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HOW THE UNITED STATES POSTAL SERVICE (USPS) COULD ENCOURAGE MORE LOCAL ECONOMIC DEVELOPMENT

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I. INTRODUCTION

Over the last ten years, the United States Congress has made it increasingly difficult for the United States Postal Service ("USPS")[1] to encourage economic development on the ground.[2] Congress has deprived the USPS of its traditional means of achieving local economic development goals, which have largely benefitted sub-national governments by providing indirect federal subsidies. This deprivation has occurred, at least in part, through the 2006 Postal Accountability and Enhancement Act ("PAE Act"),[3] which expressly limits the USPS's right to offer certain non-postal services like domestic money transfers and other financial products.[4]

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1. *See* KEVIN R. KOSAR, CONG. RESEARCH SERV., THE U.S. POSTAL SERVICE: COMMON QUESTIONS ABOUT POST OFFICE CLOSURES 5 (2012):

> The USPS was established in 1971 by the Postal Reorganization Act (PRA; P.L. 91-375; 84 Stat. 725). Previously, postal services have been provided by the U.S. Post Office Department (USPOD), a government agency that received annual appropriations from Congress . . . . Under this configuration, the Post Office had operational difficulties and developed a reputation for incompetence and corruption.
>
> The PRA abolished USPOD and replaced it with the U.S. Postal Service [(USPS)] . . . , an "independent establishment of the executive branch" (39 U.S.C. 201). The USPS . . . has far greater freedom to run its operation than the [USPOD].

2. *See generally* OFFICE OF THE INSPECTOR GEN., U.S. POSTAL SERV., RETAIL OPPORTUNITIES FOR THE U.S. POSTAL SERVICE, (Sept. 4, 2015) (finding that the USPS could provide better non-postal services to its existing customers, including through Sure Money/Dinero Seguro, as a way to achieve political, economic and social goals).

3. Pub. L. No.109-435, 120 Stat. 3198 (2006) (attempting to "reform the postal laws of the United States").

4. Traditionally, the USPS had an implied right to offer a range of financial services. This right was assigned to the USPS through federal legislative action, although this legal authority was not expressly provided to the USPS. For example:

> Congress assigned the USPS the "general duty" to "maintain an efficient system of collection, sorting, and delivery of the mail nationwide" (39 U.S.C. 403(b)). In order to carry out this obligation, the law gives the USPS the "specific powers" to "provide for the collection, handling, transportation, delivery, forwarding, returning, and holding of mail, and for the disposition of undeliverable mail" (39 U.S.C. 404(a)(1)); and [to] "*determine the need for*

The PAE Act was enacted at the behest of interested parties, which included U.S. private sector firms in the banking and financial services industries.[5] These interested parties supplied Congress with a host of seemingly-valid reasons for why the USPS should not enter additional non-postal markets.[6] Foremost, these parties reasoned that entering such markets would be "the worst idea since the Edsel,"[7] especially given the USPS's historically-poor record in delivering non-postal services through competitive markets.[8] Additionally, "the Post Office lacks the institutional capacity" to operate effectively in competitive markets.[9] Third, the USPS, as a large, well-funded public competitor, would unjustifiably cut into the earnings of U.S. private sector firms.[10]

Congress ultimately embraced each argument because the USPS has advantages that are not available to banks nor any other private sector firm.[11] These advantages include the ability to borrow from the Treasury

> *post offices, postal and training facilities and equipment, and . . . provide such offices, facilities, and equipment as it determines are needed*" (39 U.S.C. 404(a)(13).

KOSAR, *supra* note 1, at 5 (emphasis added) (note 39 U.S.C. § 404(a)(3) is incorrectly cited as (a)(13) in the original report).

5. *See generally* Mehrsa Baradaran, *It's Time For Postal Banking: The USPS Should Help Extend Credit To The Unbanked Population*, 127 HARV. L. REV. F. 165, 165 (2014) (finding that the USPS could provide better service to its customers by providing additional products, such as financial services, despite U.S. private sector concerns).

6. *Id.*

7. Baradaran, *supra* note 5, at 165. *See* Roger Horowitz, *Commemorating the Ford Edsel's Historically Bad Launch: Echoes*, BLOOMBERG (Nov. 29, 2011), https://www.bloomberg.com/view/articles/2011-11-29/commemorating-the-ford-edsel-s-historically-bad-launch-echoes ("In November 1956, Ford settled on a name for its new line of mid-priced automobiles: It would be called the Edsel, after the son of the firm's founder. Launched the following September, the Edsel was an utter flop, and has since become an exemplar of a product gone wrong.").

8. OFFICE OF THE INSPECTOR GEN., U.S. POSTAL SERV., THE ROAD AHEAD FOR POSTAL FINANCIAL SERVICES 9 (2015) (describing the ways that the USPS could offer additional, or better, non-postal services by making more effective use of its existing resources).

9. *Id.*

10. *Id.*

11. *See* Chris Edwards, *Privatizing the U.S. Postal Service*, DOWNSIZINGGOVERNMENT.ORG (Apr. 4, 2016), http://www.downsizinggovernment.org/usps (finding that the USPS's governmental advantages are unfair, and largely unjustified, at least from the perspective of the U.S. private sector). The U.S. private sector, however, fails to acknowledge that it also benefits from "hidden" advantages such as tax expenditures and other "upside-down" subsidies. *See, e.g.*, Desmond King, *America's Hidden Government: The Costs of a Submerged State*, 91 FOREIGN AFF. 153, 153 (May/June 2012) ("One consequence and driver of the contested legitimacy of the American state is the degree to which so much government work has gone underground in recent decades, far more than in other advanced industrial countries, which is the subject of the political scientist Suzanne Mettler's important new book, *The Submerged State*. Increasingly, Mettler argues, many government policies in the United States are designed to be hidden from view, executed not through direct, highly visible legislation but rather through indirect and passive mechanisms, such as tax breaks, leading citizens to underestimate both the scale of government activity in general and the extent to which it benefits them individually.")

Department at subsidized[12] interest rates, the right to avoid paying certain state and local taxes,[13] exemption from a host of user fees, the right to ignore most local zoning requirements,[14] qualified immunity[15] from a range of civil actions,[16] the right to employ eminent domain,[17] and, a broad grant of regulatory power,[18] which could impede the progress of private sector competitors.[19] In other words, it is assumed that the USPS has an unfair advantage because of the implicit subsidies,[20] which permit the USPS to

12. *See generally* JOHN BLACK ET. AL., *OXFORD DICTIONARY OF ECONOMICS* 394 (4th ed. 2012) ("[A 'subsidy' is a] . . . payment by the government to consumers or producers which makes the factor costs received by producers greater than the market price charged to consumers. Subsidies may be given on grounds of income distribution, to improve the incomes of produces, or the welfare of consumers. [But, subsidies] . . . are not usually economic efficient for [any of these purposes, as] . . . even [public] . . . goods consumed heavily by the poor are also consumed by the better off, so that much of the benefit of the subsidy goes to those who do not need it.").

13. The legal right to avoid paying state and local taxes, presumably, has deprived many jurisdictions of local sales tax revenues over time. *See generally* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 822–23 (8th ed. 2016) ("Sales taxes – including general, broad-based sales taxes on a wide range of retail transactions, as well as selective sales taxes targeted at particular categories of transactions – accounted for 11% of local own-source revenues [, at least in Fiscal Year 2013].").

