognize a new fundamental right under substantive due process. In this methodical examination, the Court made five categorical inquiries.” *Id.* at 1064.

⁸³ 554 U.S. 570, 592 (2008).

⁸⁴ *Id.* (quoting U.S. CONST. amend. II).

⁸⁵ *Id.* at 592–95.

⁸⁶ *Id.* at 605–26.

⁸⁷ *Id.* at 592–95.

⁸⁸ *Id.* at 598–604.

⁸⁹ *Id.* at 605–10.

⁹⁰ *Id.* at 610–14.

⁹¹ *Id.* at 614–16.

⁹² *Id.* at 616–19.

Establishing historical evidence of the existence of a fundamental right is not alone sufficient for the Supreme Court to recognize the right. In order to understand the right's implications, the scope of the right must be defined. In *Heller*, the Supreme Court defined the scope of a fundamental right by looking to its original purpose and to the historical practices and expectations of the right.⁹³ In order to demonstrate the practicality of recognizing a fundamental right to postal service, this Comment will follow the framework adopted by the Supreme Court in recognizing the individual right to keep and bear arms.

III

THE FUNDAMENTAL RIGHT TO POSTAL SERVICE

In recognizing the fundamental right to keep and bear arms, the U.S. Supreme Court articulated a framework to determine whether a purported right is deeply rooted in American history and tradition.⁹⁴ The framework articulated in *District of Columbia v. Heller* coincides with an extensive analysis of the Second Amendment as enumerated in the Bill of Rights.⁹⁵ In the recognition of implied or unenumerated fundamental rights, such as the right to privacy, the Supreme Court has not offered as detailed a framework to follow. That *Heller* offers such a framework could be in part due to a combination of the author's concise writing style and commitment to an originalist theory of constitutional interpretation, for which Justice Scalia was well known.⁹⁶ The framework could also be a direct consequence of the text of the Second Amendment, which for the *Heller* majority implied a preexisting right that "shall not be infringed."⁹⁷ This Comment will use the concise, originalist framework offered by Justice Scalia to examine not only the history and tradition of the American postal service but also the text and surrounding debates of the U.S. Constitution's Postal Clause.

The following analysis will closely follow the six inquiries of the *Heller* framework, with one exception. The Supreme Court in *Heller* specifically looked to rights protected by state constitutions during the ratification era to confirm the majority's interpretation of the right to

⁹³ *Id.* at 634–35.

⁹⁴ *See supra* Part II.

⁹⁵ 554 U.S. at 576–628.

⁹⁶ Samuel Alito, *A Tribute to Justice Scalia*, 126 *YALE L.J.* 1605, 1605–08 (2017).

⁹⁷ *Heller*, 554 U.S. at 592.

keep and bear arms as an individual right, as opposed to a militia-based right.⁹⁸ The right to postal service is not enshrined in any state constitution because, as the following will demonstrate, postal operations were pervasively understood to be an exclusive federal power. Thus, the remaining sections of Part III will lay the foundation to answer whether the right to postal service was historically rooted in our nation's founding and whether the right was understood to be fundamental by (1) Americans in the ratification era; (2) post-ratification legal scholars; (3) nineteenth-century jurisprudence; (4) the post-Civil War Congress; and (5) post-Civil War legal scholars. The answers that follow will present a compelling argument that the right to postal service is a fundamental right deeply rooted in our nation's history and tradition.

A. The Right to Postal Service Is Historically Rooted in Our Nation's Founding

The first inquiry in recognizing the fundamental right to postal service is whether the right is historically rooted in our nation's founding and the societies that preceded it. The Supreme Court in *District of Columbia v. Heller* looked to the historical background of the Second Amendment to confirm the Amendment codified a preexisting right to keep and bear arms.⁹⁹ The Supreme Court traced the roots of the right to keep and bear arms to seventeenth-century England and the dawn of the American Revolution.¹⁰⁰ Similarly, the right to postal service is traceable to eighteenth-century England and the dawn of the American Revolution. Moreover, the Postal Service's aspirational roots can be traced back another 1,200 years to the ancient Persian and Roman Empires.¹⁰¹

In describing the letter carriers of the fifth-century Persian postal service, Herodotus wrote, “[They] are stopped neither by snow nor rain nor heat nor darkness from accomplishing their appointed course with all speed.”¹⁰² If this quotation seems familiar, that may be because it is the unofficial motto of the USPS: “Neither snow nor rain nor heat nor

⁹⁸ *Id.* at 598–604.

⁹⁹ *Id.* at 592.

¹⁰⁰ *Id.* at 592–93.

¹⁰¹ Darrell E. Issa, *The Postal Reform Act: A Plan for an Affordable, Sustainable Postal Service*, 38 J. LEGIS. 151, 151 (2012).

¹⁰² *Id.* (quoting HERODOTUS OF HALICARNASSUS, THE HISTORIES 494 (A.D. Godley trans., Pax Liborum 2010) (1920), http://www.paxliborum.com/res/downloads/histories_5by8.pdf [<https://perma.cc/23Z6-E7F9>]).

gloom of night stays these couriers from the swift completion of their appointed rounds.”¹⁰³ That the concept of postal service is traceable to the ancient Persian and Roman Empires clearly indicates that the system is rooted in societies preceding our nation’s founding. While the concept of postal service can be traced to the fifth century, the American postal system derives its functional roots from the seventeenth-century British postal service, the Royal Post Office.¹⁰⁴

The British postal system initially developed as a network of “post roads,” which were marked by “posts” and connected major cities and towns.¹⁰⁵ Posts served as stations for sending and receiving correspondence and packages, exchanging tired horses, collecting tolls, and hiring vehicles and guides.¹⁰⁶ The government employed a “postmaster” or “post-mistress,” oftentimes a newspaper publisher, to operate the local “post office.”¹⁰⁷ In 1692, the first Postmaster General of the colonies was appointed by the British government, establishing the North American Post Office as a branch of the Royal Post Office¹⁰⁸ and creating the first centralized postal system in the colonies.¹⁰⁹ The Royal Post Office continued operating the North American postal system until 1775 and the onset of the Revolutionary War.¹¹⁰ In England and North America, eighteenth-century records indicate an understanding, particularly among newspaper printers, of the post office as a public service institution and a network for disseminating information via free or reduced-cost newspaper carriage.¹¹¹ In England specifically, the burgeoning right to postal service in the late eighteenth century received institutional support with the King’s Bench ruling in *Smith v. Powdich*, which required local postmasters to deliver letters as addressed, rather than hold onto them for delivery.¹¹² “One writer claims that *Powdich* ‘in the most deliberate and solemn manner had

¹⁰³ *Id.* (quoting *Frequently Asked Questions: About Postal History and People*, SMITHSONIAN NAT’L MUSEUM, <https://postalmuseum.si.edu/frequently-asked-questions> [<https://perma.cc/AJZ3-MQ5W>]).

