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## Federal Police Power Turns to the Postal Clause

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## COMMENTS

FEDERAL POLICE POWER TURNS TO THE POSTAL CLAUSE.—During the past three years the federal government in an attempt to cope with pressing national problems, has invaded strange fields regarded by many as solely within the domain of state jurisdiction. The result has been a spirited legal struggle, still in the course of vigorous prosecution, between the jealous guardians of states' rights and the enthusiastic proponents of greater federal power. Rallying beneath the standard of the Tenth Amendment the adherents of the doctrine made sacred by Calhoun have valiantly fought to dam the ever-rising tide of national police power. Under the aegis of popular support, the federal forces have wheeled into action the heavy artillery of the taxation clause, the general welfare clause, the interstate commerce clause, and the postal clause.<sup>1</sup> It is to a determination of the range and striking power of the last mentioned field-piece that this paper is directed.

The Constitution vests in Congress the power "to establish post-offices and post-roads."<sup>2</sup> Apprehensive lest too strong an expression of federal power jeopardize the acceptance of the proposed constitution, the delegates to the Constitutional Convention phrased the grant in its present innocuous form.<sup>3</sup> But passing mention was made of it in the *Federalist*<sup>4</sup> and the state conventions were almost unanimous in considering the clause too innocent to warrant discussion.<sup>5</sup> With the passage of time, however, this merest skeleton of a grant has been enveloped with the flesh and blood of a vast postal system.<sup>6</sup>

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1. For a general discussion of national police power see Cushman's articles, *National Police Power Under the Commerce Clause of the Constitution* (1919) 3 MINN. L. REV. 289, 381, 452; *National Police Power Under the Taxation Clause of the Constitution* (1920) 4 MINN. L. REV. 247; *National Police Power Under the Postal Clause of the Constitution* *id.* at 402. The spending power is discussed in CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934) c. 4. See also *The Gold Clause Cases*, 294 U. S. 240 (1935), Comment (1935) 4 FORDHAM L. REV. 287; *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935) (*Hot Oil case*), (1935) 4 FORDHAM L. REV. 341; *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (NRA case) (1935), Comment (1935) 4 FORDHAM L. REV. 457; *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330 (1935), (1935) 4 FORDHAM L. REV. 498; *United States v. Butler*, 56 Sup. Ct. 312 (1936) (AAA case); *Ashwander v. Tennessee Valley Authority*, 56 Sup. Ct. 466 (1936), Comment (1936) 5 FORDHAM L. REV. 114.

2. U. S. CONST. Art. 1, § 8, cl. 7.

3. ROGERS, *POSTAL POWER OF CONGRESS* (1916) 23.

4. "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." *FEDERALIST* (1788) No. 42.

5. ROGERS, *POSTAL POWER OF CONGRESS* (1916) 25. In New York alone was danger perceived in the grant. At the state convention Mr. Jones moved an amendment which would limit the postal clause so that Congress could not effect construction or repair of highways in a state without that state's consent. 2 ELLIOTT'S DEBATES 379.

6. The postal system has grown to enormous size. See *POSTAL STATISTICS OF THE UNITED STATES FROM 1789 TO 1930, BY FISCAL YEARS* (U. S. Post Office Dept.); CHU, *THE POST OFFICE OF THE UNITED STATES* (2d ed. 1932).

Carriage of the mails was early made a government monopoly.<sup>7</sup> Later postal service was broadened to include the issuance of money orders,<sup>8</sup> the banking facilities of a postal savings bank,<sup>9</sup> and the common carrier function of the parcel post.<sup>10</sup> In addition, the system, with its extensive network of post-offices reaching every sizable community in the country, has become one of the most valuable administrative organizations in the employ of the federal government. For example, it has been called upon to collect taxes by the sale of stamps<sup>11</sup> and to borrow money by the sale of bonds.<sup>12</sup> Aside from the administrative activities, what has been outlined above constitutes the collectivistic functions of the post-office.<sup>13</sup> Naturally the government's incursions into the field of private business have not escaped vehement criticism.<sup>14</sup> But the postal system is more than a mere competitor of private business. It advances the public good by providing an instrumentality dedicated to the ideal of the cheap and efficient transmission of intelligence.<sup>15</sup> Further, it forms the background for the exercise of an indispensable national police power.

### *Congress May Establish Post-roads*

Under the plenary grant of power to establish post-roads Congress possesses

7. 1 STAT. 232 (1792). The modern statute is 35 STAT. 1123 (1909), 18 U. S. C. A. § 304 (1926). The monopoly is constitutional. *United States v. Bromley*, 53 U. S. 87 (1851); *United States v. Thompson*, Fed. Cas. No. 16,489 (D. Mass. 1846); see *Ex parte Jackson*, 96 U. S. 727, 735 (1877). For an early contention that the monopoly is unconstitutional see a pamphlet entitled "The Unconstitutionality of the Laws of Congress Prohibiting Private Mails" (1844), by Lysander Spooner.

8. 17 STAT. 297 (1872), 39 U. S. C. A. c. 19 (1926). This branch of the system grew rapidly. See POSTAL STATISTICS, *supra* note 6; REP. POSTMASTER GEN. (1935) 93. For a survey of this phase of the postal service see UNITED STATES POSTAL MONEY-ORDER SYSTEM (1915). The establishment of a postal money-order system is a valid exercise of the postal power. *Bolognesi v. United States*, 189 Fed. 335 (C. C. A. 2d, 1911), *cert. denied*, 223 U. S. 726 (1911).

9. 36 STAT. 814 (1910) as amended, 39 U. S. C. A. c. 20 (1926). Private banking failures in the last four years have led to a tremendous increase in postal savings deposits. See POSTAL STATISTICS, *supra* note 6; REP. POSTMASTER GEN. (1935) 94.

10. 37 STAT. 557 (1912), 39 U. S. C. A. § 240 (1928); *cf.* 43 STAT. 1067 (1925), as amended by 45 STAT. 942, 39 U. S. C. A. § 247 (1928).

11. Thus in 1935 the post-office sold documentary, internal revenue stamps, and stamps for the Bureau of Biological Survey of the Department of Agriculture. REP. POSTMASTER GEN. (1935) XIV. The Potato Act of 1935 provided for the imposition of a tax to be collected by the sale of stamps at post-offices. 49 STAT. 783, 7 U. S. C. A. § 802 (f) (1935), repealed, Act of Feb. 10, 1936, c. 42. A similar provision is contained in the Social Security Act. 49 STAT. 638, 42 U. S. C. A. § 1109 (1935).

12. Between the dates of March 1, 1935 and June 30, 1935, the Post Office Department sold United States Savings Bonds to 497,000 purchasers with a total maturity value of \$128,000,000. REP. POSTMASTER GEN. (1935) XIV. During the World War, the Department aided in the flotation of the Liberty Loans by the sale of thrift stamps.

13. For a more complete discussion of this phase of the postal service see ROGERS, POSTAL POWER OF CONGRESS (1916) 30-35.

14. A typical protest: "The Post Office Department in Business," address by W. R. Lence at the Propeller Club in New Orleans, Oct. 27, 1932 (N. Y. Pub. Lib. \*c. p. v. 2528).

15. KELLY, UNITED STATES POSTAL POLICY (1931) *passim*.

a powerful proprietary authority of as yet undefined extent. Although no case squarely involving the point has ever come before the courts, it would appear that in addition to selecting post-routes the federal government may build and maintain post-roads.<sup>16</sup> Since this grant keeps pace with the scientific advance of the nation and is not limited to the means of communication known and in use at the time the Constitution was adopted,<sup>17</sup> it follows that Congress can construct and operate railroads,<sup>18</sup> airlines,<sup>19</sup> and telegraph and telephone systems.<sup>20</sup> Moreover, with the exercise of federal condemnation powers<sup>21</sup> it would seem possible to nationalize the existing facilities.<sup>22</sup> Those features of the present services which are not directly involved in the transmission of intelligence could nevertheless be continued by the government on the theory that they are incidental private undertakings which render more efficient a governmental agency.<sup>23</sup> The same principle has been applied to

16. ROGERS, *POSTAL POWER OF CONGRESS* (1916) 61-81; POMEROY, *CONSTITUTIONAL LAW* (10th ed. 1888) § 412; HALL, *CONSTITUTIONAL LAW* (1925) § 321; MACGRUDER AND CLAIRE, *CONSTITUTION* (1933) 94 (in conjunction with war and commerce powers); BURDICK, *LAW OF THE AMERICAN CONSTITUTION* (1922) 340 (same). But see PUTNEY, *UNITED STATES CONSTITUTIONAL LAW AND LEGAL HISTORY* (1908) 255. 2 STORY, *COMMENTARIES* (5th ed. 1891) c. 18 contains a full discussion of the point involved. The Cumberland Road cases [*Seabright v. Stokes*, 44 U. S. 151 (1845); *Niel, Moore & Co. v. Ohio*, 44 U. S. 720 (1845); *Achison v. Huddleson*, 53 U. S. 293 (1851)], turn on the question of compacts between the federal government and the states, but Rogers [*supra*, at 96] thinks they plainly imply the power to establish post-roads encompasses the power to build and maintain them. Cf. *Dickey v. Maysville, etc., Co.*, 37 Ky. 113 (1838). He deems the point clinched by the cases involving eminent domain and federal incorporation of railway and bridge companies. *Kohl v. United States*, 91 U. S. 367 (1875) (exercise of federal condemnation powers for purposes of erecting combined courthouse, post-office, customs house, United States' depository, and internal-revenue and pension offices); *California v. Pacific R. Co.*, 127 U. S. 1 (1887) (under the postal, war, and commerce powers Congress may build or cause to be built a railroad and give a federal franchise to a corporation for the latter); *United States v. Inlots*, Fed. Cas. No. 15,441 (C. C. S. D. Ohio 1873) (without state consent Congress, under the postal power, may condemn land for the purpose of building a post office); *Latinette v. City of St. Louis*, 201 Fed. 676 (C. C. A. 7th, 1912) (Congress, under the postal and commerce powers, may build or authorize the building of an interstate bridge across a navigable stream and may empower a municipality to condemn lands for that purpose); see *Wilson v. Shaw*, 204 U. S. 24, 33 (1907).

17. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1 (1877).

18. Cf. *California v. Pacific R. Co.*, 127 U. S. 1 (1887), cited note 16, *supra*.

19. Congress, it is claimed, has the power to provide landing fields for mail planes. MACGRUDER AND CLAIRE, *THE CONSTITUTION* (1933) 95.

20. Cf. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1 (1877).

21. See the condemnation cases cited note 16, *supra*.

22. ROGERS, *POSTAL POWER OF CONGRESS* (1916) 150-156; CORWIN, *CONSTITUTION* (1926) 29 (under the postal and commerce powers). Acquisition of telegraph lines is made easy by a statute which, after granting telegraph companies the right of way over or through the public domain, military or post roads, and navigable streams, stipulates that the federal government may for postal, military, or other purposes purchase at an appraised value all the property of the companies which avail themselves of the above privileges. 14 STAT. 221 (1866), 47 U. S. C. A. §§ 1, 4 (1926).

23. *Osborn v. United States Bank*, 22 U. S. 738 (1824); *First Nat. Bank v. Fellows*,

justify, under the commerce clause, national ownership of hydro-electric units and the sale of power incidentally generated by them.<sup>24</sup> Thus the ownership of huge developments has been sanctioned where the grant was merely of power to regulate an activity, interstate commerce. It is reasonable to suppose that since the grant in the post-roads clause is both plenary and proprietary an equal if not greater authority to acquire property under it will be recognized by the courts.

### *Power of Exclusion from the Mails*

The postal clause is one of the primary founts of national police power. Police regulations which stem from this constitutional source generally stand on the congressional power to exclude from the mails.<sup>25</sup> Certain regulations are, of course, necessary to the protection of the physical facilities of the system and to the convenient handling of matter accepted for mailing. Among these may be mentioned laws making criminal the conversion or destruction of mail matter or the instrumentalities employed by the postal service<sup>26</sup> and laws prescribing the size and weight of mailable material.<sup>27</sup> In the same category are rules which render non-mailable matter which is inherently

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244 U. S. 416 (1917); *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180 (1921). The *Smith* case involved the constitutionality of the Federal Farm Loan Act, 39 STAT. 360 (1916) [since amended by 42 STAT. 1454 (1923) and EXEC. ORDER 6084 (1933)], 12 U. S. C. A. § 241 (1926), which set up federally financed banks to facilitate the making of low-interest loans to farmers. It was sustained on the ground that the banks were established as fiscal agents of the government, depositories of federal money, and purchasers of United States bonds and thus within the creative powers of Congress, even though they were "intended in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States Bank, or the authority given to national banks to carry on additional activities, destroyed the authority of Congress to create those institutions." *Id.* at 211. In the *Smith* case the activity was carried on by a federally owned corporation. Such a corporation could be formed to take over the railroads, airplane lines, and the telegraph and telephone systems. See on the subject of such corporations: VAN DORN, *GOVERNMENT OWNED CORPORATIONS* (1926); Comment (1935) 83 U. OF PA. L. REV. 346.

24. *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (1913); *Arizona v. California*, 283 U. S. 423 (1931); *Ashwander v. Tennessee Valley Authority*, 56 Sup. Ct. 466 (1936).

25. Exclusion from the mails is not the sole means of exercising postal police power. Cheaper rates are given to certain articles in order to encourage their circulation. Publications issued at regular intervals and circulated free or mainly free [48 STAT. 880, 39 U. S. C. A. § 293b (1934)], books sent by public libraries or associations not organized for profit [45 STAT. 953, 39 U. S. C. A. § 293a (1928)], and reading matter for the blind [48 STAT. 678, 39 U. S. C. A. § 331 (1934)] are so favored. The section admitting newspapers to the lower second-class mailing rates [20 STAT. 359 (1879), as amended by 48 STAT. 928, 39 U. S. C. A. § 226 (1934)], is likewise a beneficial police measure. But see p. 306, *infra*, where the regulatory features of this statute are discussed.

26. POSTAL LAWS AND REGULATIONS OF 1932, §§ 2336-2349.

27. *Id.* §§ 577-588

dangerous to the health and safety of postal employees.<sup>28</sup> But these are not, strictly speaking, the police regulations referred to above. Regulations of this class, by declaring various articles to be non-mailable, seek to protect the health, safety, and morals of the senders and recipients of mail matter and the public at large. Thus Congress has denied admittance to the mails to all matter on the outside of which is contained a defamatory, threatening, or obscene communication.<sup>29</sup> Seditious writings are barred.<sup>30</sup> Obscene matter and articles adapted or intended to prevent conception or produce abortions and circulars giving information as to where the same may be obtained likewise fall under a ban.<sup>31</sup> The use of the postal system is denied to those who seek to employ it to consummate a fraudulent scheme or obtain money or property under false pretenses.<sup>32</sup> Lottery tickets and circulars or advertisements concerning them,<sup>33</sup> prize-fight films,<sup>34</sup> insect pests,<sup>35</sup> intoxicating liquors,<sup>36</sup> and small arms capable of being concealed on the person<sup>37</sup> are also non-mailable. Periodicals are denied the cheap second-class mail rates, and thus for all practical purposes excluded from the use of the mails, unless paid-for advertising is clearly distinguished from editorial, feature and news items, and

28. 35 STAT. 1131 (1909), as amended by 48 STAT. 1063, 18 U. S. C. A. § 340 (1934).

29. 25 STAT. 187 (1888), as amended, 18 U. S. C. A. § 335 (1926). *Warren v. United States*, 183 Fed. 718 (C. C. A. 8th, 1910) (section is constitutional). See also 47 STAT. 649 (1932), as amended by 49 STAT. 427, 18 U. S. C. A. § 338a (1935), which is the recently enacted extortion statute.

30. 40 STAT. 230 (1917), 18 U. S. C. A. §§ 343-345 (1926). The statute is valid. *Milwaukee Pub. Co. v. Burleson*, 255 U. S. 407 (1921); *Masses Pub. Co. v. Patten*, 246 Fed. 24 (C. C. A. 2d, 1917). The postmaster is to judge whether the matter offered for mailing offends the statute and the courts will not disturb his finding unless he is clearly wrong. *Milwaukee Pub. Co. v. Burleson*, *supra*; *Masses Pub. Co. v. Patten*, *supra*; *Gitlow v. Kiely*, 44 F. (2d) 227 (S. D. N. Y. 1930).

31. 17 STAT. 302 (1873), as amended to 36 STAT. 1339 (1911), 18 U. S. C. A. § 334 (1926). The constitutionality of the section has never been contested in the Supreme Court. *Public Clearing House v. Coyne*, 194 U. S. 497, 508 (1904). In affirming convictions, however, the Court has approved the validity of the section *sub silentio*. *Grimm v. United States*, 156 U. S. 604 (1895); *Swearingen v. United States*, 161 U. S. 446 (1896); *Dunlop v. United States*, 165 U. S. 486 (1897); *United States v. Limehouse*, 285 U. S. 424 (1932). "Indecent" within the meaning of the statute also includes "matter of a character tending to incite arson, murder or assassination." 36 STAT. 1339 (1911), 18 U. S. C. A. § 334 (1926). This portion of the section is valid. *Magon v. United States*, 248 Fed. 201 (C. C. A. 9th, 1918), *cert. denied*, 249 U. S. 618 (1919).

32. 25 STAT. 873 (1889), as amended by 35 STAT. 1130 (1909), 18 U. S. C. A. § 338 (1926). The section is valid. *Badders v. United States*, 240 U. S. 391 (1916); *New v. United States*, 245 Fed. 710 (C. C. A. 9th, 1917), *cert. denied*, 246 U. S. 665 (1918).