14. *See* Black, *supra* note 12, at 447 ("['Zoning' is the local government] system of specifying that certain activities can only be carried out on in particular areas. Some activities cause harmful externalities, by emitting noise, smells or dust, or by attracting heavy traffic. Zoning tries to minimize the harm done by such activities, by concentrating them where they do the least damage, and separating them from residential, commercial or amenity areas.").

15. *See* Briffault, *supra* note 13, at 1035 ("[For example, the Federal Tort Claims Act] authorizes tort claims against the federal government and provides immunity for 'the exercise or performance or the failure to exercise or perform a discretionary function or duty.' In a series of cases, the [U.S.] Supreme Court has developed a distinction between planning decisions, which are immune, and operational decisions, which are not.").

16. By use of the term "civil action," this Article makes reference to "an action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation." BLACK'S LAW DICTIONARY 32
(8th ed. 2004).

17. By use of the term "eminent domain," this Article makes reference to "the inherent power of a governmental entity to take privately owned property, esp. land, and convert it to a public use, subject to reasonable compensation for the taking." *Id.* at 601.

18. *See* Black, *supra* note 12, at 346 ("['Regulatory power,' which often is referred to as 'regulation,' is exercised through [legal rules that] . . . individuals or firms are obligated to follow; or the procedure for deciding and enforcing such rules. Modern economies are subject to numerous forms of regulation. [This regulation] . . . may be designed to promote public health and safety; for example, rules on food hygiene and the coding of electrical wiring. [It also] . . . may be designed to promote competition and prevent unfair trading practices: for example, monopolies and mergers are controlled in most societies, and insider dealing is forbidden in many countries. [But, regardless of the underlying goals of regulation, it] . . . may be set and enforced by government bodies, or by quasi-autonomous non-governmental organizations.").

19. *See* Black, *supra* note 12, at 254 ("A ['market' is a] . . . place or institution in which buyers and sellers of a good or asset meet. A market was originally a physical location, and still is for some goods, for example cattle or fish markets . . . . In other cases, the market is a network of dealers linked by telephone and computer, and following common trading rules and conventions . . . [No matter their form, markets help to] . . . facilitate trade in goods."). *See* Edwards, *supra* note 11.

20. *See generally* Joseph Noss & Rhiannon Sowerbutts, *The Implicit Subsidy of Banks*, VOX (June 17, 2012), http://voxeu.org/article/implicit-subsidy-banks (noting that an implicit subsidy, by

offer lower-than-average pricing for non-postal services such as money orders.[21]

Disinterested parties, such as Professor Mehrsa Baradaran, remain unconvinced by these arguments.[22] For example, Baradaran counters that some "government support and even subsidies [are] . . . appropriate and justifiable."[23] She also asserts that such advantages may be justified because they are "grounded in historical practice."[24] Lastly, Baradaran points out that the USPS's governmental advantages may be structured to track the terms of the existing U.S. social contract.

What each of these arguments has in common is a belief that the USPS is the least cost avoider, as between the various parties, in terms of producing certain non-postal services.[25] This belief, which is supported by the USPS's track record in a variety of different contexts, could provide an alternative way to encourage future economic development on the ground.[26] Among the reasons why, as I have discussed in several recent

definition, "represents a transfer of resources from one set of agents – the government (and ultimately taxpayers) – to the financial sector").

21. *See* Black, *supra* note 12 at 331 (By definition, the 'public sector' is made up of those "parts of the economy which are not controlled by individuals, voluntary organizations or privately owned companies. The public sector thus includes government at all levels, national and local; government-owned firms; and quasi-autonomous non-government organizations.").

22. *See* Baradaran, *supra* note 5, at 165–66 (Among the potential justifications for its existing advantages is the fact that "the USPS is in a unique position to provide much-needed financial services for the large population of unbanked or underbanked Americans.").

23. *Id.*

24. *Id.*

25. *See generally* Kyle D. Logue and Joel Slemrod, *Of Coase, Calabresi and Optimal Tax Liability*, 63 TAX L. REV. 797, 798 (2010) ("In his seminal book, *The Cost of Accidents: A Legal and Economic Analysis*, [now-Judge Guido] Calabresi concluded that, assuming transaction costs prevent a Coasean result, the optimal tort liability regime is one of avoiding accidents including the administrative costs of the tort system. Calabresi concluded that such a regime will sometimes call for assigning tort liability to the 'cheapest cost avoider' – that is, the party able to minimize negative externalities (or third-party harms) most efficiently.").

26. *Cf., e.g.*, OFFICE OF THE INSPECTOR GEN., supra note 2, at 9.

> [In] the early 2000s, the [Urbana-Champaign Independent Media Center ("UCIMC")] . . . learned that the downtown Post Office building in Urbana . . . was for sale and the city was in danger of losing its retail post office . . . [UCIMC] worked with the Postal Service on the purchase, raised funds, and secured tenants to obtain a mortgage . . . [UCIMC] successfully purchased the building in 2005. The Postal Service agreed to maintain its retail unit and pay $1.00 per year (for ten years) at this downtown location . . . The partnership between the UCIMC and the Postal Service demonstrates the potential of collaborative arrangements.

articles,[27] is that least cost avoiders tend to be more introspective than otherwise similarly-situated parties.[28]

One possible explanation for why parties that are more introspective yield greater public value,[29] in both absolute and relative terms, is that they are able to convert previously dead capital into more liquid assets.[30] By doing so, introspective parties make more effective use of their scarce resources. Less introspective parties, in contrast, may not recognize this possibility.

Assuming that the USPS wants to take a more introspective approach, the question to ask is "whether different non-postal services need to be offered so as to bring about more local economic development." The USPS is likely to answer "yes," especially if this agency draws on recent scholarship. Illustrative examples of this work include a series of USPS "white papers."[31]

These white papers argue that the USPS should offer "different" services, rather than additional services,[32] so as to achieve its local economic development goals. Yet, while each white paper is filled with suggestions about how to improve non-postal services, they do not offer much guidance for doing so.[33] The lack of guidance, especially with respect to what is

27. *See*, *e.g.*, Randall K. Johnson, *Why U.S. States Need Pension Waiver Credits*, 40 S. ILL. U. L.J. 203, 217 (2016) (finding that public employers, such as the State of Illinois, could limit their budgetary shortfalls by creating a new tax expenditure program, Pension Waiver Credits, which allows them to make better use of their existing resources).

28. The benefits of introspective governance have been observed in a variety of public policy contexts. *See*, *e.g.*, Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1056 n.4 (2015) (finding that U.S. government agencies that engage in introspection may perform better than similarly-situated institutions).

29. By use of the term "public value," this Article makes reference to the process of taking into account "the benefits and costs of public services not only in terms of dollars and cents but also in terms of how government actions affect important civil and democratic principles such as equity, liberty, responsiveness, transparency, participation and citizenship." Shane Kavanagh, *Defining and Creating Value for the Public* (Oct. 2014), THE BOOKSHELF, https://www.gfoa.org/sites/default/files/GFROct1457_0.pdf (accessed on Aug. 4, 2016).