¹⁰⁴ Robert G. Natelson, *Founding-Era Socialism: The Original Meaning of the Constitution’s Postal Clause*, 7 *BRIT. J. AM. LEGAL STUD.* 1, 8 (2018).

¹⁰⁵ *Id.* at 10.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 7.

¹⁰⁹ USPS, PUB. 100, *supra* note 49, at 2.

¹¹⁰ Natelson, *supra* note 104, at 24.

¹¹¹ *Id.* at 14. This understanding had become the prevailing rationale by the nineteenth century. *Id.*

¹¹² *Id.* at 18 (discussing (1774) 98 Eng. Rep. 1033 (KB)).

affirmed this principle . . . that the Post Office was to wait upon the people, and not the people upon the Post Office.”¹¹³

The establishment of the American postal system is widely attributed to Benjamin Franklin. In detailing its own history, the USPS recounts that “America’s present Postal Service descends from the system Franklin placed in operation.”¹¹⁴ In 1775, the Second Continental Congress convened to strategize the defense of the colonies against the British and tasked Franklin with chairing the committee charged with drafting recommendations for creating a postal system.¹¹⁵ The same year, Congress adopted the committee’s recommendations and created the position of postmaster general, naming Franklin as the first to hold the office.¹¹⁶ At the dawn of the American Revolution, communication without British oversight was of vital importance, and “[t]he conveyance of letters and intelligence was essential to the cause of liberty.”¹¹⁷

Similarities between the functionality of the colonial branch of the Royal Post Office and its American successor were immediately recognizable. When Congress appointed Franklin as Postmaster General, the post roads authorized by Congress ran from Massachusetts to Georgia—the very routes established by the Royal Post Office.¹¹⁸ Beyond mere functionality, the founders modeled what would become the Postal Clause on British law; this parallel reflected Franklin’s thirty-seven-year career in the Royal Post Office, from 1737 to 1774.¹¹⁹ While Franklin was serving as joint Postmaster General of the colonies in 1767, the British Parliament expanded the Royal Post Office within Great Britain by granting the British Postmaster General the authority “to establish Post Offices and Post Roads.”¹²⁰ While the Articles of Confederation as ratified by Congress in 1781 had a lengthier postal clause,¹²¹ the likeness of the U.S. Constitution’s Postal Clause is

¹¹³ *Id.* Natelson goes on to qualify that there is little evidence to show that this was a widespread view. *Id.*

¹¹⁴ USPS, PUB. 100, *supra* note 49, at 4.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Natelson, *supra* note 104, at 31.

¹¹⁹ USPS, PUB. 100, *supra* note 49, at 2–3.

¹²⁰ Natelson, *supra* note 104, at 14.

¹²¹ ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

The united states in congress assembled shall also have the sole and exclusive right and power of . . . establishing and regulating post-offices from one State to another,

unmistakable; Article I provides Congress with the enumerated power “[t]o establish Post Offices and post Roads.”¹²²

A thorough examination of the proceedings of the Constitutional Convention of 1787 and the correspondence between those in attendance interestingly unearths little discussion of the Postal Clause.¹²³ The final draft of the Constitution was presented to the convention on August 6, 1787, and provided, “The Legislature of the United States shall have the power . . . [t]o establish Post-offices.”¹²⁴ The next mention of the clause involved the motion to expand the power by adding “and post-roads,” as moved by Elbridge Gerry of Massachusetts and seconded by John Francis Mercer of Maryland.¹²⁵ Notably, Gerry and Mercer were Antifederalists, were opposed to a strong national government, and would eventually oppose the Constitution itself during the ratification debates.¹²⁶ While Gerry and Mercer expanded the Postal Clause, it does not follow from their staunch antifederalist beliefs that they sought to expand the federal government’s postal power. Rather, I would argue that their motion to expand the Postal Clause was more likely an acknowledgment of the preexisting right to access the postal services the new nation would soon provide.

The right to postal service is historically rooted in our nation’s founding and the societies that preceded it. While the American postal system’s aspirational roots are traceable to fifth-century Persia, as seen in the unofficial motto of the USPS, the right to postal service is traceable to eighteenth-century England. This is evidenced by the understanding of the postal service as a vehicle for disseminating information through free or reduced-cost delivery of newspapers in late eighteenth-century England and North America. One year after the King’s Bench clarified for Englishmen their right to access postal services, the first postal routes were established by the Second Continental Congress. That same Congress tasked Benjamin Franklin with developing the burgeoning nation’s postal system, which unsurprisingly reflected Franklin’s thirty-seven-year service in the

throughout all the united states, and exacting such postage on the papers passing thro’ the same as may be requisite to defray the expenses of the said office

Id.

¹²² U.S. CONST. art. I, § 8, cl. 7.

¹²³ Natelson, *supra* note 104, at 44–46.

¹²⁴ *Id.* at 45 (citation omitted).

¹²⁵ *Id.* (citation omitted).

¹²⁶ *Id.*

Royal Post Office. In establishing the American postal system and in the debates over the postal power, the founding fathers recognized the right to access postal services free from British oversight as implicit to the concept of ordered liberty.

B. Americans in the Ratification Era Understood the Right to Postal Service as Fundamental

The second inquiry in recognizing the fundamental right to postal service requires an examination of whether Americans during the ratification era would have understood that right to be fundamental. The Supreme Court in *District of Columbia v. Heller* looked to the 1788 ratification debates to confirm that Federalists and Antifederalists alike understood the Second Amendment as the codification of a preexisting right.¹²⁷ Similarly, the debates surrounding the Postal Clause—or lack thereof—indicate that Federalists and Antifederalists alike found little controversy in the clause.¹²⁸ While the Postal Clause is an enumerated power of Congress and does not explicitly codify the preexisting right to postal service, the ratification-era debates illustrate how Americans understood the right to postal service as fundamental.