33. 17 STAT. 302 (1872), as amended to 35 STAT. 1129 (1909), 18 U. S. C. A. § 336 (1926). The section is constitutional. *Ex parte Jackson*, 96 U. S. 727 (1877); *In re Rapier*, 143 U. S. 110 (1892); *Horner v. United States*, 143 U. S. 570 (1892).

34. 37 STAT. 240 (1912), 18 U. S. C. A. § 405 (1926). *Cf. Weber v. Freed*, 239 U. S. 325 (1915) (portion of section which prohibits importation of prize fight films held valid under commerce clause).

35. 33 STAT. 1270 (1905), 7 U. S. C. A. § 143 (1926).

36. 35 STAT. 1131 (1909), as amended to 48 STAT. 1063, 18 U. S. C. A. § 340 (1934).

37. 44 STAT. 1059, 18 U. S. C. A. § 361 (1927).

unless a sworn statement is filed with the postmaster general and the postmaster at the office of which the publication is entered, setting forth certain information as to its ownership and management.<sup>38</sup>

Federal police power can also make itself felt in regulations which are designed to complement state legislation. The first bill of this nature based on the postal authority of Congress was sponsored by Calhoun in 1835. It sought to prevent the introduction of anti-slavery literature into states which prohibited its circulation, and would, in effect, have denied the use of the mails to such publications when addressed to southern destinations.<sup>39</sup> The bill was never passed. A statute somewhat similar in form was enacted in 1917 which made criminal the use of the mails to carry liquor advertising into states which had placed a ban upon such advertising.<sup>40</sup> This legislation was repealed in 1934.<sup>41</sup> From time to time, bills have been offered with the purpose of filling gaps in state blue-sky legislation by forbidding the use of the mails to evade local regulations.<sup>42</sup> The most recent example of complementary federal legislation is contained in Section 8 of the Public Utility Holding Company Act.<sup>43</sup> This section prohibits the ownership of interests in competing gas and electric units by holding companies in violation of state law and denies them the use of the mails to consummate the acquisition of the illegal interest.<sup>44</sup>

The constitutionality of the use of the postal clause to the end that state regulation be made more efficient has never been before the Supreme Court. However, analogous laws which are based on the commerce clause and which bear the *imprimatur* of the Court provide ample precedent and all but remove the question of constitutionality. Thus a statute is valid which forbids the shipment into a state of goods in violation of state law.<sup>45</sup> Again the Court has approved the type of enactment which obliterates the original package doctrine with respect to certain goods and renders them amenable to state

38. 37 STAT. 553, 554 (1912), as amended by 47 STAT. 1486, 39 U. S. C. A. §§ 233, 234 (1933). These requirements are constitutional. *Lewis Pub. Co. v. Morgan*, 229 U. S. 288 (1913).

39. See the discussion in 6 McMASTER, HISTORY OF THE PEOPLE OF THE UNITED STATES (1883) 288-291.

40. 39 STAT. 1069 (1917), as amended to 40 STAT. 1151 (1919), 18 U. S. C. A. § 341 (1926).

41. Act of Jan. 11, 1934, c. 1, tit. 1, § 12, 48 STAT. 316.

42. See *Hearings before Committee on Banking and Currency on S. 875*, 73d Cong., 1st Sess. (1933) (A Study of the Economic and Legal Aspects of the Proposed Federal Securities Act) 325-328.

43. 49 STAT. 817, 15 U. S. C. A. § 79h (1935).

44. The section appears to be invalid as a postal provision. See p. 321, *infra*.

45. *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U. S. 311 (1917) (intoxicating liquors). This case established the constitutionality of 37 STAT. 699 (1913), reenacted, 49 STAT. 877, 27 U. S. C. A. § 122 (1935). Cf. 49 STAT. 494, 49 U. S. C. A. § 61 (1935) (prison goods), which is valid by analogy. See also *Rupert v. United States*, 181 Fed. 87 (C. C. A. 8th, 1910), which held valid a statute [Lacey Act, 31 STAT. 183 (1900), as amended to 49 STAT. 380, 18 U. S. C. A. § 392 (1935)] prohibiting the interstate shipment of game killed in violation of state law.

regulation upon delivery to the consignee.<sup>46</sup> Such legislation constitutes neither a delegation of the powers of Congress nor an enlargement of the powers of the states.<sup>47</sup>

Again, the congressional power to exclude from the mails is exercised to supplement federal regulation in other fields. Thus certain publications which violate the copyright laws are non-mailable.<sup>48</sup> The use of the mails in connection with a counterfeiting scheme is forbidden.<sup>49</sup> So also, the Espionage Act of 1917 contains a section which makes it unlawful to send through the mails any matter in violation of its provisions.<sup>50</sup>

The reasoning employed to bring exclusionary legislation within the constitutional fold is not quite clear. Out of the varying and sometimes obscure viewpoints which have been taken, two theories stand out.<sup>51</sup> One proceeds as follows:<sup>52</sup> before the Constitution was adopted each state had the power to establish post-offices and post-roads; in the exercise of this power it could have promulgated police regulations designed to protect its citizens against harmful influence through misuse of the postal system; by adopting the Constitution the states completely surrendered to the federal government all postal powers (the incidental police power included) which they formerly possessed; where the public health, safety, or morals demand it, Congress, by excluding matter from the mails, may indirectly deal with crime and immorality within the states, although direct intervention would be unauthorized. The other theory<sup>53</sup> is based on the fact that the government owns the postal system. It maintains, that as proprietor the United States may exclude matter from the mails on the ground of public policy; that the use of the mails is a privilege and not a right;<sup>54</sup> and that as a consequence Congress is not limited in its exclusionary powers to actually or potentially dangerous articles, but may deny the facilities of the postal system to matter, the circulation of which it deems unwise or undesirable.

Assuming that either of the above theories is sufficient to account for the

46. *Whitfield v. Ohio*, 56 Sup. Ct. 532 (1936) (prison goods—Hawes-Cooper Act, 45 STAT. 1084, 49 U. S. C. A. § 60 [1929]); *In re Rahrer*, 140 U. S. 545 (1891) (intoxicating liquors—Wilson Act, 26 STAT. 313 [1890], 27 U. S. C. A. § 121 [1926]); *Rhodes v. Iowa*, 170 U. S. 412 (1898) (same).

47. *In re Rahrer*, 140 U. S. 545 (1891).

48. 35 STAT. 1083 (1909), 17 U. S. C. A. §§ 32, 33 (1926); 20 STAT. 359 (1879), 39 U. S. C. A. § 227 (1926).

49. 25 STAT. 873 (1909), 18 U. S. C. A. § 338 (1926).

50. 40 STAT. 230 (1917), 18 U. S. C. A. § 343 (1926); see note 30, *supra*.

51. Professor Cushman mentions a third, based on the special duty to protect the people from the dangers inherent in an efficient postal system. Cushman, *National Police Power Under the Postal Clause of the Constitution* (1920) 4 MINN. L. REV. 402, 420. This theory is merged in the first theory set forth in the text.

52. *In re Rapier*, 143 U. S. 110 (1892); Brief, submitted by Samuel Untermyer, Counsel, contained in Report of the Committee to Investigate the Concentration of Control of Money and Credit, H. R. REP. No. 1593, 63d Cong., 3d Sess., Ser. No. 424 (1913) 120.

53. This is the theory adopted by Professor Cushman. Cushman, *supra* note 51, at 421.

54. As to whether the use of the mails is a privilege or a right and the importance of the distinction, see p. 309, *infra*.

source of postal police power, there still remains to be determined the limits within which the power may be exercised. Here the field of speculation must be invaded to some extent, for since no law based on the postal grant has ever been declared unconstitutional, there exists no judicially settled boundary about the clause. *Dictum* and the general principles of constitutional law provide some guide. Thus it is clear that federal legislation based upon the postal power, just as in the case of legislation based upon any other constitutional grant, is subject to the prohibitions contained in the first ten amendments.<sup>55</sup> No postal statute may curtail the freedom of religion<sup>56</sup> or of the press,<sup>57</sup> authorize an unlawful search or seizure,<sup>58</sup> or deprive a person of life, liberty or property without due process of law. While the field is fertile for moot questions concerning the first three provisions mentioned, it is in the application of the last, the due process clause of the Fifth Amendment, that the greatest difficulty is encountered.

Immediately, upon entering the field of due process, the problem is presented—does the Constitution insure an individual the *right*<sup>59</sup> to use the mails, the *privilege*<sup>60</sup> to use the mails, or merely an *immunity*<sup>61</sup> from state legislation on the subject? If he has merely an immunity from state legislation, the further inquiry must be—has the individual by the law of the *states* a right or a privilege to use the mails? Thus in any event it is apparently necessary to decide whether the claim to the use of the mails is a right or a privilege. The Supreme

55. 1 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* (2d ed. 1929) § 67.

56. See Cushman, *supra* note 51, at 426.

57. 2 WILLOUGHBY, *op. cit.* *supra* note 55, § 657; ROGERS, *POSTAL POWER OF CONGRESS* (1916) 117 *et seq.*; Cushman, *supra* note 51, at 426.