30. Johnson, *supra* note 27, at 211 n. 61 ("Dead capital" is the idea that property has little-or-no-value when it cannot be made liquid. Examples of dead capital, within the [public sector pension] context, include government-owned property that is not put to its best use (at least, for public employers such as the State of Illinois) and the right to avoid the opportunity costs that are associated with deferred compensation (at least, for public employees with public pensions). *See* Hernando de Soto, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 5–6 (2000). Examples of dead capital, at least within the context of development economics, include houses built on land whose ownership rights are not adequately recorded, unincorporated businesses with undefined liability, and industries located where financiers and investors cannot see them. *Id.*

31. *See generally* OFFICE OF THE INSPECTOR GEN., U.S. POSTAL SERV., MODERNIZING THE POSTAL MONEY ORDER (2016) (finding that the USPS could reform the Postal Money Order, using a variety of different methods, so as to achieve its key political, economic and social goals).

32. *See* Baradaran, *supra* note 5, at 165–66.

33. *Id.* at 166.

meant by the word "different," which could mean either "better" or "additional," results in a lack of clarity about what should be done. One unfortunate result is that sub-national governments, such as U.S. cities in crisis, are being deprived of USPS assistance in a variety of ways.[34]

In an attempt to provide a measure of guidance to the USPS, this Article does four things. First, it explains how to provide new incentives for people to buy USPS money transfers through the Sure Money®/DineroSeguro® Program ("SM/DS"). The Article also describes how a subsequent increase in USPS money transfer sales could expand local tax bases. Third, it shows why any expansion of local tax bases may help U.S. cities in crisis to improve their prospects. Lastly, this Article explains how expansion may impact a range of different parties. Examples include the real parties in interest,[35] third party beneficiaries,[36] and unrelated third parties.[37]

Implicit in this argument is the idea that the USPS could help U.S. cities in crisis to realize future economic development, at least in cases where the USPS agrees that certain non-postal services should not be treated "better" than their substitutes. Examples of non-postal services that receive preferential treatment, in terms of their fees or service charges being exempt from the local sales tax,[38] are the USPS Money Order and USPS Money Transfer programs.[39] Private sector substitutes, which may be treat-

34. Per this issue, "cities in crisis" are local governments that are "struggling under the weight of many complex issues that threaten their continued existence." Kristen Barnes, *Dissecting Cities in Crisis: Problems and Solutions*, 92 CHI.-KENT L. REV. ___ (forthcoming2017).

35. By use of the term "real party in interest," this Article makes reference to a "party who has standing to be heard by the court in a matter to be decided." United States Courts, *Party In Interest*, GLOSSARY OF LEGAL TERMS, https://www.uscourts.gov/glossary (search for glossary letter "p"; then follow to "party in interest") (last visited on Jul. 14, 2016).

36. By use of the term "third-party," this Article makes reference to "a person who is not a party to a lawsuit, agreement, or other transaction but who is usually somehow implicated in it." BLACK'S LAW DICTIONARY, *supra* note 6 at 1617.

37. Baradaran, *supra* note 5, at 166.

38. *See* Natasha Varyani, *Taxing Electronic Commerce: The Efforts Of Sales And Use Tax To Evolve With Technology*, 39 OKLA. CITY U. L. REV. 151, 180 (2014) (noting that the local sales tax is defined as a levy that is set equal to a percentage of value of the item purchased, and that the sales tax itself is paid by the consumer, collected by the seller, and remitted to the state, most often on a quarterly basis.).

39. This article will base its analysis upon a typical state-level approach to taxing bank and financial institutional service charges. Such an approach often has a very limited scope. *See, e.g.*, *Iowa Sales Tax on Bank and Financial Institution Service Charges*, IOWA DEP'T OF REVENUE, https://tax.iowa.gov/iowa-sales-tax-bank-and-financial-institution-service-charges (last visited Feb. 3, 2017) ("The following are examples of exempt charges because they have no relationship to checking accounts. The list is not exclusive: . . . Charges for travelers or similar type checks, bank cashier's checks, bank drafts, or money orders when these instruments have no relation to a customer's checking account . . . .").

ed "worse," include the certified checks that are billed to checking accounts by U.S. financial institutions.[40]

These substitutes could be treated in a relatively-standard way by simply applying the local sales tax to the fees that are charged for similarly-situated negotiable instruments. While this modest change in tax policy is likely to require additional legislative action,[41] it may be justified by the fact that sub-national governments gain a new source of local revenue. This change may prove to be an inspired choice, since, every day, about 300,000 USPS money orders are sold.[42]As such, it could have a tremendous impact upon the financial prospects of U.S. cities in crisis, especially if the public sector were to follow the USPS's example and work with elected officials to assure that the fee and service charges for all similarly-situated products are subject to the sales tax.

A secondary benefit is that the neutrality principle will no longer be violated by the local sales tax, since future "decisions are made on their economic merits and not for tax reasons."[43] There are three reasons why this change matters and should be implemented. First, almost any increase in fee or service charges is unlikely to be salient to USPS customers.[44] Next, even if this change does prove to be salient, USPS customers are likely to become less sensitive over time. It, lastly, it will not limit demand for many USPS products, such as the USPS money order or the USPS money transfer, especially in cases where the change is combined with improved service provision.

My Article explains how, and why, USPS should bring about this modest change. Its explanation, which builds on a 2006 newspaper column,[45] unfolds in five additional Parts. Part II describes the applicable law.

40. *Id.* ("The following are nonexclusive examples of bank and financial institution service charges which, if related to checking accounts, are subject to tax: The fee for issuing a certified check. A certified check is drawn form a particular account. This is in contrast to a bank cashier's check.").

41. By use of the term "federal legislative action," this Article references the process whereby "each chamber [of Congress] produces detailed, chamber-specific legislative action steps." *Legislative Action Steps*, CONGRESS.GOV, https://www.congress.gov/help/legislative-glossary#I (accessed on Jul. 14, 2016).

42. U.S. POSTAL SERV., POSTAL FACTS 2016 20 (2016) ("Each day the Postal Service picks up, processes and delivers millions of letters and packages. No single operation in the world comes close to this level of connectivity . . . Here's just ONE day in the life of the United States Postal Service. (Figures are averages) . . . 306,930—number of money orders issues.").

43. *Tax: Fundamentals in Advance of Reform Before the S. Comm. on Finance*, 110th Cong. 41 (2008) (written testimony of Jason Furman, Director, Brookings Institution)

44. *Cf.* Randall K. Johnson, *Who Wins Residential Property Tax Appeals?*, 6 COLUM. J. TAX L. 209, 218 (2015) (describing one example of when a change in treatment, over time, becomes more and more apparent to taxpayers).

45. *See* Randall K. Johnson, *Insurgent Urban Planning*, TOLEDO FREE PRESS, Aug. 2006, at B13 (finding that a modest expansion of SM/DS could provide benefits to the real parties in interest for

Part III contains a description of the SM/DS international money transfer product. Part IV shows how a SM/DS reform could encourage more local economic development,[46] especially in cases where reform increases local tax revenues.[47] Part V explains why increased tax revenues could limit budgetary shortfalls for U.S. cities in crisis.[48] Part VI outlines an implementation plan for the USPS, which identifies key economic, political and social considerations that should inform the USPS's approach to SM/DS reform.

money transfer contracts (i.e. the USPS and the purchaser of a USPS money transfer), their third-party beneficiaries (i.e. designated recipients) and unrelated third-parties (i.e. local governments, among others, which indirectly benefit from valid money transfer contracts)).