In the period that followed the nation's founding, sharp debates over the Constitution ensued, but the propriety of the Postal Clause never came into question.¹²⁹ Federalists and Antifederalists generally approved of the clause.¹³⁰ In writing Federalist Paper No. 42, James Madison wrote of the postal power: "The power of establishing post roads must, in every view, be a harmless power, and may, perhaps, by judicious management, become productive of great public conveniency. Nothing which tends to facilitate the intercourse between the States can be deemed unworthy of the public care."¹³¹ While Antifederalists used the postal power as an example of an appropriate central government power, in contrast with the powers they deemed inappropriate,¹³² Federalists tried to limit the scope of any potential controversy by distinguishing post roads from other roads, illustrating

¹²⁷ 554 U.S. 570, 598–99 (2008).

¹²⁸ Natelson, *supra* note 104, at 47 (noting that Federalists and Antifederalists generally approved of the clause).

¹²⁹ *Id.* at 51–52 (examining the ratification debates in state conventions and in public).

¹³⁰ *Id.* at 47.

¹³¹ THE FEDERALIST NO. 42 (James Madison).

¹³² See FEDERAL FARMER, FEDERAL FARMER III (1787), <https://teachingamericanhistory.org/library/document/federal-farmer-iii> [<https://perma.cc/AES7-WGUB>].

that state governments would exercise sole jurisdiction over the latter.¹³³

The First Federal Congress exercised its postal power by establishing the Post Office Department through the Post Office Act of 1789.¹³⁴ The establishment of the post office was the sixteenth undertaking of the First Congress; the Post Office Act notably preceded legislation allowing for the compensation of members of Congress, federal judges, and the President and Vice President, as well as legislation establishing the judicial courts of the United States.¹³⁵ While the exact timing of the legislation passed during the First Congress could reflect a mundane committee delay, it could also reflect the importance of the law. Arguably, the early establishment of the post office showcases the uncontroversial and simple nature of the law, echoing the drafting-era debates, or lack thereof, around the Postal Clause itself. In their first session, members of the First Congress found it necessary to exercise their postal power and establish the postal service for the people of the United States.

Even though the postal power itself was uncontroversial, numerous controversies and complaints surrounded the quality and unreliability of the postal service in the late eighteenth century.¹³⁶ This unreliability can be traced to a congressional grant of the post office's 1787 request to revert from the expensive use of stagecoaches to the cheaper, individual post riders for routes through New England.¹³⁷ The Postmaster General at the time heralded this decision as an attempt to improve services and address the "concerns of cost, reliability, and scheduling."¹³⁸ However, in reverting to individual post riders for these routes, the post office ended its policy of providing free postage for newspaper publishers exchanging their papers and disrupted the delivery of newspapers and letters.¹³⁹ The resulting delays and unreliability caused widespread agitation among Americans; some

¹³³ Natelson, *supra* note 104, at 47.

¹³⁴ An Act for the Temporary Establishment of the Post-Office, ch. 16, 1 Stat. 70 (1789).

¹³⁵ See 1 U.S. CONG., THE PUBLIC STATUTES AT LARGE, LIST OF THE PUBLIC ACTS OF CONGRESS xviii (Richard Peters ed., 1848).

¹³⁶ Natelson, *supra* note 104, at 48–51.

¹³⁷ *Id.*

¹³⁸ *Id.* at 48.

¹³⁹ CTR. FOR THE STUDY OF THE AM. CONST., NO. 1: NEWSPAPERS, PSEUDONYMS & THE DEBATE OVER THE CONSTITUTION 2 (2013), https://archive.csac.history.wisc.edu/sotm_1013_pseudonyms.pdf [<https://perma.cc/5P63-MGXV>].

patrons believed their mail was being purposely delayed or even opened and scrutinized.¹⁴⁰

This insecurity and uncertainty surrounding the postal service marked the ratification era¹⁴¹ and sparked further controversy between the Antifederalists and Federalists.¹⁴² A number of Antifederalists thought the unreliable delivery to be political, believing that Federalist papers were free to pass through the post while opposition papers were being obstructed.¹⁴³ One Antifederalist, writing in 1788 under the pseudonym “Manco,” declared:

It is the established creed of America, that the Liberty of the Press is the Palladium of all the civil, political and religious rights of Americans. The News-Papers are the best vehicles of intelligence and information, respecting public affairs, to the people at large; and to stop their free circulation, is an act of injury and insult to the citizens of these United States. At no time can it be more necessary to keep open the channels of communication than at the present moment. . . . If the people submit to this conduct, nothing can rouse them from their lethargy, and their next sleep will be the sleep of Death—the loss of their liberties.¹⁴⁴

In 1790, then-Postmaster General Samuel Osgood outlined the difficulties facing the post office in a report to Congress.¹⁴⁵ These difficulties included the decreasing mail volume, overextension of franking privileges,¹⁴⁶ ineffective rates of postage, threats from private competition, and the allegation that “postmasters may have consulted their own interests in preference to that of the public.”¹⁴⁷ In summary, a range of government actions had hindered the post office such that it was no longer providing the standard of service that Americans understood they had a right to.

Americans in the ratification era recognized the right to postal service as fundamental. The postal service was the first American communications network, allowing for the unimpeded exchange of news, ideas, and opinions. In passing the Postal Service Act of 1792

¹⁴⁰ Natelson, *supra* note 104, at 48.

¹⁴¹ DANIEL C. ROPER, *THE UNITED STATES POST OFFICE* 43 (1917).

¹⁴² Natelson, *supra* note 104, at 49.

¹⁴³ *Id.*

¹⁴⁴ CTR. FOR THE STUDY OF THE AM. CONST., *supra* note 139, at 2.

¹⁴⁵ ROPER, *supra* note 141, at 44–45.

¹⁴⁶ Franking privileges allow members of Congress to send mail through the postal service under their signature without postage. See MATTHEW E. GLASSMAN, *CONG. RSCH. SERV.*, RS22771, *CONGRESSIONAL FRANKING PRIVILEGE: BACKGROUND & RECENT LEGISLATION* 1 (2015).

¹⁴⁷ ROPER, *supra* note 141, at 45.

and exercising the postal power, Congress agreed; the Act permitted newspaper publishers to exchange their papers with other publishers free of charge.¹⁴⁸ The reaction of early Americans to postal delays and unreliable service—especially for newspapers—in order to reduce costs showcases the importance of access to prompt, reliable, and efficient postal service. For these ratification-era Americans, the right to postal service was clearly understood as fundamental.