58. ROGERS, *POSTAL POWER OF CONGRESS* (1916) 123-126; 2 WILLOUGHBY, *op. cit.* *supra* note 55, § 657. It is made a crime for postal employees to open mail matter. 35 STAT. 1125 (1909), 18 U. S. C. A. § 318 (1926). Further, exclusionary legislation usually contains clauses restricting the opening of mail matter to authorized employees of the dead letter office or persons armed with a proper search warrant. See for example, 40 STAT. 230, 18 U. S. C. A. § 343 (1926).

59. A right is given: *Hoover v. McChesney*, 81 Fed. 472 (C. C. D. Ky. 1897); see *Milwaukee Pub. Co. v. Burleson*, 255 U. S. 407, 432 (1921) (dissenting opinion by Brandeis); ROGERS, *POSTAL POWER OF CONGRESS* (1916) 178.

60. A privilege is given: *Missouri Drug Co. v. Wyman*, 129 Fed. 623 (C. C. E. D. Mo. 1904); see Cushman, *supra* note 51, at 123; Pam, *Powers of Regulation Vested in Congress* (1910) 24 HARV. L. REV. 77, 99-100; Barrett, *Is There a National Police Power?* (1934) 14 B. U. L. REV. 243, 267. But see the writer's change of position in Barrett, *The Underlying Conflict Between Our Constitutional Scheme of Government, and the Apparent Trend of Congressional Legislation and Executive Administration* (1936) 16 B. U. L. REV. 10, 80.

61. The contention that the Constitution provides only an immunity from state legislation has been made with reference to the interstate commerce clause. GAVITT, *THE COMMERCE CLAUSE* (1932) 36, 39. By analogy it applies here. The reasoning is as follows: The Constitution is here dealing with public and not private law, it being concerned with setting a boundary between state and federal jurisdiction; before the Constitution was adopted, the right or privilege to use the postal system arose from state law; the Constitution merely transferred the power to maintain and control the post-office from the state to the federal government; the change did not affect the nature of an individual's claim upon the use of the system, but merely established an immunity from state legislation.

Court has neither directly passed upon the point nor indicated by *dictum* what stand it might take. Since no consistent terminology has been in general use, it would be futile to seek a solution in the welter of loose language with which both the higher and lower courts clothe their conception of an individual's claim to the use of the postal system. While the distinction between right and privilege is of academic importance,<sup>62</sup> practically, it would make a difference only in the theory upon which a case of due process is brought. The ultimate questions as to the extent of the postal power which the court would have to answer would be substantially the same whether a right or a privilege be involved.<sup>63</sup> Where only a privilege is involved one who attacks the constitutionality of a postal statute is required to show unfair discrimination or to go one step back and show interference with his right to do business. If a right be involved, the denial thereof is sufficient to raise the question of due process. Although the theory in each instance would differ, the basic issues, as to the extent of the postal police power, are always identical.

### *Legislation By Indirection*

The first inquiry addressed to a statute should be—is it a *postal* regulation; for if it is determined that the power to enact the legislation has not been delegated to Congress under the postal clause, the examination of its constitutionality ends there. No probing to fix the extent of the postal power is necessary.

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62. Thus, according to Hohfeldian terminology a right is a correlative of a duty and a privilege is a correlative of no-right. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923) 6, 60. Translated into terms applicable to the postal system: if an individual has a right, there is a corresponding duty upon the government to carry mail matter which he submits; if he merely has a privilege, there is no duty upon the government and it may annex conditions precedent to the use of the mails. See the discussion, as to the nature of the conditions which may be imposed, in Cushman, *supra* note 51, at 424. See also, note 63, *infra*.

63. Assuming that the use of the mails is a right, it is still subject to police regulation. 3 WILLOUGHBY, *op. cit. supra* note 55, § 1043. To hold a police regulation valid, it must appear that the federal government has the general power to enact it [*cf.* HUGHES, *THE SUPREME COURT* (1928) 154-156], and that this particular regulation is not unreasonable, capricious or arbitrary [*cf.* 3 WILLOUGHBY, *op. cit. supra* note 55, at 1701-1706, 1772; *Nebbia v. New York*, 291 U. S. 502, 525 (1933)]. The latter inquiry is a factual test which is applied to the circumstances of each case after the first-mentioned requirement has been satisfied. The former requirement involves a decision as to whether the subject matter regulated is amenable to police legislation. It also calls for a determination as to which sovereignty, the state or the federal government, is the proper authority to promulgate the law. Now if it be assumed that the use of mails is a privilege, it may still be urged that deprivation thereof makes it impossible to carry on a business and thus results in a deprivation of that right (this contention is made in *Pettergill, Is the Death Sentence in the Senate Public Utility Holding Company Bill Unconstitutional?* 79 Cong. Rec., June 20, 1935, at 10218, 10233). Or it may be contended that the regulation is discriminatory and that equal protection of the laws under the Fifth Amendment is denied. [Cushman, *supra* note 51, at 439. Compare the doctrine of unconstitutional limitations. Merrill, *Unconstitutional Conditions* (1929) 77 U. OF PA. L. REV. 879; Hale, *Unconstitutional Conditions and Constitutional Rights* (1935) 35 COL. L. REV. 321]. But in any event the same questions as to the extent of police power must be answered.

Just what is a postal statute and what is not is a question which admits of no inclusive answer. Clearly, if Congress employs exclusion from the mails solely as a sanction to enforce legislation not justifiable under any other grant, it has not acted under the authority of the postal clause.<sup>64</sup> Thus, if as once suggested,<sup>65</sup> Congress should require every corporation, whether engaged in interstate commerce or not, to give the fullest publicity to its corporate affairs by filing a report of its organization and business, and provide that non-compliance would result in complete deprivation of the use of the mails, the enactment would bear no substantial relation to the postal system and could in no wise be classified as a postal law.<sup>66</sup>

On the other hand, judicial approval has been obtained for purely police regulation designed to regulate matters not intrinsically related to the post-office.<sup>67</sup> They are justified on the ground that the federal government is not compelled to allow the postal system, an instrumentality within its control, to be employed for improper ends. In all of these cases, however, the objectionable practice was advanced through the use of the mails; while in the corporate publicity proposal, the mails were involved only remotely. For example, the use of the mails to perpetrate a fraud is forbidden. Here the letter containing the fraudulent offer is actually sent through the mails and the scheme would be impossible of fruition were it not for the immediate utilization of the postal facilities. But where the use of the mails is denied entirely without regard to the nature of the article sent, it is obvious that the only nexus between the corporation regulated and the postal system is the universal necessity of every business to resort to the mails in order to carry on its ordinary affairs. To maintain that such a relation is sufficient to bring the postal power into

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64. There exist two lines of cases on the question of legislation by indirection. One line stands for the proposition that when Congress passes a law purporting to be in the exercise of a particular congressional power, the Court may not inquire into the motive underlying the law. *Veazie Bank v. Fenno*, 75 U. S. 533 (1869); *In re Kollock*, 165 U. S. 526 (1897); *Champion v. Ames*, 188 U. S. 321 (1903); *McCray v. United States*, 195 U. S. 27 (1904); *United States v. Delaware & Hudson Co.*, 213 U. S. 366 (1909); *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180 (1921); *Arizona v. California*, 283 U. S. 423 (1931). The other line of cases reveals that in many instances the Court has shown no hesitation in going behind the declaration on the face of a statute. *Child Labor Tax Case*, 259 U. S. 20 (1922); *Hill v. Wallace*, 259 U. S. 44 (1922); *Linder v. United States*, 268 U. S. 5 (1925); *Trusler v. Crooks*, 269 U. S. 475 (1926); *United States v. Constantine*, 296 U. S. 280 (1935); *Hopkins Federal Sav. & Loan Ass'n v. Cleary*, 56 Sup. Ct. 235 (1935); *United States v. Butler*, 56 Sup. Ct. 312 (1936). Cf. the instances where the Court investigated the motives of state legislatures, cited in Beck, *Nullification by Indirection* (1910) 23 HARV. L. REV. 413, 453 *et seq.* It is interesting to note that when Beck wrote his article in 1910 there were no Supreme Court cases available for him to cite in favor of his contention that legislation by indirection was improper. It is only in comparatively recent times that the Court has resorted to investigations of Congressional motive. In every case in the first line, the statute was sustained and in every case in the second line the statute was held invalid. Here is one of the clearest illustrations of the statement that the Supreme Court really remains unfettered by precedent.

65. Pam, *supra* note 60, at 99.

66. See Cushman, *supra* note 51, at 440.

67. See p. 306, *supra*.

play, is to maintain that Congress can regulate every business, a *reductio ad absurdum*. And yet, as is usual in constitutional limitations there is no logical stopping place between the two extremes. What is a postal regulation, will probably become a question to be decided upon the facts of each case, much as the question of what is "commerce" is determined in controversies arising under the interstate commerce clause.<sup>68</sup>

### *The Securities Act of 1933*

Congress in recent legislation, the Securities Act of 1933,<sup>69</sup> The Securities Exchange Act of 1934<sup>70</sup> and The Public Utility Holding Company Act of 1935,<sup>71</sup> has resorted to the postal power in a more extreme fashion than ever before. The court tests which these enactments provoke will probably remove much of the blur from the present roughly sketched judicial delineation of postal police power. If the acts are sustained as postal regulations, then the post-office clause will take its place alongside the commerce clause as a major source of federal police authority.