46. One reason for private citizens to buy more USPS money transfers would be a price adjustment, which could be justified by more cost effective delivery of SM/DS and a more dynamic pricing model. *See*
WALTER W. EUBANKS & PAULINE H. SMALE, CONG. RESEARCH SERV., FOREIGN REMITTANCES TO LATIN AMERICA 1 (2003) ("The cost of international money transmissions is important to foreign and immigrant workers and recipient countries because of the relatively low incomes of the workers and the intended recipients, and the impact these remittances have on the local economies.").

47. *See* Black, *supra* note 12, at 401 ("[A 'tax base' is the] set of incomes on which direct taxes are levied, and transactions on which indirect taxes are levied. The tax base is lowered by all allowances and exemptions . . . [Thus, it stands to reason that the] broader the tax base, the lower are the tax rates required to raise any given total.").

48. It must be acknowledged that expansion of the local sales tax may not be unambiguously positive, especially for those individuals that reside in U.S. cities in crisis. *See, e.g.*, CARL DAVIS, ET AL., INST. ON TAXATION AND ECON. POL'Y, WHO PAYS? A DISTRIBUTIONAL ANALYSIS OF THE TAX SYSTEMS IN ALL 50 STATES 12 (5th ed. 2015). The Kind of Tax Matters:

> Sales and excise taxes are the most regressive element in most state and local tax systems. Sales taxes inevitably take a larger share of income from low-and middle-income families than from rich families because sales taxes are levied at a flat rate and spending as a share of income falls as income rises. Thus, while a flat-rate general sales tax may appear on its face to be neither progressive nor regressive, that is not its practical impact. Unlike an income tax, which generally applies to most income, the sale tax applies only to spent income and exempts saved income. Since high earners are able to save a much larger share of their incomes than middle-income families – and since the poor can rarely save at all – the tax is inherently regressive.

But, all is not lost because the federal government provides a way to deal with the regressive nature of this tax.

> Federal income tax rules allow taxpayers to claim itemized deductions for state and local personal income and property taxes (and, temporarily, general sales taxes). The ability to deduct these taxes on . . . federal tax forms means that if [low-income residents of U.S. cities in crisis] . . . itemize (rather than take the standard deduction) on . . . federal taxes, [the regressive nature of the sales tax could be completely negated] . . . by lower federal taxes. This feature of the federal income tax [system is called] . . . the "federal offset."

Id. at 15.

II. POSITIVE ANALYSIS

For the last two hundred and forty years,[49] the USPS was legally obligated to provide services that bound "the Nation together through the personal, educational, literary, and business correspondence of the people."[50] This obligation gave the USPS an implied right to provide both postal services and non-postal services, such as providing in-kind benefits on behalf of various governments.[51] The USPS often provided non-postal services at little to no additional cost.[52]

The USPS traditionally used its non-postal services to encourage local economic development,[53] and it did so in three ways. First, the USPS provided goods and services that its customers, especially those in rural areas,[54] could not otherwise obtain.[55] It also provided direct and implicit

49. *See* U.S. POSTAL SERVICE, UNIVERSAL SERVICE AND THE POSTAL MONOPOLY: A BRIEF HISTORY 2 (Oct. 2008), https://about.usps.com/who-we-are/postal-history/universal-service-postal-monopoly-history.pdf:

> The story of the United States Postal Service begins in 1775, when the Continental Congress named Benjamin Franklin the first American Postmaster General. Franklin and his fellow patriots saw a robust mail system as critical to the nation's welfare. A healthy postal network facilitated communication among army commanders and the first elected representatives, and representatives and their constituents.

50. KOSAR, *supra* note 1, at 5 ("While Congress designed the USPS to be a self-supporting entity, the nation's legislature also requires the USPS to serve the public as a whole. This 'public service obligation,' as it often is termed, is located in [the USPS's] . . . 'postal policy' (39 U.S.C. 101) and the USPS's 'general authority' (39 U.S.C. 403).").

51. *See* U.S. POSTAL SERV., supra note 49 at 11

> Postal employees have registered aliens, distributed Internal Revenue Service forms and publications, surveyed vacant houses for the Federal Housing Administration, and reported carrier-route mileage data to the Bureau of Public Roads. [USPS employees] continue to provide non-postal services to customers for other government agencies by: (1) accepting passport applications for the Department of State; (2) selling migratory bird stamps for the U.S. Fish and Wildlife Service; (3) distributing veterans' burial flags for the Department of Veterans Affairs; and, (4) providing selective service registration forms and materials for the Selective Service System.

52. U.S. POSTAL SERV., supra note 49 at 10 ("[P]ostal employees cooperated with the National Weather Bureau in disseminating weather forecasts. Beginning in 1873, about 4,500 postmasters posted the Weather Bureau's daily weather reports in their offices, reaching an estimated one-third of the U.S. population; by 1876 reports were posted in nearly 7,000 offices.").

53. U.S. POSTAL SERV., supra note 49 at 10 ("Beyond its core service—delivering U.S. Mail—the Postal Service has served Americans in a multitude of less obvious and less tangible ways. On a national scale, lucrative contracts for mail transportation spurred the development of the American transportation network—from stagecoach routes to railroads to airlines.").

54. *Id.* at 10 ("[P]ostal employees provide incalculable services to customers, from helping elderly and disabled citizens pay their monthly bills to literally savings lives. Postal employees are often the only government representative in town, and sometimes are the only daily visitor to remote homesteads.").

55. U.S. POSTAL SERV., supra note 49, at 11:

subsidies in the form of in-kind benefits and services,[56] including below-market rate delivery of U.S. mail.[57] Lastly, the USPS distributed its subsidies to individuals and private sector firms alike.[58]

In other words, the USPS encouraged local economic development across national space and in a relatively-standard way for all eligible legal persons,[59] by leveraging its advantages in support of a range of third parties.[60] These advantages arose from the fact that the USPS "is immune to most forms of regulation; pays few taxes; and borrows money at the lowest rate possible."[61] Other less visible advantages,[62] which are only rarely not-

> [USPS employees] have . . . given first-aid treatment . . . have had to help in sickness and death, even arranged funerals . . . have extracted livestock from fences and called the veterinarian in emergency cases. In my years as a carrier I honestly believe that I've done everything except act as a midwife.

56. *See* Black, *supra* note 12, at 33 ("['in-kind benefit' arises when a government directly provides public] . . . goods and services to those in need of them. This is an alternative to providing citizens with monetary incomes sufficient to meet their needs via the market.").

57. *See* U.S. POSTAL SERV., supra note 49 at 3–4:

> Because news was considered crucial to an informed electorate, the first major postal law, passed in 1792, allowed newspaper printers to send each other newspapers for free, facilitating the spread of national and foreign news outward from the seat of government . . . The 1792 postal law also provided for the carriage of newspapers to subscribers for the relatively low rate of either 1 cent (for up to 100 miles) or 1.5 cents (for more than 100 miles) . . . Until prepayment of newspaper postage became mandatory in 1875, many subscribers failed to pay even the low rates of postage, effectively receiving free delivery.

58. *See* U.S. POSTAL SERV., supra note 49, at 10 (A less glamorous boon than the salient advantages that are given to members of the U.S. public sector, "but one that benefited millions of Americans, was rural free delivery, which stimulated road improvement nationwide since passable roads were a prerequisite for establishing new delivery routes.").