C. Post-Ratification Scholars Understood the Right to Postal Service as Fundamental

The third inquiry in recognizing the fundamental right to postal service requires reviewing the commentary of post-ratification legal scholars to gauge their understanding of the right. In *District of Columbia v. Heller*, the Supreme Court examined the work of three prominent legal scholars in the post-ratification era to determine their understanding of the Second Amendment and the right to keep and bear arms: St. George Tucker, William Rawle, and Joseph Story.¹⁴⁹ Accordingly, this section examines these works to evaluate each scholar's understanding of the Article I power to establish post offices and post roads. While the three scholars do not explicitly describe a right to postal service, the commentaries of Tucker and Rawle underpin the argument put forth by Story that Congress has both the power and a duty to carry mail along the post roads. From this duty, I infer an implicit understanding of the fundamental right to postal service.

Law professor and former Antifederalist St. George Tucker authored—according to Justice Scalia¹⁵⁰—the most important early American edition of Blackstone's Commentaries.¹⁵¹ Tucker's brief commentary on the Postal Clause does not dilute his understanding of the vital importance of postal services.¹⁵² After a concise discussion on the

¹⁴⁸ An Act to Establish the Post-Office and Post Roads Within the United States (the Postal Act), ch. 7, § 21, 1 Stat. 232 (1792).

¹⁴⁹ 554 U.S. 570, 605–10 (2008).

¹⁵⁰ *See id.* at 594.

¹⁵¹ 1 GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (1803) [hereinafter TUCKER'S BLACKSTONE].

¹⁵² *Id.* app. Note D, at 265 (“The post-office, under proper regulations, is one of the most beneficial establishments which can be introduced by any government; by providing the means of intercourse between the citizens of remote parts of the confederation, on such a regular footing, as must contribute greatly to the convenience of commerce, and to the free, and frequent communication of facts, and sentiments between individuals.”).

possibility of states possessing a concurrent and subordinate postal power, Tucker examines the Postal Clause primarily through a revenue lens.¹⁵³

The post-office, under proper regulations, is one of the most beneficial establishments which can be introduced by any government; by providing the means of intercourse between the citizens of remote parts of the confederation, on such a regular footing, as must contribute greatly to the convenience of commerce, and to the free, and frequent communication of facts, and sentiments between individuals. Hence the revenue arising from this source will always be more easily collected, and more cheerfully paid, than any other whatever. It appears, that notwithstanding the many unprofitable branches, into which the post-roads have been divided for the convenience of the people of the United States, there still remains a considerable sum that is annually brought into the federal treasury.

It seems reasonable that the product of this branch of the revenue should be, exclusively, applied to the extention [sic] of its benefits, until they shall completely pervade every part of the union.¹⁵⁴

Even through a revenue lens, Tucker emphasizes the importance of the power to establish post offices for the benefit of citizens.¹⁵⁵ Further, Tucker advocates for any and all postal revenue to be immediately reinvested into the postal service until the benefits “completely pervade every part of the union.”¹⁵⁶ Without explicitly discussing the right to postal service, Tucker considers the Postal Clause as providing more than a grant of power to Congress.

William Rawle, a prominent lawyer, similarly considers the Postal Clause in his 1829 treatise, *A View of the Constitution of the United States*.¹⁵⁷ In his commentary on the Postal Clause, Rawle immediately acknowledges the necessary connection of the postal power to the nation’s general welfare.¹⁵⁸ For Rawle, as for Tucker, the postal power is more than an enumerated power of Congress, and the importance of the clause is found in its implementation: “A regular system of free and speedy communication, is of vital importance to the mercantile interest, but on a wider scale we must also admit it to be of the first consequence

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 265.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ 2 WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 103–04 (1829).

¹⁵⁸ *Id.* at 103.

to the general benefit.”¹⁵⁹ Rawle goes on to describe the execution of the postal power as promoting the general welfare through informing the citizenry of their political interests, assisting government operations, and supporting private correspondence.¹⁶⁰

The Postal Clause, according to Rawle, was enacted and founded on the principle that the power is exclusive to the federal government.¹⁶¹ Relatedly, Rawle’s most striking point relates to the constitutional question of “whether [C]ongress has a right to open a new mail road through a state or states for general purposes, involving the public benefit.”¹⁶² For Rawle, the construction of good roads and the existence of swift communication—i.e., the use of the postal power—which clearly promote the nation’s prosperity, cannot raise serious allegations of infringing on state sovereignty or “the liberties of the people.”¹⁶³ Rawle’s belief that the establishment of post roads by Congress is not an infringement of individual liberties does not lend itself to an explicit acknowledgment of the right to postal service. However, Rawle’s analysis of the Postal Clause, like Tucker’s, considers the use of the power by Congress essential to ordered liberty.

The commentaries of Tucker and Rawle underpin an extensive discussion of the Postal Clause in Joseph Story’s *Commentaries on the Constitution of the United States*.¹⁶⁴ Story published his famous commentaries in 1833, and his analysis of the Postal Clause begins with a tone of amusement:

The nature and extent of this power, both theoretically and practically, are of great importance, and have given rise to much ardent controversy. . . . It was passed over by the Federalist with a single remark, as a power not likely to be disputed in its exercise, or to be deemed dangerous by its scope. . . . One cannot but feel, at the present time, an inclination to smile at the guarded caution of these expressions, and the hesitating avowal of the importance of the power. It affords, perhaps, one of the most striking proofs, how much the growth and prosperity of the country have outstripped the most sanguine anticipations of our most enlightened patriots.¹⁶⁵

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 104.

¹⁶³ *Id.*

¹⁶⁴ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 22–47 (1833).

¹⁶⁵ *Id.* at 22.

Referencing Tucker and Rawle, Story describes the establishment of the post office as “one of the most beneficent, and useful establishments under the national government.”¹⁶⁶

Pivoting away from the Postal Clause and toward the use of the postal power, Story describes postal service as, “by a wider diffusion of knowledge, enabl[ing] political rights and duties to be performed with more uniformity and sound judgement.”¹⁶⁷ For Story, the influence of the postal service is “of incalculable value to the permanent interests of the Union.”¹⁶⁸ Moreover, that Congress alone could exercise the postal power is of great importance to Story: “The national government is that alone, which can safely or effectually execute it, with equal promptitude and cheapness, certainty and uniformity.”¹⁶⁹ Using the words of Chief Justice John Marshall in *M’Culloch v. Maryland*, Story explores the pervasive liberal construction of the postal power: “[T]his 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 from one post-office to another.”¹⁷⁰

Post-ratification legal scholars understood the Postal Clause as more than a grant of congressional power. For Joseph Story, Congress has a duty to ensure the mail is carried between post offices and over post roads. Beyond this duty, Story articulates a sort of standard for this duty with his understanding that the federal government alone can safely and effectually execute postal services with “equal promptitude and cheapness, certainty and uniformity.”¹⁷¹ That the Postal Clause not only provides Congress the power to establish post offices and post roads but also conveys a duty to carry the mail could be construed as evidence of a preexisting right to postal service. Without the transmission of mail, the post offices and post roads established by Congress would be of little value. Further, without individuals accessing postal services in order to transmit mail, the postal power would similarly be of little use. Post-ratification legal scholars understood Congress to have a duty to carry the mail because individual access to postal services required as much. Thus, post-ratification legal

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 23.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 24.