The Securities Act (and this is also true of the two other acts) reflects the widespread belief that the glare of public disclosure is one of the most efficacious means of insuring fair corporate practice.<sup>72</sup> Enforced publicity and other forms of governmental control are justified by the proponents of the Act on the ground that "when a corporation seeks funds from the public it becomes in every true sense a public corporation. Its affairs cease to be the private prerequisite of its bankers and managers; its bankers and managers themselves become public functionaries."<sup>73</sup> The Securities Act is the inaugural attempt of the federal government to prevent the issuance of unsound securities. As a condition precedent to a public offering through the mails or instrumentalities of interstate commerce, it requires that there be filed a registration statement containing information useful to the investor about the corporation, its officers, directors and principal stockholders, the underwriters, and the details of the issue.<sup>74</sup> Section five, the key enforcement section of the Act, contains the prohibitions relating to interstate commerce and the mails.<sup>75</sup> Insofar as the mails are involved Section five makes it unlawful to use them to sell, or offer to sell, by means of a prospectus or otherwise, or to send through the mails for the purpose of sale, or delivery after sale, any unregistered security.<sup>76</sup> It is

68. Cf. GAVIT, *THE COMMERCE CLAUSE* (1932) cc. 4, 5.

69. 48 STAT. 74 (1933), as amended by 48 STAT. 905, 15 U. S. C. A. c. 2A (1934).

70. 48 STAT. 881, 15 U. S. C. A. c. 2B (1934).

71. 48 STAT. 838, 15 U. S. C. A. c. 2C (1935).

72. See BRANDEIS, *OTHER PEOPLE'S MONEY* (1913) c. 5; cf. Rohrllich, *The New Deal in Corporation Law* (1935) 35 COL. L. REV. 1167, 1170.

73. Frankfurter, *The Federal Securities Act II* (Aug. 1933) 8 FORTUNE 53, 111. See also ROOSEVELT, *ON OUR WAY* (1934) 46; BERLE AND MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) c. 4.

74. Securities Act §§ 5, 6, 7, 48 STAT. 77, 78 (1933), as amended by 48 STAT. 906, 15 U. S. C. A. §§ 77e, 77f, 77g (1934).

75. Only the postal provisions will be considered here.

76. Securities Act § 5a, 48 STAT. 77 (1933), as amended by 48 STAT. 906, 15 U. S. C. A. § 77e (a) (1934).

likewise unlawful to send through the mails any prospectus relating to a registered security which prospectus does not conform to the requirements of the Act.<sup>77</sup> Further, unless such a prospectus accompanies or precedes it, no registered security may be sent through the mails for the purpose of sale or delivery after sale.<sup>78</sup> Certain securities,<sup>79</sup> including those issued before or within sixty days after the passage of the Act,<sup>80</sup> those sold by an issuer who is a resident or domestic corporation to persons resident in the same state,<sup>81</sup> those issued under government supervision,<sup>82</sup> and those exchanged by an issuer with its present security holders are exempt<sup>83</sup> from the above provisions. Again, Section five applies only to issuers, underwriters and dealers (including brokers); and they are subject to its provisions only under certain circumstances. Issuers are subject to these provisions whenever they make a public offering.<sup>84</sup> Dealers (including underwriters no longer functioning as such with regard to the security involved) are liable to the provisions of Section five as to transactions in a security involving all or any part of an unsold allotment to or subscription by such dealer as a participant in the distribution of the securities by the issuer.<sup>85</sup> Brokers are liable only when they solicit orders and not when they merely execute the orders of their customers.<sup>86</sup>

A person, who though not offering a security for sale, for a consideration describes it in a letter, investment service, newspaper or any communication, may not send the same through the mails without revealing the consideration so paid.<sup>87</sup> The use of the mails to defraud is prohibited.<sup>88</sup>

The Act also provides for civil liabilities. One who purchases from a seller who violates Section five may "recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."<sup>89</sup> Similarly, a vendor who sells a security by means of a false or misleading prospectus sent through the mails is liable for the same measure of damages to the

77. *Id.* § 5 (b) (1), 48 STAT. 77 (1933), as amended by 48 STAT. 906, 15 U. S. C. A. § 77e (b) (1) (1934).

78. *Id.* § 5 (b) (2), 48 STAT. 77 (1933), as amended by 48 STAT. 906, 15 U. S. C. A. § 77e (b) (2) (1934).

79. *Id.* § 3 (a), 48 STAT. 75 (1933), as amended by 48 STAT. 906 (1934) and 49 STAT. 557, 15 U. S. C. A. § 77c (a) (1935).

80. *Id.* (a) (1).

81. *Id.* (a) (11).

82. *Id.* (a) (2), (6), (7), (8).

83. *Id.* (a) (9).

84. Securities Act § 4 (1), 48 STAT. 77 (1933), as amended by 48 STAT. 906, 15 U. S. C. A. § 77d (1) (1934).

85. *Ibid.*

86. Securities Act § 4 (2), 48 STAT. 77 (1933), as amended by 48 STAT. 906, 15 U. S. C. A. § 77d (2) (1934).

87. Securities Act § 17 (b), 48 STAT. 84, 15 U. S. C. A. § 77q (b) (1933).

88. Securities Act § 17 (a), 48 STAT. 84, 15 U. S. C. A. § 77q (a) (1933). This section goes a bit further than the present mails fraud statute. See Herlands, *Criminal Law Aspects of the Securities Act of 1933* (1933) 67 U. S. L. REV. 562.

89. Securities Act § 12, 48 STAT. 84, 15 U. S. C. A. § 77l (1933).

purchaser unless such vendor sustains "the burden of proof that he did not know, and in the exercise of reasonable care could not have known" of the untruth or omission of any material statement therein contained.<sup>90</sup> Other civil liabilities are imposed where the registration statement is false or misleading.<sup>91</sup>

At the outset of a discussion of the constitutionality of the Act from the standpoint of the postal power it must be noted that its proponents considered it, primarily, a regulation of interstate commerce and argued its validity on that basis, invoking the postal clause only as an incidental prop.<sup>92</sup> It would now appear, however, that a stronger case can be built on the post-office clause.<sup>93</sup>

The first inquiry, is the law a postal statute, must be answered in the affirmative. Here the practice to be regulated, the fraudulent issuance of securities, involves the use of the mails in a direct and proximate fashion. True the Act regulates the issuance of all securities, whether fraudulent or not, but such regulation is necessary to achieve the broad purposes of the law and is an integrated part of the general plan to prevent fraudulent use of the mails.

The second inquiry, is the regulation a valid exercise of the police power, must likewise be answered in the affirmative, although more room for argument exists. Undoubtedly, issuance of securities is a matter which is subject to state police legislation.<sup>94</sup> Such legislation has been upheld on the ground that the state has the power to prevent the imposition of fraud on the public.<sup>95</sup> It appears reasonable to assume that the federal government has a similar jurisdiction based on its power to prevent instrumentalities within its control from being employed to defraud the public.<sup>96</sup> As to arguments based on the Tenth Amendment they augment the case for constitutionality. In the first place, by specific provision in the Act, state regulations remain unaffected.<sup>97</sup> Their requirements, necessitating the filing of reports and documents, must still be obeyed. In the second place, the doctrine of divided sovereignty was not incorporated into the Constitution to weaken the powers of government, but to render them more effective. Complete control over the issuance of securities might have been exercised by a single sovereign state before our

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90. *Ibid.*

91. Securities Act § 11, 48 STAT. 82 (1933), as amended by 48 STAT. 907, 15 U. S. C. A. § 77k (1934). For general treatments of the Act, see THORPE AND ELLIS, *THE FEDERAL SECURITIES ACT MANUAL* (1933); LASSER AND GERARDI, *FEDERAL SECURITIES ACT PROCEDURE* (1934); MEYER, *THE SECURITIES EXCHANGE ACT OF 1934* (1934) 157 *et seq.*

92. At the committee hearings in the House, Mr. Thompson, one of the draftsmen of the bill, pitched the Act squarely on the commerce clause, making no mention of the postal power. *Hearings Before Committee on Interstate and Foreign Commerce on H. R. 4314*, 73d Cong., 1st Sess. (1933) 39, 40. Throughout both the hearings before the House and the Senate no mention was made of the postal power. See *Hearings, passim* and *Hearings before Committee on Banking and Currency on S. 875*, 73d Cong., 1st Sess. (1933) *passim*.

93. *Jones v. Securities and Exchange Comm.*, 79 F. (2d) 617 (C. C. A. 2d, 1935).

94. *Hall v. Geiger-Jones Co.*, 242 U. S. 539 (1917); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559 (1917); *Merrick v. Halsey & Co.*, 242 U. S. 568 (1917).