59. *See* U.S. POSTAL SERV., supra note 49 at 11–12:

[In] his book, *Preserving the People's Post Office*, Christopher W. Shaw discusses a more intangible service provided by the Postal Service – its democratizing effect. Shaw explains:

> The Postal Service is an institution that reaches every American on a regular basis, and it does not discriminate. All Americans are entitled to receive the same service. It is irrelevant whether they are rich or poor, rural or urban, black or white, young or old: all Americans are equal in the eyes of the Postal Service.

60. *See generally* Johnson, *supra* note 27.

61. Johnson, *supra* note 27, at BII.

62. In *Neither Snow Nor Rain*, Devin Leonard "emphasized a darker side of postal history" that indicates the USPS may have a relative advantage in influencing U.S. public opinion. *See generally* DEVIN LEONARD, NEITHER SNOW NOR RAIN: A HISTORY OF THE UNITED STATES POSTAL SERVICE (2016). One example of how this previously-unrecognized advantage operated, over time, is provided by Anthony Comstock, the longtime postal inspector that] "banned and prosecuted the mailing of birth control pamphlets, 'marriage aids' and 'indecent' literary works like Walt Whitman's poems, lest they pollute public morals." Lisa McGirr, *Two Books Recount How Our Postal System Created A Communications Revolution*, N.Y. TIMES (July 8, 2016), https://www.nytimes.com/2016/07/10/books/review/neither-snow-nor-rain-and-how-the-post-office-created-america.html?_r=0 (last visited Apr. 11, 2017).

ed, include USPS's high level of public trust in comparison to other federal agencies and non-governmental actors.[63]

Recent legislative action, however, threatens to limit the USPS's future local economic development efforts.[64] For example, the PAE Act not only prevents the USPS from adding non-postal services, it also gives regulators such as the Postal Regulatory Commission (PRC)[65] the authority to terminate existing non-postal services.[66] The PAE Act, which partially delegated regulatory authority over the USPS, became fully effective in 2006.[67] Additional legislative action has recently been considered.[68]

Notwithstanding this limitation of its authority, the USPS has identified several ways to encourage more local economic development.[69] The first approach requires the USPS to focus on expanding the non-postal services that this agency already offers under its current authority.[70] Another option involves the creation of additional services that could be offered under broader legal authority, as opposed to under its reduced authority, such as "general purpose reloadable prepaid cards, small loans, and deposit accounts."[71] A third way calls for the USPS to deliver its existing services, especially high-upside products such as SM/DS, in more effective ways.[72]

More effective service delivery may be the best way to encourage more local economic development, especially for U.S. cities in crisis that

63. OFFICE OF THE INSPECTOR GEN., *supra* note 8, at 6.

64. *See id.* at 12.

65. *See generally* Postal Regulatory Commission ("PRC"), *About The Postal Regulatory Commission* (2016), http://www.prc.gov/about (last visited June 6, 2016). Per the site:

> The [Postal Regulatory Commission (PRC)] is an independent agency that has exercised regulatory oversight over the Postal Service since its creation by the Postal Reorganization Act of 1970, with expanded responsibilities under the Postal Accountability and Enhancement Act of 2006. The [PRC] is composed of five Commissioners, each of whom is appointed by the President, by and with the advice and consent of the Senate, for a term of six years. A Commissioner may continue to serve after the expiration of his or her term for up to one year or until a successor is confirmed. No more than [three] members of the [PRC] may be adherents of the same party.

66. OFFICE OF THE INSPECTOR GEN., *supra* note 8, at 11.

67. *See id.*

68. *See* KOSAR, *supra* note 1, at 9 ("[For example, in] . . . the 112th Congress, more than two dozen bills [carried] . . . provisions related to the USPS's post offices and retail service to the public. The bills vary in their approaches . . . and H.R. 2309, H.R. 2692, S.1668, and S.1789 illustrate this diversity.").

69. OFFICE OF THE INSPECTOR GEN., *supra* note 8 at 6.

70. *Id.* at 2.

71. *Id.* at 10.

72. *See id.* at 22 ("The Postal Service should take a close look at its . . . products to see how changes in product design, pricing strategy, and marketing approaches could better meet the needs of the underserved and increase revenue.").

face economic, political, and social barriers to optimal performance.[73] This approach produces relatively lower transaction costs than other potential reform options,[74] such as partnering with U.S. private sector firms. It also identifies a range of governmental failures[75]—such as an inefficient use of scarce public resources[76]—which prevent U.S. cities in crisis from making the best decisions about how to carry out their business under conditions of scarcity.[77]

The USPS should seize upon the opportunity provided by this limitation of its traditional authority, so as to engage in more effective delivery of key non-postal services. One possible way for the USPS to do so is to focus on reform of its high-upside offerings. Among the high-upside options that could be delivered in a more effective way is SM/DS, especially if the USPS adopts to a virtual money transfer system that combines faster delivery with reduced costs.

III. DESCRIPTION OF SM/DS INTERNATIONAL MONEY TRANSFER PROGRAM

SM/DS is a non-postal service that provides USPS money transfers through the use of international money orders and cash-to-cash wire transfers.[78] Currently, USPS money orders can be purchased from any Post Of-

73. More effective service delivery, especially for existing non-postal services such as SM/DS, may be required to offset potential revenue losses that could arise from economic, political and social changes. *See*, *e.g.*, Kirk Semple, *Mexican Officials Take Steps to Counter 'the Trump Emergency'*, N.Y. TIMES (May 22, 2016), http://www.nytimes.com/2016/05/23/world/americas/donald-trump-mexico.html (last visited May 22, 2016). The U.S. and Mexico "are now enjoying one of the more harmonious periods in a turbulent history. But many in Mexico fear that the friendship would rupture should [U.S. presidential candidate Donald] Trump win the election and follow through on his threats to . . . force Mexico to pay for the construction of a wall between the countries" by interrupting the flow of international money transfers (and other types of exchange) between the U.S. and Mexico. *Id.*

74. *See* Black, *supra* note 12, at 292 (defining opportunity cost as the: "cost of something in terms of an opportunity foregone. For example, for a farmer the opportunity cost of growing wheat is given by what they would have earned fi they had grown barley, assuming barley is the best alternative.").

75. *See* CLIFFORD WINSTON, BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, GOVERNMENT FAILURE VS. MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 2–3 (2006) (noting that governments failures arise "when government has created inefficiencies because it should not have intervened [in a particular market] . . . in the first place or when [that government] . . . could have solved a given problem . . . more efficiently . . . by generating greater net benefits").

76. *See* Black, *supra* note 12, at 293 (defining "optimality" as "the choice from all possible uses of resources of that . . . gives the best result. This is often represented by the maximization of benefits or the minimization of losses; in general the objective function describes what is to be optimized.").

77. *See* Black, *supra* note 12, at 363 (defining "scarcity" as the "property of being in excess demand at a zero price").

78. U.S. GOV'T ACCOUNTABILITY OFFICE, INTERNATIONAL REMITTANCES: INFORMATION ON PRODUCTS, COSTS AND CONSUMER DISCLOSURES 15 (2005) (describing the characteristics of interna-

fice in values up to $700 and can be sent to 28 countries.[79] USPS wire transfers, in contrast, permit transfers of "up to $1,500 a day to Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Peru and Argentina."[80] Neither the purchase price of USPS money orders nor that of USPS wire transfers, usually, vary based upon the location where the money transfer contract has been executed.