¹⁷⁰ *Id.* at 38 (quoting *M’Culloch v. Maryland*, 17 U.S. 316, 417 (1819)).

¹⁷¹ *Id.* at 24.

scholars implicitly understood the existence of a fundamental right to postal service.

D. Nineteenth-Century Jurisprudence Understood the Right to Postal Service as Fundamental

The fourth inquiry in recognizing the fundamental right to postal service is whether the courts interpreted the Postal Clause as conferring a fundamental right. The Supreme Court in *District of Columbia v. Heller* evaluated the 1820 *Houston v. Moore* holding and found evidence that nineteenth-century jurisprudence interpreted the right to keep and bear arms as an individual, fundamental right.¹⁷² In an effort to show that the interpreters of the Second Amendment in the century after its ratification understood the amendment as they did, the *Heller* majority discussed a number of nineteenth-century state-level cases that interpreted state constitutions. In order to obtain evidence that the Supreme Court has interpreted the Postal Clause as securing a right to postal service, this section requires a slightly more expansive review of the case law through the nineteenth century and into the twentieth century.

That the federal government has a duty to carry the mails is pervasive in nineteenth-century case law. In 1845, the Supreme Court held that the federal government through the Postal Clause has “unquestionably a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care.”¹⁷³ From this recognition, the Supreme Court in 1895 acknowledged the executive’s ability to demand an injunction against those interfering with the federal government’s duty to transmit the mails.¹⁷⁴

[W]henver the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the

¹⁷² *District of Columbia v. Heller*, 554 U.S. 570, 610–11 (2008) (discussing *Houston v. Moore*, 18 U.S. 1, 24 (1820)).

¹⁷³ *Searight v. Stokes*, 44 U.S. 151, 169 (1845).

¹⁷⁴ *In re Debs*, 158 U.S. 564, 599 (1895).

courts, or prevent it from taking measures therein to fully discharge those constitutional duties.¹⁷⁵

In the preceding cases, the Supreme Court recognized the power to protect the mails as a derivative of the Postal Clause. This protection was not without its limits. The Supreme Court has additionally held that individuals have a “legal right under the general acts of Congress relating to the mails to have their letters delivered at the post office as directed.”¹⁷⁶

A similar line of doctrine recognizing the power to police the mails began with the Supreme Court’s 1877 holding in *Ex parte Jackson*:¹⁷⁷ “The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.”¹⁷⁸ In upholding the constitutionality of legislation to exclude leaflets advertising lotteries from the mail, the Supreme Court interpreted the Postal Clause as vesting Congress with the power to regulate the entire American postal system.¹⁷⁹

In the 1904 case *Public Clearing House v. Coyne*, the Supreme Court clearly articulated its understanding of the postal service as important but not fundamental.¹⁸⁰ The majority in *Public Clearing House* acknowledged the existence of the postal service since colonial times and its recognition in the Constitution and in the earliest acts of Congress.¹⁸¹ Yet the majority failed to comprehend how a postal system with higher rates and using “methods of transmission so slow and uncertain” could have “assumed anything of the importance it now possesses.”¹⁸² Even after recognizing the importance of the Postal Service, the majority clarified its position:

It is not, however, a necessary part of the civil government in the same sense in which the protection of life, liberty and property, the defence [sic] of the government against insurrection and foreign invasion, and the administration of public justice are; but is a public function assumed and established by Congress for the general welfare, and in most countries its expenses are paid solely by the

¹⁷⁵ *Id.* at 586.

¹⁷⁶ *Am. School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902).

¹⁷⁷ 96 U.S. 727, 732 (1877).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ 194 U.S. 497, 506 (1904).

¹⁸¹ *Id.*

¹⁸² *Id.*

persons making use of its facilities; and it returns, or is presumed to return, a revenue to the government, and really operates as a popular and efficient method of taxation. Indeed, this seems to have been originally the purpose of Congress. The legislative body in thus establishing a postal service may annex such conditions to it as it chooses.¹⁸³

In the same opinion, the majority felt it pertinent to clarify as follows:

Congress would have no right to extend to one the benefit of its postal service, and deny it to another person in the same class and standing in the same relation to the Government, it does not follow that under its power to classify mailable matter, applying different rates of postage to different articles, and prohibiting some altogether, it may not also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception.¹⁸⁴

Notably, after the dissent of Justice Oliver Wendell Holmes in *U.S. ex rel. Milwaukee Social Democratic Publishing Co. v. Burlison*, the Supreme Court began to deviate from this short line of precedent.¹⁸⁵ Justice Holmes eloquently penned, “The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues.”¹⁸⁶ Justice Holmes’s words have been repeated in case law to protect access to postal services through the First Amendment.¹⁸⁷

Nineteenth-century interpreters of the Postal Clause recognized not only the importance of the postal service but also the duty of the federal government to carry the mail. During the nineteenth century, the Supreme Court recognized the congressional power to protect and police the mail. Early twentieth-century case law does not recognize postal service as a fundamental right, distinguishing between postal service and the concepts of life, liberty, and property. Yet the same case law acknowledges that access to the postal service itself cannot be arbitrarily extended and denied by Congress. As the twentieth century progressed, the Supreme Court revisited its understanding of the fundamental right of postal service through case law protecting access to the postal service through the First Amendment.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 507–08.

¹⁸⁵ 255 U.S. 407, 437 (1921).

¹⁸⁶ *Id.*

¹⁸⁷ *See, e.g., Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965).