95. See cases cited note 94, *supra*.

96. See p. 308, *supra*.

97. Securities Act § 18, 48 STAT. 85, 15 U. S. C. A. § 77r (1933).

federal system was established. Can it be argued that in setting up the national government, jurisdictional voids between state and national government were intended? State regulation is admittedly unable to deal with the interstate aspects of security selling. A state cannot control the mails, the chief sales instrumentality which bridges the gap between the security seller and the public.<sup>98</sup> It is helpless against the activities of individuals operating from other states.<sup>99</sup> How then can it be maintained that the federal government, in regulating these phases of the problem, invades the province of the states? The Act respects the spirit of the Constitution when it confines its principal regulatory provisions to issues intended for an interstate traffic. Local issues, it wisely leaves to state control.<sup>100</sup>

The remaining questions, do the means selected have a real and substantial relation to the end sought to be obtained, and are the means reasonable, also appear susceptible of affirmative response. It cannot be denied that were the mails closed to fraudulent transactions concerning the sale of securities, the exclusion would be impeccable in so far as constitutionality is involved. Indeed such transactions have been held to fall within the present mail frauds act.<sup>101</sup> But such regulation, because of administrative difficulties, falls far short of effective control. Consequently, it is necessary to impose compulsory registration of all issues in order to sift the good from the bad before public offering.<sup>102</sup> The civil and criminal liabilities imposed tend to deter the offering of fraudulent securities, the evasion of registration, and the falsification of registration statements. Charges of intermeddling in the affairs of corporations cannot be sustained. The Act merely requires that information of use to the investor in judging the financial condition of the corporation and the personal equation of those who control it, be filed for public reference. Trade secrets and the like, if contained in a registration statement will be protected and the public denied access thereto by the Commission.<sup>103</sup> Transactions which are innocuous in and of themselves may be prohibited on the ground that such prohibition is reasonably essential and incident to the main purpose of an enactment.<sup>104</sup> All the provisions of the law satisfy this description.

98. ROGERS, *POSTAL POWER OF CONGRESS* (1916) 127 *et seq.* And see 2 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* (2d ed. 1929) § 660a.

99. See *Hearings before the Committee on Interstate and Foreign Commerce on H. R. 4314*, 73d Cong., 1st Sess. (1933) 10, 99.

100. Securities Act § 3 (a) (11), 48 STAT. 906, 15 U. S. C. A. § 77c (a) (11) (1934).

101. *Stephens v. United States*, 41 F. (2d) 440 (C. C. A. 9th, 1930), *cert. denied*, 282 U. S. 880 (1930); *Hydney v. United States*, 44 F. (2d) 134 (C. C. A. 6th, 1930), *cert. denied*, 283 U. S. 824 (1931); *Foshay v. United States*, 68 F. (2d) 205 (C. C. A. 6th, 1934), *cert. denied*, 291 U. S. 674 (1934); *Levine v. United States*, 79 F. (2d) 364 (C. C. A. 9th, 1935); *Greenbaum v. United States*, 80 F. (2d) 113 (C. C. A. 9th, 1935).

102. That this is a reasonable requirement, see *Jones v. Securities and Exchange Comm.*, 79 F. (2d) 617 (C. C. A. 2d, 1935).

103. *Cf.* Securities Exchange Act § 24, 48 STAT. 901, 15 U. S. C. A. § 78x (1934). It is presumed that this provision will be followed by the Securities and Exchange Commission even though information be filed with it under another act.

104. *Purity Extract Co. v. Lynch*, 226 U. S. 192 (1912), and cases there cited; *United States v. Ferger*, 250 U. S. 195 (1919); *Westfall v. United States*, 274 U. S. 256 (1927); *Semler v. Dental Examiners*, 294 U. S. 608 (1935).

They appear to be intimately associated with and well calculated to achieve the laudatory purposes of the Act.

Finally, the Act cannot be successfully assailed as discriminatory. With the general purpose of the law, the extermination of fraud in the issuance of securities, instinct in every section, it adversely affects no individual not proximately related to the transactions involved.<sup>105</sup> Thus not every seller of securities not registered or otherwise issued in violation of the Act comes within its scope. Only those intimately associated with the actual issuance, the issuer, the underwriter and the dealer are regulated. There appears to be a reasonable basis for discrimination and the draftsmen of the Act have kept within it.

### *The Securities Exchange Act of 1934*

Whatever source of federal power may be advanced to sustain the Securities Exchange Act of 1934, it is apparent that it cannot rest upon the postal clause. An examination of its principal provisions conclusively reveals this. Roughly, the purpose of the Act proceeds along three paths:<sup>106</sup> to control credit in security transactions in order to limit speculation and avoid the unsettling economic disorders resulting therefrom; to regulate the security markets in order to prevent unfair practices; and to regulate securities publicly traded in so as to provide the purchaser with adequate information and prevent the taking of unfair advantage by insiders of information not available to the general public. Credit control is effectuated through provisions restricting the amount of credit which may be extended to customers engaged in margin transactions.<sup>107</sup>

Security market control is obtained by compelling registration in the case of a securities exchange<sup>108</sup> and authorizing the Securities and Exchange Commission to issue rules for the registration of dealers and brokers on over-the-counter markets.<sup>109</sup> The registration statement of the exchange must contain information as to its membership, rules and organization.<sup>110</sup> It is made unlawful for any broker, dealer or exchange to employ the mails or instrumentalities of interstate commerce for the purpose of using the

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105. See Bumiller, *Exemptions of Securities and Transactions Under the Federal Securities Act of 1933* (1936) 10 U. OF CIN. L. REV. 125.

106. MEYER, *SECURITIES EXCHANGE ACT OF 1934* (1934) 11; Securities Exchange Act § 2, 48 STAT. 881, 15 U. S. C. A. § 78b (1934). Cf. The Report of the Committee to Investigate the Concentration of Control of Money and Credit, H. R. REP. NO. 1593, 63d Cong., 3d Sess. Ser. No. 424 (1913) (Pujo Investigation) and the bill recommended by the Committee (p. 170-173).

107. Securities Exchange Act § 7, 48 STAT. 886, 15 U. S. C. A. § 78g (1934). Loans to brokers and dealers are also regulated. [*Id.* § 8, 48 STAT. 888, 15 U. S. C. A. § 78h (1934)]. Flexibility is lent to these provisions by placing their administration in the hands of the Federal Reserve Board with the power to adjust the details of the control plan by reasonable regulations. [*Id.* §§ 7, 8, *supra*].

108. Securities Exchange Act § 5, 48 STAT. 885, 15 U. S. C. A. § 78e (1934).

109. *Id.* § 15(a), 48 STAT. 895, 15 U. S. C. A. § 78o (1934).

110. *Id.* § 6 (a), 48 STAT. 885, 15 U. S. C. A. § 78f (a) (1934). Before an exchange will be registered it must show that its rules provide for expelling, suspending and disciplining members for just cause (just cause must include wilful violation of the provisions of the Act). *Id.* § 6 (b), 48 STAT. 884, 15 U. S. C. A. § 78f (b) (1934).

facilities of an exchange to effect or report any transaction in a security unless such exchange is registered.<sup>111</sup> Brokers who trade in their own account are subjected to regulation designed to minimize the conflict between their own and their customer's interests.<sup>112</sup> Certain manipulative devices have been prohibited (including wash and matched sales) and others (including pegging, short sales, and stop loss orders) left to regulation by the Commission.<sup>113</sup>

Security control is given to the Commission by registration provisions which make it unlawful to effect any transaction in an unregistered security (other than an exempted security) on a national securities exchange.<sup>114</sup> Solicitation of proxies through the mails or otherwise is subjected to the regulation of the Commission.<sup>115</sup> The unfair use of "inside" information is discouraged by provisions which make it mandatory upon officers, directors and principal stockholders to file reports of their security holdings and keep the same up to date by supplementary monthly reports whenever a change in their holdings is made.<sup>116</sup> Should any in this group make a profit by the purchase and sale, or sale and purchase of the corporation's securities within a six month period, such profit is recoverable at the suit of the corporation.<sup>117</sup> Further, no officer, director, or principal stockholder may sell short or on credit the securities of his corporation.<sup>118</sup> The Securities and Exchange Commission is given broad authority to investigate and cause to be enjoined violations of the Act.<sup>119</sup> Where in its opinion such action is necessary or appropriate to the protection of the investor<sup>120</sup> it may suspend for a period not exceeding one year or withdraw the registration of an exchange; deny, suspend for not more than one year, or expel any member or officer of a securities exchange; summarily suspend trading in any registered security for not more than ten days; and with the approval of the President, summarily suspend all trading on an exchange for not more than ninety days. The Commission may also alter the rules of an exchange where the Commission deems such change to be in the public interest and the exchange refuses to act.<sup>121</sup>

It requires no deep insight into the nature of stock exchange practice to

111. *Id.* § 5, 48 STAT. 885, 15 U. S. C. A. § 78e (1934).