As a condition precedent to USPS performance, the original purchaser must identify a designated recipient for each money transfer.[81] Each designated recipient[82] may redeem his or her money transfer in exchange for cash, or another form of legal tender,[83] at a foreign post office or another authorized location abroad.[84] Additional redemption options, such as peer-to-peer payments, also may be available depending on where the money transfer is sent by the purchaser.[85]

Despite numerous attempts to make SM/DS as easy and stress-free as possible[86] and a product that USPS customers actually want to buy, SM/DS continues to "languish[] after years of steep declines."[87] This reduction in customer demand is troubling especially in light of recent federal legisla-

tional money transfer products, the requirements that are imposed on U.S. private sector firms that offer international money transfers and the information that is collected in the normal course of the international money transfer business).

79. *See USPS International Money Transfers: Take Advantage of Secure Overseas Money Transfers With a United States Postal Service (USPS) International Money Order or Wire Transfer*, FINDER, https://www.finder.com/
international-money-transfers/usps (last visited Jun. 1, 2016) (describing the ways that SM/DS delivers USPS money transfers).

80. *Id.*

81. *Id.*

82. By use of the term "designated recipient," this Article makes reference to the third party beneficiary of a valid money transfer contract. This third party beneficiary is selected by the purchaser at the time of contract formation. *See id.*

83. *See* Black, *supra* note 12 at 236 (defining "legal tender" as "money which a creditor is legally obligated to accept in settlement of a debt. It is necessary to have some rules on this so that it is clear when debts have been defaulted on").

84. FINDER, *supra* note 79.

85. *See* Chetan G. Shah, *Virtual Banking: A Guide to Innovation and Partnering*, 72 FIN. ANALYSTS J. 1, 2 (2014) (book review). Per the author:

> Banks in Poland can now deliver special offers to customers directly in their Facebook accounts, personalized with respect to their transactions. The Commonwealth Bank of Australia can facilitate peer-to-peer payments between Facebook "friends" by using mobile phone numbers and addresses and can enable customers to request payments, check balances, and transfer money between accounts. [And in] India, ICICI Bank gives its customers account information through Facebook, an application that is hosted on the bank's servers.

86. *See generally* OFFICE OF THE INSPECTOR GEN., *supra* note 8.

87. *Id.* at 14.

tive actions,[88] such as the PAE Act, and the increased demand for reform to SM/DS.[89] It is anticipated that private sector alternatives, such as commercial money transfer options and person-to-person payment services, could further undercut consumer demand for SM/DS.[90]

Stated simply, the USPS's inability to fully-leverage SM/DS has led to millions of dollars in lost revenue and possibly even more prospective losses.[91] This lost revenue has not gone unnoticed by the USPS or its regulators.[92] In fact, the USPS readily acknowledges that even a modest reform of SM/DS "could create a [more] . . . successful international money transfer business that benefits millions of Americans."[93] Notwithstanding this USPS admission, little-to-no SM/DS restructuring has ever taken place.

A modest reform of SM/DS could be undertaken in several different ways. For example, USPS could partner with banks or other financial institutions to offer a better-quality product.[94] The USPS also could license the product to private sector firms, so long as this assignment of rights complies with the applicable law.[95] A third option is for the USPS to make better use of its scarce resources by seeking out new ways to assure the efficient allocation of both postal and non-postal services.

The ideal approach, which also happens to align with conventional views of economic efficiency,[96] is for the USPS to leverage what it already has and do more with less.[97] By doing so, the USPS can capitalize on its comparative advantages and "already significant investment in SM/DS."[98] For example, the USPS could make use of "thousands of post offices, sta-

88. *See* McGirr, *supra* note 62 ("[B]ecause of repeated barebones congressional appropriations, the service has been unable to modernize, and mounting volume in outdated facilities has resulted in chaos, inefficiency and dysfunction.").

89. *See* OFFICE OF THE INSPECTOR GEN., *supra* note 8 at 14.

90. It is unclear whether the USPS's money transfer competitors are properly collecting, and turning over, local sales taxes because of the uncertain status of alternatives such as person-to-person payment systems. Jeff Brown, *How to Choose a Person-to-Person Payment System*, MAIN STREET (Oct. 6, 2011), https://www.mainstreet.com/article/how-choose-person-person-payment-system ("Person-to-person payment systems, or P2P services, have been around for some time. PayPal is the best known, allowing users to send money to other individuals. Now, the explosion of smart phones and tablets makes it easy to make a payment, or receive one, just about anywhere . . . .")

91. *Id.*

92. *Id.*

93. OFFICE OF THE INSPECTOR GEN., *supra* note 8 at 14.

94. *Id.* at 27.

95. *Id.* at 2.

96. *See* Black, *supra* note 12, at 121 (defining "economic efficiency" as "making the maximum use of available resources").

97. Johnson, *supra* note 45, at B13.

98. *Id.*

tions and branches across the country that would require minimum upgrading and staff training to expand SM/DS."[99]

IV. NORMATIVE ANALYSES

A: Policy Recommendation

As of this writing, SM/DS is not well-positioned to capitalize on the growing market for international money transfers. The USPS has acknowledged as much, *sua sponte*, in a series of white papers.[100] As a result, the USPS has begun to actively consider "a strategic expansion to more post offices (particularly to those in areas with large immigrant populations), along with more effective marketing," as a means of boosting SM/DS international money transfer sales.[101]

Therefore, now is the time to restructure SM/DS so as to provide "better" non-postal service to USPS customers. Better service is likely to result if the USPS adopts a completely virtual money transfer system, which builds on its existing products and infrastructure. Building on these products and services assures that SM/DS will be delivered faster and at a reduced cost.

This argument is elaborated in the following Parts: Sub-Part 1 identifies a low-cost way of reforming SM/DS, which takes into account political and legal constraints; Sub-Part 2 outlines potential barriers to SM/DS reform; and Sub-Part 3 describes a viable way to overcome these barriers.

1. Program Design

If the USPS decides to reform SM/DS, it may view a completely virtual money transfer system as its best option.[102] A completely virtual system could allow the USPS to issue money transfers that are akin to electronic transmissions while also providing a way to improve the profitability of this non-postal service. The reason is that, "given that the Postal Service already has an electronically linked internal network and [does] . . .

99. *Id.*

100. *See, e.g.*, OFFICE OF THE INSPECTOR GEN., *supra* note 8, at 14.

101. *Id.*

102. *See generally* H.C. Mpofu, M. Thinyane and A. Terzoli, *Virtual Money Transfer System: A Component of the M-Payment System For A Marginalized Area* 3 (2010) (unpublished paper), *available at* http://satnac.org.za/proceedings/2010/papers/software/Mpofu%20FP%20429.pdf (suggesting the virtual transfer system that is described in this Article only requires the USPS to gather information, which could be used to prevent money laundering and to make improvements to SM/DS over time, prior to deposit of the money transfer funds in the designated recipient's account, after which the rest of the transactions are independent and are handled by the virtual transfer system's database).

not require a complex network of agents,"[103] this change could allow the USPS to improve its service at no additional cost.