E. The Post–Civil War Congress Understood the Right to Postal Service as Fundamental

The fifth inquiry in recognizing the fundamental right to postal service requires an examination of whether the post–Civil War Congress, the 39th Congress, understood the right as fundamental. In *District of Columbia v. Heller*, the Supreme Court determined the understanding of the post–Civil War Congress by examining the legislative history of the Freedmen’s Bureau Act of 1866, the Civil Rights Act of 1871, and the drafting of the Fourteenth Amendment.¹⁸⁸ The right to postal service is not explicitly referred to in this post–Civil War legislation that outlined the federal effort to ensure *state governments* afforded basic civil rights to the millions of people no longer enslaved in the South. Unlike the right to keep and bear arms, the right to postal service was protected by the *federal government* and was provided as an essential service. Even so, this section will demonstrate that the post–Civil War Congress understood the right to postal service as fundamental through the use and discussion of the postal power to govern the development of the telegraph.

This understanding is best explained through the repeated use of the postal power to govern the development of the telegraph in the mid-1800s.¹⁸⁹ In 1843, Congress instructed Samuel F. B. Morse to construct a telegraph line to determine the new technology’s effectiveness.¹⁹⁰ In 1844, Morse transmitted the first message on American soil between the U.S. Capitol and Baltimore, Maryland.¹⁹¹ Within the year, Congress had appropriated funding for the endeavor and placed the telegraph service under the direction of the Postmaster General.¹⁹² Before long, the telegraph service was available on a fee basis for use

¹⁸⁸ 554 U.S. 570, 614–16 (2008).

¹⁸⁹ See U.S. POSTAL SERV., TELEGRAPH: EARLY POSTAL ROLE (2015), <https://about.usps.com/who-we-are/postal-history/telegraph.pdf> [<https://perma.cc/U7RJ-9JFM>] [hereinafter USPS, TELEGRAPH]; see also Gardiner G. Hubbard, *Government Control of the Telegraph*, 137 N. AM. REV. 521, 531 (1883) (“The power of Congress to construct post-roads, to own and operate lines of stage-coaches for carrying the mails and passengers, to construct and operate lines of telegraph, has, I believe, rarely been doubted.”).

¹⁹⁰ See An Act to Test the Practicability of Establishing a System of Electro-Magnetic Telegraphs by the United States, ch. 84, 5 Stat. 618 (1843).

¹⁹¹ USPS, TELEGRAPH, *supra* note 189, at 2.

¹⁹² An Act Making Appropriations for the Civil and Diplomatic Expenses of the Government for the Year Ending the Thirtieth June, Eighteen Hundred and Forty-Six, and for Other Purposes, ch. 71, 5 Stat. 752, 757 (1845) (“For defraying the expenses of the magnetic telegraph from the city of Washington to Baltimore for the current year . . . the said sum to be disbursed under the direction and superintendence of the Postmaster General.”).

by the general public.¹⁹³ Congress eventually found the telegraph to be too expensive to continue providing it as a public service and authorized—against the wishes of the Postmaster General overseeing the service¹⁹⁴—the sale or lease of the telegraph line.¹⁹⁵ In November 1846 and again in April 1847, the Post Office Department leased the line to private companies at no cost under the condition that the government could continue to send telegrams free of charge.¹⁹⁶

After the initial telegraph line had been leased to private companies, newly constructed lines began to appear across the country.¹⁹⁷ To fully understand the telegraph as a means of communication to the drafters of the Fourteenth Amendment requires an examination of the 34th Congress. The strife and violence that reverberated throughout the 34th Congress, including the attack on Senator Charles Sumner,¹⁹⁸ foreshadowed the looming Civil War. Even so, Congress remained steadfastly committed to ensuring the equality of (white, male) U.S. citizens in access to newly established international telegraph lines.¹⁹⁹ The Act to Expedite Telegraphic Communication for the Uses of the Government in its Foreign Intercourse was passed on March 3, 1857, and spelled out the required contractual provisions for a telegraph line between the United States and Great Britain.²⁰⁰ The Act conditioned appropriation for the line on the provision that Great Britain recognize the “equality of rights among the citizens of the United States in the use of said [] communication and the lines of telegraph.”²⁰¹

¹⁹³ USPS, TELEGRAPH, *supra* note 189, at 2.

¹⁹⁴ Postmaster General Cave Johnson described the telegraph as “an agent vastly superior to any other ever devised by the genius of man for the diffusion of intelligence.” *Id.* at 3 (quoting ANNUAL REPORT OF THE POSTMASTER GENERAL 861 (1845)). The Postmaster General warned that “in the hands of individuals or associations, the telegraph may become the most potent instrument the world ever knew to effect sudden and large speculations—to rob the many of their just advantages, and concentrate them upon the few.” *Id.*

¹⁹⁵ An Act Making Appropriations for the Service of the Post-Office Department for the Year Ending Thirtieth June, Eighteen Hundred and Forty-Seven, ch. 31, 9 Stat. 19 (1846).

¹⁹⁶ USPS, TELEGRAPH, *supra* note 189, at 3.

¹⁹⁷ *Id.*

¹⁹⁸ *South Carolina Representative Preston Brooks’s Attack on Senator Charles Sumner of Massachusetts, Historical Highlights*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <https://history.house.gov/Historical-Highlights/1851-1900/South-Carolina-Representative-Preston-Brooks-s-attack-on-Senator-Charles-Sumner-of-Massachusetts/> [<https://perma.cc/B5K3-47D3>] (last visited Jan. 2, 2021).

¹⁹⁹ An Act to Expedite Telegraphic Communication for the Uses of the Government in its Foreign Intercourse, ch. 95, 11 Stat. 187 (1857).

²⁰⁰ *Id.*

²⁰¹ *Id.*

Out of concern for the integrity of this new system of communication, Congress continuously debated whether to bring telegraph lines back under the direction of the Postal Service.²⁰² A staunch supporter of government ownership, Missouri Senator Benjamin Gratz Brown was elected in 1863 to the U.S. Senate as a member of the Unconditional Union Party and served in the 39th Congress.²⁰³ In a speech on the Senate floor referencing a previously passed resolution on the matter,²⁰⁴ Senator Brown outlined his support for establishing telegraph lines in connection with the postal system to ensure accessibility for the public.²⁰⁵ By predicating telegraph lines on the “post office principle,” or the uniform rate system, the surplus of profitable lines could support the extension of lines on poorer routes; as Senator Brown explained, “the short thus equalizing the long.”²⁰⁶ Further, Senator Brown believed government ownership of telegraph lines would break up the newspaper monopoly in New York and disrupt its control over the public dissemination of news, providing for the rapid development of newspapers nationwide.²⁰⁷ After outlining in scrupulous detail the cost effectiveness of his proposal, Senator Brown ended his speech by asking, “whether the public have not a right to be protected by the Government against so enormous a taxation on its rightful postal facilities, for telegraphs are nothing else.”²⁰⁸

The post–Civil War Congress understood the right to postal service and its underlying purpose of communication to be fundamental. In encapsulating this understanding, First Assistant Postmaster General

²⁰² See H.R. DOC. NO. 40-35, at 1–5 (1869) (documenting congressional action between 1837 and 1869).