112. *Id.* § 11 (a), (b), 48 STAT. 891, 14 U. S. C. A. § 78k (a), (b) (1934).

113. *Id.* § 9, 48 STAT. 889, 15 U. S. C. A. § 78i (1934); *id.* § 10, 48 STAT. 891, 15 U. S. C. A. § 78j (1934).

114. *Id.* § 12 (a), 48 STAT. 892, 15 U. S. C. A. § 781 (a) (1935). Registration statements are filed with the exchange and the Commission and must contain information relative to the organization and financial condition of the corporation, the extent of the security holdings of its officer, directors, stockholders, and underwriters, and other items. [*Id.* § 12 (b), 48 STAT. 892, 15 U. S. C. A. § 781 (b) (1935)]. In addition, periodical and other reports, intended to keep the filed information up to date, must be furnished. [*Id.* § 13, 48 STAT. 894, 15 U. S. C. A. § 78m (1934)].

115. *Id.* § 14, 48 STAT. 895, 15 U. S. C. A. § 78n (1934).

116. *Id.* § 16 (a), 48 STAT. 896, 15 U. S. C. A. § 78p (a) (1934).

117. *Id.* § 16 (b), 48 STAT. 896, 15 U. S. C. A. § 78p (b) (1934).

118. *Id.* § 16 (c), 48 STAT. 896, 15 U. S. C. A. § 78p (c) (1934).

119. *Id.* § 21, 48 STAT. 899, 15 U. S. C. A. § 78u (1934).

120. *Id.* § 19 (a), 48 STAT. 898, 15 U. S. C. A. § 78s (a) (1934).

121. *Id.* § 19 (b), 48 STAT. 898, 15 U. S. C. A. § 78s (b) (1934).

realize that the Act, briefly sketched above, is not a postal statute.<sup>122</sup> For example, one vital section of the Act involves the mails and provides that the use of the postal system is denied to those who desire to report or effect a transaction in a security or an unregistered exchange.<sup>123</sup> If it were sought to sustain this provision on the postal power, the attempt would fail. Here would be a clear instance of legislation by indirection. The actual practices which the enactment seeks to regulate are for the most part remote from the use of the mails. In addition the blanket prohibition on using the mails for any transaction on an unregistered exchange is far too broad.

However, it does not appear that such an extreme stand will be taken by the government. Commissioner Landis, the moving spirit behind the Act, at hearings before the House Committee on Interstate and Foreign Commerce frankly admitted that the Act's only hope was based on the interstate commerce power<sup>124</sup> and added that "the other powers have been dragged in incidentally . . . you try to get as many props as you can to support a particular matter."<sup>125</sup> As to the last point, that other props are important on particular matters, it may be said that, if the Act can be sustained on the commerce power, then many of the postal provisions will be valid as regulations designed to complement government control authorized under another delegated power.<sup>126</sup>

There is some force in the contention that a number of the postal provisions may stand, independent of the remainder of the Act, solely on the postal power. Among these may be mentioned the sections rendering non-mailable communications intended to aid in the manipulations of market prices<sup>127</sup> and

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122. The Act resembles in form and scope (although it would appear that it goes much further) the Grain Futures Act, 42 STAT. 998 (1922), 7 U. S. C. A. §§ 1-17 (1926). The latter was subjected to a test in *Chicago Board of Trade v. Olsen*, 262 U. S. 1 (1923). The Court placed its approval on portions of the Act but refused to consider the postal and interstate commerce provisions [42 STAT. 999 (1922), 7 U. S. C. A. § 6 (1926)]. While the Court's hesitancy is equivocal it might be ascribed to doubts as to the constitutionality of this form of legislation. Commissioner Landis grounds the Securities Exchange Act on cases like the Board of Trade case, *supra*. See *Hearings before Committee on Interstate and Foreign Commerce on H. R. 8720*, 73d Cong., 2d Sess. (1934) 32.

123. Securities Exchange Act § 5, 48 STAT. 885, 15 U. S. C. A. § 78e (1934).

124. *Hearings*, *supra* note 138, at 17, 32, 901.

125. *Id.* at 32.

126. *Cf.* notes 48-50, *supra*. The sections referred to in the text are Securities Exchange Act § 5, 48 STAT. 885, 15 U. S. C. A. § 78e (1934) (use of mails to transact business on unregistered exchange prohibited); *id.* § 15, 48 STAT. 895, 15 U. S. C. A. § 78o (1934) (regulation of over-the-counter market transactions through the mails); *id.* § 30, 48 STAT. 904, 15 U. S. C. A. § 78dd (1934) (prohibiting use of the mails to trade on foreign exchanges in order to evade the provisions of the Act).

127. Securities Exchange Act § 9, 48 STAT. 889, 15 U. S. C. A. § 78i (1934); *id.* § 10, 48 STAT. 891, 15 U. S. C. A. § 78j (1934). Here congressional power to prevent the mails from being employed as an instrumentality for the advancement of fraud would be sufficient to sustain the sections. Under the present mail frauds statute there has been secured at least one conviction for stock market manipulations. *United States v. Brown*, 79 F. (2d) 321 (C. C. A. 2d, 1935) (wash sales and bribing of customers' men).

*Cf.* 49 STAT. 981, 27 U. S. C. A. § 205 (f) (1935), setting up standards for liquor advertisements sent through the mails. It is sustainable on the same ground—prevention of fraud.

solicitations of proxies in violation of rules laid down by the Commission.<sup>128</sup> Despite the separability clause in the Act it is necessary to find that independent of the other provisions of the statute these could be given legal effect and that Congress intended them to stand even though the remainder of the Act fell.<sup>129</sup> The clause merely raises a presumption of divisibility which can be overcome by a showing that Congress would not have been satisfied with the Act unless the discarded parts were retained.<sup>130</sup> Whether these provisions would meet this test is conjectural. It may be said of them however, that if they were separately reenacted they would be valid.<sup>131</sup>

### *The Public Utility Holding Company Act of 1935*

Recognizing the harm resulting to investor and consumer from the abuse of the holding company as an economic instrumentality<sup>132</sup> and the patent inability of the states to cope with the vast interstate and in some instances nation-wide systems which have arisen<sup>133</sup> Congress, by means of the Public Utility Holding Company Act of 1935 has sought to impose regulation co-extensive with the evil. The Act provides for close supervision of the internal affairs of holding companies and the eventual liquidation of those units which cannot show an economic justification for their existence.<sup>134</sup> As in the acts previously outlined, registration with the Securities and Exchange Commission is required. Unless a holding company is registered it may not own or operate any utility assets for the interstate transmission of manufactured gas or electrical energy or actually transport the same in interstate commerce.<sup>135</sup> Nor may it use the mails or any instrumentality of interstate commerce to effect or perform any service, sales or construction contract with a public-utility company

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128. Securities Exchange Act § 14a, 48 STAT. 895, 15 U. S. C. A. § 78n (a) 1934. This section was inserted to prevent blind signing of proxies by dealers and brokers who carry securities for stockholders, and by the stockholders themselves, with the consequent perpetuation of the present management. That this lack of intelligent voting is an evil and on occasions provides an avenue for fraud cannot be doubted. The situation can exist only so long as the use of the mails to solicit is allowed. Here denial of the use of the mails may be justified as an attempt to avoid abuse of the mails.

129. *Dorchy v. Kansas*, 264 U. S. 286 (1924). A separability clause provides a rule of construction, "But it is an aid merely; not an inexorable command." *Id.* at 290. *Cf. Hill v. Wallace*, 259 U. S. 44 (1922).

130. *Williams v. Standard Oil Co.*, 278 U. S. 235 (1929); *Utah Power & Light Co. v. Pfof*, 286 U. S. 165 (1932).

131. See notes 127, 128, *supra*.

132. Comment (1936) 45 YALE L. J. 468, 472-478.

133. *Id.* at 478-481.

134. Public Utility Holding Company Act § 11, 49 STAT. 820, 15 U. S. C. A. § 79k (1935). This is the famous "Death Sentence" section. For a brief holding it unconstitutional, see (Pettergill, Is the "Death Sentence" in the Senate Public Utility Holding Company Bill Constitutional?) 79 Cong. Rec., June 20, 1935, at 10218. For a brief sustaining the Act, see *Hearings before Committee on Interstate Commerce on S. 1725*, 74th Cong., 1st Sess. (1935) 807-820.