A restructured SM/DS may operate as the public sector equivalent of Walmart2Walmart, money transfers, since it allows USPS customers to transfer money between USPS retail facilities and approved locations abroad.[104] This reform also permits the USPS to narrow the competitive distance between SM/DS and private sector alternatives. Such a restructuring, lastly, could permit faster receipt of money by designated recipients and assure that the original purchaser pays a reduced price.[105]

2. Program Benefits

Having explored positive and normative views of this yet-to-be implemented reform, this Article now explains how SM/DS reform could yield a range of consumer benefits. These benefits arise from the fact that USPS customers may pay less for each money transfer, whereas their designated recipients gain more certainty about how much money they will receive. Due to the marked increase in consumer surplus, both immediately and over time, demand for the product is likely to rise.[106]

The USPS also may benefit from this increased consumer demand. This increased demand could directly translate into greater profitability,[107]

103. OFFICE OF THE INSPECTOR GEN., *supra* note 8, at 15.

104. *Id.*

105. *See* Sara Schoenfeld, *Much Ado About Nexus: The States Struggle To Impose Sales Tax Obligations On Out-Of-State Sellers Engaged In E-Commerce*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 263, 266–68 (2013) ("E-commerce allows sellers to conduct business online and reach consumers all over the nation. However, a seller engaging in e-commerce must be aware that it is obligated to collect and remit state sales taxes to each state with which the seller [has] . . . established "substantial nexus . . . ."). This term, "substantial nexus," is not well-defined, although it has been interpreted by the U.S. Supreme Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Among other things, *Quill* held that an out-of-state seller must have physical presence, as determined by the fact that it undertook certain activities in a state, before it must collect local sales taxes from its buyers. *See* Natasha Varyani, *Taxing Electronic Commerce: The Efforts Of Sales And Use Tax To Evolve With Technology*, 39 OKLA. CITY U. L. REV. 151, 177 (2014). Varyani notes that:

> traditional retailers with brick-and-mortar storefronts, such as the USPS, have a clear substantial nexus . . . . This ensures that traditional retailers collect the required amount of sales taxes and remit it correctly; because the site of each transaction is easily determined, the list—and number—of jurisdictions to which they must remit the sales tax is also easily determined.

Id.

106. *See* OFFICE OF THE INSPECTOR GEN., *supra* note 8, at 15 ("Because the underserved tend to spend nearly every penny they make, any money they save by using Postal Service financial products would immediately go back into the economy. [The reason is that the underserved are likely to spend these savings] on groceries, utilities, medical bills, and entertainment.").

107. *Id.* at 16 ("If 10 percent of the $89 billion spent on alternate financial services was instead spent at the Postal Service, it could bring in $8.9 billion a year.").

which, in turn, may help the USPS to meet its long-term debt obligations.[108] As a result of paying down its long-term debt obligations, which include employee benefits[109] and public pension obligations,[110] the USPS could gain financial freedom and a greater measure of respect from its regulators.

Finally, unrelated third parties may benefit from SM/DS reform. Such benefits could include positive externalities, such as a significant expansion of the local sales tax base, which may have a net benefit for society. Examples of potential third-party beneficiaries are U.S. cities in crisis, especially when these entities "identify effective, innovative and viable solutions" to their current financial difficulties.[111]

3. Critical Assessments

Despite the many benefits that may be realized through SM/DS reform, especially for the real parties to a money transfer contract, certain interested third parties are still likely to oppose the change. This opposition draws on three basic arguments.[112] The first argument is that the USPS may

108. By definition, "long-term debt obligations" are "liabilities . . . [like] debentures, loans, deferred tax liabilities and pension obligations.." that are not due within the next 12 months. The portions of long-term liabilities that will come due within the next 12 months are listed under current liabilities to provide a "more accurate view of a company's . . . ability to pay current liabilities as they become due." INVESTOPEDIA, http://www.investopedia.com/terms/l/longtermliabilities.asp (last visited June 7, 2016).

109. *See* U.S. POSTAL SERV., *Retiree Health Benefits Prefunding* (2011), https://about.usps.com/who-we-are/financials/annual-reports/fy2010/ar2010_4_002.htm (accessed on Jun. 7, 2016). Per the report:

> Unlike any other public or private entity . . . the U.S. Postal Service must pre-fund retiree health benefits. [The USPS] must pay today for benefits that will not be paid out until some future date . . . The pre-funding requirement . . . contributes significantly to postal losses. . .Even with the careful stewardship of resources . . . current forecasts anticipate insufficient cash.

110. *See generally* Johnson, *supra* note 27.

111. Barnes, *supra* note 34. Specifically, this Article assumes that SM/DS reform would provide benefits for the real parties to a money transfer contract (i.e. the USPS and individual purchasers of USPS money transfers), third party beneficiaries (i.e. the designated recipients of USPS money transfers) and unrelated third parties (i.e. U.S. cities in crisis, which may indirectly benefit from money transfer contracts).

112. *Cf.* McGirr, *supra* note 62. Per McGirr:

> Flexible and innovative . . . the post office [traditionally has] . . . stood as a 'powerful counter to the argument that private industry always serves Americans better than the government.' [One example of how the U.S. government did so is when it authorized the USPS to create] . . . postal banks . . . [In response to the success of postal banks,] . . . private stakeholders fought against a more robust postal banking system . . . [As such, the current] . . . battles between private interests and the postal service [over the creation of non-postal services should be understood to be merely the most recent episode in a history] as old as the service itself.

have unfair competitive advantages,[113] which unjustifiably work to the detriment of other market participants.[114] An example is the USPS's immunity from local zoning requirements, which makes it less costly for the USPS to maintain a local presence.[115] The assumption is that the USPS may use this subsidy to set its prices artificially low.

The second argument assumes that, unlike U.S. private sector firms in competitive markets, the USPS has little incentive to be economically-efficient.[116] This assumes that the USPS receives an implicit subsidy, which makes it indifferent to consumer demand.[117] One possible result is that the USPS may produce more public goods[118] and services[119] than its customers want to buy.[120]

Finally, some point out the USPS's historically-poor record in competitive markets.[121] In too many cases, the USPS made much less money than expected.[122] One reason is that the USPS uses a less-than-dynamic pricing model,[123] regardless of where the transaction or occurrence takes place.[124] This approach implies that the USPS may use its non-postal services, including SM/DS, as loss-leaders.[125]

Fortunately, the key word on which all three arguments depend is "competitive."[126] U.S. private sector firms, rather than the USPS, are the ones that have taken advantage of a less-than-competitive money transfer market to reap record profits.[127] As such, the USPS may justifiably enter

113. *See* Edwards, *supra* note 11.

114. *See generally* Johnson, *supra* note 45.

115. *Id.*

116. *Id.*

117. *See* Black, *supra* note 12, at 203 (defining "indifference" as a "graphical representation of the set of commodity bundles that are ranked as equally good by a consumer. If commodity bundles X and Y are on the same indifference curve then the consumer is indifferent between x and y; and for any utility function representing the consumer's preferences U(x)=U(y).").

118. *See* Black, *supra* note 12, at 330 ("[A 'public good' is one] that no consumer can be excluded from using if it is supplied, and for which consumption by one consumer does not reduce the quantity available for consumption by any other.").

119. By use of the term "public service," this Article makes reference to an instance in which a public good takes the form of an activity. This activity is undertaken by the government, or its agents, for the benefit of the general public.

120. *See* Johnson, *supra* note 45.

121. *Id.* at B13.