²⁰³ *Biographical Directory of the United States Congress: BROWN, Benjamin Gratz*, LIB. OF CONG., <https://bioguide.congress.gov/search/bio/B000905> [<https://perma.cc/629W-P5LK>] (last visited Jan. 2, 2021).

²⁰⁴ The resolution read as follows:

Resolved. That the Committee on Post Offices and Post Roads be instructed to inquire into the expediency of authorizing the Post Office Department to construct and operate telegraph lines along the principal mail routes, or such of them as it may deem necessary, or to contract with such lines as may be already established, if that shall be deemed more advisable, for the use and control of such lines; and, in connection with the postal business, to establish offices at such points as may be determined upon, open at all hours to the public and the press, for safe and speed transmission of dispatches, under proper regulations and at fixed minimum rates; the committee to report by bill or otherwise.

CONG. GLOBE, 39th Cong., 1st Sess. 979 (1866).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 980.

²⁰⁸ *Id.*

Daniel C. Roper would write fifty years later, “The history of civilization is the history of the struggle for human rights. Basic in this struggle is free communication on equal conditions. Progress in the facilities for such communication has made the United States postal service a democratic institution.”²⁰⁹ The debates over protecting the telegraph as a means of communication through analogies to the Postal Service indicate that members of the 39th Congress understood the right to postal service to be fundamental.

F. Post–Civil War Scholars Understood the Right to Postal Service as Fundamental

The sixth and final inquiry in recognizing the fundamental right to postal service is whether post–Civil War legal scholars continued to understand the right as fundamental. In *District of Columbia v. Heller*, the Supreme Court examined the work of late nineteenth-century legal scholars to confirm the scholars’ continued understanding of the Second Amendment and the right to keep and bear arms as an individual, fundamental right.²¹⁰ The Supreme Court in *Heller* specifically looked to the treatises of legal scholars Thomas Cooley, John Norton Pomeroy, James Kent, Benjamin Vaughan Abbott, and John Ordronaux for support.²¹¹ This section will similarly examine their work to confirm that post–Civil War legal scholars continued to understand the right to postal service as fundamental.

In his 1868 *Treatise on the Constitutional Limitations*, Thomas M. Cooley focuses on the right to postal service through the Fourth Amendment lens of “unreasonable seizures”:²¹²

The importance of public confidence in the inviolability of correspondence, through the post-office, cannot well be overrated; and the proposition to permit letters to be opened at the discretion of a ministerial officer, would be met with general indignation. The same may be said of private correspondence by telegraph; the public are not entitled to it for any purpose; and a man’s servants might, with the same propriety, be subpoenaed to bring into court his private letters and journals, as a telegraph operator to bring in his private correspondence. In either case, it would be equivalent to an unlawful and unjustifiable seizure of his papers,—such an “unreasonable seizure” as is directly condemned by the Constitution. In England,

²⁰⁹ ROPER, *supra* note 141, at 79.

²¹⁰ 554 U.S. 570, 616–19 (2008).

²¹¹ *Id.*

²¹² THOMAS M. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 307, n.2 (1868).

the Secretary of State sometimes issues his warrant for opening a particular letter, where he is possessed of such facts as he is satisfied would justify him with the public; but no American officer or body possesses such authority, and its usurpation should not be permitted.²¹³

Cooley's full understanding of the right to postal service comes into focus in his 1881 treatise, *General Principles of Constitutional Law*, with the application of the postal power to telegraph lines.²¹⁴ Cooley wrote on the matter, "Congress may also regulate communication by telegraph between the States, and where a State has given exclusive privileges which would preclude free intercourse, it may under . . . the power to establish post-offices and post-roads, provide for the construction of competing lines."²¹⁵ Cooley concludes by using the Supreme Court's holding in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*: "[The postal power was] intrusted [sic] to the general government for the good of the nation, it is not only the right but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation."²¹⁶

Like Cooley, legal scholars of the nineteenth century were intent on examining developments in telegraph technology through the lens of the postal power. However, the earliest post-Civil War scholar reviewed in *Heller*, John Norton Pomeroy, writing in 1868, had little to say on the matter of telegraphs as the technology was still in its infancy.²¹⁷ Pomeroy instead examines the postal power through the construction of the Pacific Railway, believing "that, like so many other matters once doubtful and disputed, this class of measures will be quietly acquiesced in by the people, as it tends to promote the general welfare."²¹⁸ In his treatise, Pomeroy provides a glimpse of his understanding of the Postal Clause as an expansive tool to develop and protect the mails given by the people to the federal government.²¹⁹ As telegraph technology advanced through the nineteenth century, so, too, did the commentary of post-Civil War legal scholars on the matter.

²¹³ *Id.*

²¹⁴ THOMAS M. COOLEY, *GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 65–66 (1881).

²¹⁵ *Id.* at 65.

²¹⁶ *Id.* at 66 (quoting *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1 (1877)).

²¹⁷ JOHN NORTON POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* 354–55 (1868).

²¹⁸ *Id.* at 354.

²¹⁹ *Id.* at 355.

In 1873, James Kent wrote of telegrams:

It is settled by the best considered cases, that sending a telegraphic message is not a bailment; but the subject is connected with that of common carriers, in so far as it is not improbable that somewhat similar duties may be imposed on telegraph companies in this country, on the ground that they are chartered for public purposes, as is shown by the exercise of the right of eminent domain in their favor. Thus it would probably be held that they are bound to transmit messages for all who offer them, and who are ready to pay the usual or settled charges. So they would not be allowed to impose unreasonable regulations or stipulations on senders²²⁰

Notably, Kent outlines his beliefs on access to telegraph services prior to the Supreme Court's *Pensacola Telegraph Co.* holding in 1877. In 1880, Benjamin Vaughan Abbott, writing in the same year as Cooley, similarly quotes the *Pensacola Telegraph Co.* holding: "As [the postal power was] intrusted [sic] to the general government for the good of the nation, it is not only the right, but the duty, of Congress to watch that intercourse among the States and the transmission of intelligence are not obstructed."²²¹ In 1891, John Ordronaux wrote of the postal power:

In like manner Congress may authorize a telegraph company to maintain and operate lines along any of the military and post-roads of the United States, because its power is not confined to the postal service known or in use when the Constitution was adopted, but may keep pace with the progress of the country, and adapt itself to any new developments which time and circumstances may bring forth. According as the progress of science makes new discoveries in the instrumentalities of commerce, the postal service of the country will need to keep abreast of its demands for easier and more rapid avenues of intercommunication. Congress cannot therefore, in its exercise of a power of such vast importance to the public weal as the postal service, be restricted to such narrow means for transporting the mails as were formerly deemed adequate.²²²

Post-Civil War legal scholars continued to understand the right to postal service as a fundamental right. Prominent legal scholars in the late nineteenth century examined the postal power and the duty of the federal government to protect access to postal services through technological advancements in the telegraph. Consequently, these

²²⁰ 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *611, n.1 (O. Holmes ed., 12th ed. 1873) (citations omitted).