135. Public Utility Holding Company Act § 4(a) (1), 49 STAT. 812, 15 U. S. C. A. § 79d (a) (1) (1935).

or holding company;<sup>136</sup> to publicly offer for sale or exchange any security of a member of its system or any holding company, or sell any such security, with reason to believe that public offering or distribution will be made through the mails or any instrumentality of interstate commerce;<sup>137</sup> to negotiate for or acquire any security or utility asset of any member of its system or any other public-utility company or holding company.<sup>138</sup> Exemptions from the provisions of the Act are, in general, left to the discretion of the Commission.<sup>139</sup>

If a registered holding company wishes to issue or sell its own securities or exercise any privilege to alter the rights of those who hold such securities, the proposal must first be submitted to the Commission for approval by means of a declaration.<sup>140</sup> With certain exceptions no registered holding company may acquire any securities, utility assets, or any other interest in any business without the approval of the Commission.<sup>141</sup> Nor may the securities of any public-utility company be acquired by an affiliate (or a person who would thereby become one) who is also an affiliate of any other public-utility or holding company without such approval.<sup>142</sup> Mutual service companies must make an application for approval to the Commission and are subject to detailed regulation.<sup>143</sup> Close supervision of the internal affairs of registered holding companies is provided for in sections dealing with inter-company (including loans, and service, sales and construction contracts) and other transactions.<sup>144</sup> Lobbyists must file details of their retainers and monthly reports of their compensation and expenses incurred.<sup>145</sup> Officers and directors of registered holding companies are under obligations similar to those placed upon them in the Securities Exchange Act.<sup>146</sup> Accounts and records must be kept in the manner prescribed by the Commission (should that body so decide) and inspection thereof must be allowed to the Commission and security holders.<sup>147</sup> Periodical and other reports may be required to keep filed information up to date and for such other and special reasons as the Commission may see fit.<sup>148</sup> The Com-

136. *Id.* subdivision (2) of subsection (a).

137. *Id.* subdivision (3) of subsection (a).

138. *Id.* subdivision (4) of subsection (a). The registration statement must contain, among other items, full particulars concerning the applicant's organization, financial conditions, important contracts, officers and directors and security-issuance history. Public Utility Holding Company Act § 5, 49 STAT. 812, 15 U. S. C. A. § 79e (1935).

139. *Id.* § 3, 49 STAT. 810, 15 U. S. C. A. § 79c (1935).

140. *Id.* § 6 (a), (b), 49 STAT. 814, 15 U. S. C. A. § 79f (a), (b) (1935) [subsection (b) sets out exemptions]. As to the contents of the declaration, see *id.* § 7 (a), 49 STAT. 815, 15 U. S. C. A. § 79g (a) (1935).

141. *Id.* § 9 (a) (1), 49 STAT. 817, 15 U. S. C. A. § 79i (a) (1) (1935).

142. *Id.* § 9 (a) (2), 49 STAT. 817, 15 U. S. C. A. § 79i (a) (2) (1935). For the necessary contents of the application for approval, see *id.* § 10 (a), 49 STAT. 818, 15 U. S. C. A. § 79j (a) (1935).

143. *Id.* § 13 (d), 49 STAT. 825, 15 U. S. C. A. § 79m (d) (1935).

144. *Id.* § 12, 49 STAT. 825, 15 U. S. C. A. § 79l (1935); *id.* § 13, 49 STAT. 825, 15 U. S. C. A. § 79m (1935).

145. *Id.* § 12(i), 49 STAT. 823, 15 U. S. C. A. § 79l (i) (1935).

146. *Id.* § 17 (a) (b), 49 STAT. 830, 15 U. S. C. A. § 79q (a), (b) (1935).

147. *Id.* § 15, 49 STAT. 828, 15 U. S. C. A. § 79o (1935).

148. *Id.* § 14, 49 STAT. 827, 15 U. S. C. A. § 79n (1935).

mission has broad investigatory powers<sup>149</sup> and may hold hearings in accordance with such rules and regulations as it may prescribe.<sup>150</sup>

It is impossible to view the Act as a postal statute.<sup>151</sup> Registration is here more than the filing of information deemed necessary to the protection of the investor who is frequently defrauded through use of the mails. It is essentially submission to thoroughgoing governmental supervision. That imposition and fraud has been visited upon investors and consumers by means of the many objectionable practices employed by public-utility companies is too well established to admit of doubt. But the fraud does not directly and proximately result through use of the postal system. Rather does it flow from the nature of the control exercised over vast accumulations of property by socially myopic individuals. Such control may be effectuated partially through use of postal facilities and it may be urged that the difference between this statute and accepted postal fraud legislation rests merely in a question of degree; but that is scarcely a conclusive argument. Differences in degree are frequently encountered and are often of crucial importance in constitutional problems. Here the difference must be deemed significant. The complete subjugation of an industry, no matter how desirable, cannot be predicated upon its common dependence on the facilities of the postal system.

Because of the manner in which the Act is constructed none of the many postal provisions can stand alone. On the other hand should substantial portions of the Act be found valid on the basis of another power, then the postal provisions would be sustainable as postal police regulations designed to aid in the achievement of a constitutionally attainable aim.<sup>152</sup>

### Conclusion

It has been suggested that only the Securities Act fairly comes within the scope of postal police power, the Securities Exchange Act and the Public Utility Holding Company Act being far more than postal statutes. The test developed, does the practice sought to be regulated involve the mails in a direct and proximate manner, is somewhat indefinite. A greater measure of certitude can be achieved only through the fire-test of further judicial application. One circumstance has in the past been given great weight—if fraud or other evil results from a particular use of the postal system and such harm could not be effectively inflicted by other means, then, since the federal government has exclusive control over the mails, the courts view denial of the use with great

149. *Id.* § 18, 49 STAT. 831, 15 U. S. C. A. § 79r (1935).

150. *Id.* § 19, 49 STAT. 832, 15 U. S. C. A. § 79s (1935).

151. No discussion of the bill as a postal statute was found in the hearings held by the Committee on Interstate Commerce of the Senate or the Committee on Interstate and Foreign Commerce of the House. One court has decided that the Act is not a postal statute. *Burco Inc. v. Whitworth*, C. C. A. 4th, Feb. 22, 1936, *cert. denied*, March 30, 1936.

152. See notes 48, 49, 50, *supra*, and accompanying text. The postal provisions referred to are: Public Utility Holding Company Act of 1935 § 4 (a) (2), (3), (4), (b), 15 U. S. C. A. § 79d (a) (2), (3), (4), (b); *id.* § 6 (a), (c), 15 U. S. C. A. § 79f (a), (c); *id.* § 8, 15 U. S. C. A. § 79h; *id.* § 9 (a), 15 U. S. C. A. § 79i (a); *id.* § 11 (g), 15 U. S. C. A. § 79k (g); *id.* § 12 (a)-(h), 15 U. S. C. A. § 79l (a)-(h); *id.* § 13 (a), (b), (e), (f), 15 U. S. C. A. § 79m (a), (b), (e), (f).

leniency. But the postal clause can not be invoked as a source of police power wherever a business makes use of the mails. Universal dependence upon the postal system cannot be made the basis of such an extension of congressional power.

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SUPERVENING IMPOSSIBILITY OF PERFORMANCE AS A DEFENSE.—The ever increasing tenseness in international relations, fomented by internal strife, and aggravated by international animosities, may soon eventuate in armed conflict between major powers. One inevitable consequence of any such conflict, because of the extensiveness of modern commercial intercourse, will be a serious interference with the performance of executory contracts throughout the world. Thus the moment is rendered propitious for the examination of an excusatory mechanism created by the courts, through the use of which promisors are relieved from the obligations of their contracts upon the plea that subsequent events have rendered performance impossible.

### *The General Rule*

The civil law recognized supervening impossibility of performance as a complete defense to an action on contract, unless it appeared that the promisor had assumed the risk that performance would remain possible.<sup>1</sup> A diametrically opposed view was adopted by the common law. Thus in *Paradine v. Jane*,<sup>2</sup> decided in 1647, the court declared, and modern authorities reiterate,<sup>3</sup> that where supervening events render performance impossible, the promisor is not excused unless the parties have so provided, notwithstanding such events were beyond his control. The rationale underlying this principle is clear. It is premised on the position that a contractual obligation is one voluntarily undertaken; that the parties are free to determine the precise terms, conditions and limitations of such obligation; that it is within the power of the promisor to qualify his obligation; that an obligation undertaken without qualification must be performed or damages given; and that it is the duty of the court to enforce the contract as made by the parties.<sup>4</sup> The principle enunciated in *Paradine v.*

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1. 1 DOMAT, CIVIL LAW (1850) 174, art. IX; 3 WILLISTON, CONTRACTS (1920) § 1979.

2. Aleyn 26, 82 Eng. Reprints 897 (K. B. 1647). The case is not strictly one of impossibility. See Page, *The Development of the Doctrine of Impossibility of Performance* (1920) 18 MICH. L. REV. 589, 594.

3. The Harriman, 76 U. S. 161 (1869); see Lavigne v. Lavigne, 176 Atl. 282, 284 (N. H. 1935); Cameron-Hawn Realty Co. v. City of Albany, 207 N. Y. 377, 382, 101 N. E. 162, 163 (1913). See also 7 HALSBURY'S, LAWS OF ENGLAND (2d ed. 1932) 209; 3 STEPHENS, COMMENTARIES (19th ed. 1928) 176; Woodward, *Impossibility of Performance as an Excuse for Breach of Contract* (1901) 1 COL. L. REV. 529.

4. The language of the reporter has become classic: "... where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him . . . but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." *Paradine v. Jane*, Aleyn 26, 27, 82 Eng. Reprints 897, 897 (K. B. 1647).