²²¹ BENJAMIN VAUGHAN ABBOTT, JUDGE AND JURY: A POPULAR EXPLANATION OF LEADING TOPICS IN THE LAW OF THE LAND 105 (1880).

²²² JOHN ORDRONAU, CONSTITUTIONAL LEGISLATION IN THE UNITED STATES 485 (1891).

scholars were firm in their beliefs that access to the telegraph by the general public should not be restricted or denied by arbitrary means. A thorough examination of post–Civil War commentary confirms that legal scholars sought to convey—through their understanding of the right to postal service—the gravity of denying access to new forms of communication. In doing so, these scholars outlined their continued understanding of the right to postal service as fundamental.

IV

DEFINING THE SCOPE OF THE RIGHT TO POSTAL SERVICE

Establishing historical evidence of the existence of an implied fundamental right is not alone sufficient for the U.S. Supreme Court to recognize the right. In order to understand the right's implications, the scope of the right and a substantive standard for the right must be defined.²²³ In *District of Columbia v. Heller*, the Supreme Court defined the scope of a fundamental right by looking to its original purpose and to the historical expectations of the right: “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.”²²⁴ Thus, the scope of the right to postal service and a substantive standard for the right can be found in the historical understanding of the right's purpose and expectations.

With the ratification of the U.S. Constitution on June 21, 1788,²²⁵ the right to postal service was implicitly adopted. The Constitution provides for the enumerated power, given by the people to Congress, “[t]o establish Post Offices and post Roads.”²²⁶ The Framers—Federalists and Antifederalists alike—found the clause uncontroversial.²²⁷ The original purpose of the postal service as established was little debated but remains contested today.²²⁸ A pragmatic view of the Postal Service's original purpose was threefold: to facilitate official government communication, to assist commerce, and to provide intelligence and revenue to the government.²²⁹ Contrary

²²³ See *supra* Part II.

²²⁴ 554 U.S. 570, 634–35 (2008).

²²⁵ *The Day the Constitution Was Ratified*, NAT'L CONST. CTR.: CONSTITUTION DAILY (June 21, 2021), <https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified> [<https://perma.cc/FE75-2J23>].

²²⁶ U.S. CONST. art. I, § 8, cl. 7.

²²⁷ See *supra* Section III.B.

²²⁸ See Natelson, *supra* note 104, at 1 (arguing that the “founding-era reasons for the postal service were revenue, promotion of commerce, and political control.”).

²²⁹ *Id.* at 32–33.

to the beliefs of some scholars,²³⁰ I do not find this pragmatic view of the postal service inconsistent with the lofty ideals expressed by individual founding fathers, like those of Dr. Benjamin Rush. Signer of the Declaration of Independence and friend of Benjamin Franklin, Dr. Rush offered his understanding of the purpose of the Postal Service in a 1787 address:

For the purpose of diffusing knowledge, as well as extending the living principle of government to every part of the united states—every state—city—county—village—and township in the union, should be tied together by means of the post-office. . . . It should be a constant injunction to the post-masters, to convey newspapers free of all charge for postage. They are not only the vehicles of knowledge and intelligence, but the [s]entinel[s] of the liberties of our country.²³¹

The recognition of a fundamental right is not required to have existed in tension with the objectives of government. The original purpose of the right to postal service as understood by the Framers included the pragmatic benefits that the service would provide alongside the mission to tie together each corner of the nation, distribute the knowledge necessary for participation in a democratic society, and guard liberty itself. It is clear that the Framers counted the right to postal service among those fundamental rights necessary to our system of ordered liberty.

The original purpose of the Postal Service as understood by the people is enshrined in its historic mission to “have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people.”²³² Further, the Postal Service “shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities.”²³³ From this original purpose, the scope of the fundamental right to postal service is defined: a fundamental right to postal service requires the state to promptly, reliably, and efficiently carry the personal, educational, literary, and business correspondence of the people in all areas of the United States.

²³⁰ *Id.* at 33. Natelson argues that “Congress saw the purposes of the post office . . . as a medium for official government intercourse, as a source of government intelligence and revenue, and as an aid for commerce. . . . In that order.” *Id.* at 32–33.

²³¹ Benjamin Rush, *Address to the People of the United States*, AM. MUSEUM 3 (Jan. 1787), https://archive.csac.history.wisc.edu/Benjamin_Rush.pdf [<https://perma.cc/BH66-FJU2>].

²³² USPS, PUB. 100, *supra* note 49, at 1.

²³³ *Id.*

CONCLUSION

Fundamental rights must be “objectively, deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”²³⁴ In *District of Columbia v. Heller*, the U.S. Supreme Court articulated a framework in acknowledging the deeply rooted history and tradition of American gun ownership and recognizing the individual right to keep and bear arms as fundamental. This Comment traced the *Heller* framework to argue for the necessity and practicality of recognizing the fundamental right to postal service. Following the *Heller* framework, this Comment showcased the right to postal service as historically rooted in our nation’s founding with the dawn of the American Revolution and in the societies preceding it, including fifth-century Persia and eighteenth-century England. In examining the work of American scholars, courts, and legislators between the eighteenth and early twentieth centuries, this Comment outlined their understanding of the right to postal service as necessary to our system of ordered liberty. Finally, this Comment examined the scope and original purpose of the right to postal service and identified a substantive standard for the Supreme Court to measure the right: a fundamental right to postal service requires the state to promptly, reliably, and efficiently carry the personal, educational, literary, and business correspondence of the people in all areas of the United States. In order to ensure prompt, reliable, and efficient postal services to all communities, the Supreme Court must recognize the fundamental right to postal service.

²³⁴ *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks omitted).