122. *See* OFFICE OF THE INSPECTOR GEN., *supra* note 8, at 14 ("Among the countries where it does operate, Dinero Seguro has a small fraction of a percent of the [international money transfer] market.").

123. *Id.* ("Dinero Seguro charges the same amount regardless of destination.").

124. *Id.* ("Currently, decisions as to whether to offer [SM/DS] are made locally, not nationally, and many locations may have limited incentive to begin carrying it.").

125. *See generally* Johnson, *supra* note 45.

126. *Id.* at B13.

127. *Id.*

into this "uncompetitive" market, under the assumption that its offerings could correct a market failure that has hurt a large number of consumers.[128]

As I wrote previously in a 2006 newspaper article, new entrants into the money transfer market have improved prices considerably.[129] But there is more that can be done.[130] Among the best ways to do so is by providing a better alternative to private sector offerings. One viable way to provide such an alternative is to undertake a targeted reform of the SM/DS program, which takes care to build on the USPS's competitive advantages.

B: Policy Implementation

If the USPS decides to restructure SM/DS, ideally by adopting a completely virtual money transfer system, it will need to create a detailed implementation plan. This implementation plan should take into account the full range of potential issues that may affect consumer demand for USPS money transfers.[131] For example, the USPS may revisit its SM/DS pricing strategy and related marketing issues.[132] It also could focus on optimizing its tracking options, which currently limit demand for USPS money orders because they fall below the industry standard.[133] The USPS, lastly, may identify a way to overcome its legal limitations under the applicable law.[134]

This implementation plan should also take care to account for future changes to the law. The USPS may do so, at little-to-no-cost, if it recognizes that while current law "generally prohibits the Postal Service from offering new non-postal services, the Postal Service might be able to expand into adjacent services with the Postal Regulatory Commission's (PRC's)

128. USPS entry into the international money transfer market also is justified because, in the recent past, it was U.S. private sector firms that entered non-competitive markets to correct market failures. *Cf.* U.S. POSTAL SERV., supra note 49 at 19:

> [T]he Postal Service [has] faced increasing competition, both indirect and direct, [from U.S. private sector firms] . . . . [For example, in] 1979, the Postal Service surrendered part of its letter-mail monopoly (for "extremely urgent" letters), opening itself up to competition in the delivery of First-Class Mail . . . . From 1980 to 1990, the Postal Service's share of the expedited mail market dropped from an estimated 33 to 12 percent.

129. *See* Johnson, *supra* note 45, at B13.

130. *See id.*

131. *See* U.S. POSTAL SERV., OFFICE OF THE INSPECTOR GEN., PROVIDING NON-BANK FINANCIAL SERVICES FOR THE UNDERSERVED 17 (2014). ("In order to expand its presence in the financial services market, the Postal Service needs a solid strategy, based, in part, on some of the lessons learned from international posts, the banking industry, and others").

132. *See* OFFICE OF THE INSPECTOR GEN., *supra* note 8 at 14. ("Dinero Seguro [is] . . . among the most expensive options for wiring money to many of the countries where it operates.")

133. *Id.*

134. *See id.* at 11.

approval."[135] One new product that may be worth advocating for, ideally as part of a larger lobbying effort, is the domestic money transfer. SM/DS, under its existing grant of authority, cannot offer any U.S. city-to-city transfers.

Lastly, this implementation plan should assure that SM/DS becomes profitable over time. To assure a measure of profitability, USPS should focus on "[a] strategic expansion to more post offices (particularly those in areas with large immigrant populations), along with more effective marketing," in an attempt to boost international money transfer sales.[136] The USPS is already considering this reform option, which could generate $163 million in new SM/DS revenues.[137]

V. IMPLICATIONS FOR U.S. CITIES IN CRISIS

Within this context, SM/DS reform could encourage more local economic development. Especially in cases where the change positively impacts local sales tax bases.[138] Local sales tax bases are created,[139] usually by a sub-state government, and imposed as a uniform levy.[140] As such, this tax is imposed on "the sale of all commodities except those specifically exempted." Once it is placed on non-exempt items—such as the fees or service charges that apply to certain products, which often are tied to checking accounts—the tax is collected.[141] This tax, in many cases, does not apply to the fees or service charges that are applied to USPS products like money transfers.[142] This fact remains true whether money transfers are delivered in tangible form, as a USPS money order, or in an intangible form such as a wire transfer or a yet-to-be created (completely) virtual money transfer.[143]

135. *Id.* at 12.

136. *Id.* at 14.

137. *Id.* at 15, 28.

138. *See generally* Bethany R. Berger, *The Illusion of Fiscal Illusion In Regulatory Takings*, 66 AM. U. L. REV. 1, 26 (2016) ("Sales taxes are a very significant source of revenue for state governments and sometimes a significant source of revenue for local governments . . . . Sales taxes comprise about a third of combined state and local revenues.").

139. Osborne M. Reynolds, LOCAL GOVERNMENT LAW 369, n.1 (3d ed. 2009) (describing how local sales taxes are created, imposed, and collected in the U.S.).

140. *Id.* ("Local sales taxes are widespread. Currently, thirty-eight states authorize local sales taxes. Three of those states—California, Utah, and Virginia—also impose a mandatory statewide local add-on to state sales taxes.").

141. *Id.*

142. *See* Briffault, *supra* note 13, at 823 ("Most states collect local and state sales taxes together[,] and then remit the local share to local governments.").

143. *See generally* Charles E. McLure, Jr., *Sales and Use Taxes on Electronic Commerce: Legal, Economic, Administrative, and Political Issues*, 34 URB. LAW. 487 (2002) (describing how local sales

In the event that elected officials agree to subject more USPS fee and service charges to the sales tax, this modest change in policy is likely to lead to greater tax yields. This conclusion is likely to be accurate regardless of the tax rate, or incidence, in the jurisdiction.[144] One potential result is that local governments, including U.S. cities in crisis, gain a new source of revenue.[145]

These revenues, likely, would expand over time. This expansion would be even more substantial, if the private sector followed suit and supported future legislative action that would permit all similarly-situated products to be subjected to the sales tax.[146] In addition to the obvious benefit of increased tax revenues, and maintenance of the neutrality principle with respect to different types of negotiable instruments, such a change may be beneficial for three underappreciated reasons.[147] First, this result underscores the point that one goal of the U.S. tax system is to collect tax dollars in an equitable way within each jurisdiction.[148] It also highlights the fact that local governments should be concerned with the impact of tax policy on consumer behavior, which includes substitution effects for individual products.[149] Lastly, this change exposes an inconvenient truth: that too many jurisdictions fail to make any connection between their own-source revenues and public spending.[150]

taxes work in practice, at least with respect to how such taxes are applied to a range of commodities that are sold online).

144. *Id.* ("In the states that authorize local sales taxes, tax rates vary from locality to locality, with the lowest average in Idaho (0.01%) and the highest in Alabama and Louisiana (4.91% each).").

145. *Cf.* Doug Smith, *Absentee vote pushes L.A. County homeless sales tax measure to a strong finish*, L.A. TIMES (May 17, 2017), http://www.latimes.com/local/lanow/la-me-ln-measure-h-final-recap-20170317-story.html (last visited May 20, 2017) (noting that Los Angeles County has considered adding "to the half-cent transportation tax approved by voters [through a proposal to increase] . . . the sales tax rate to 9.5% across most of the county.").

146. *Cf.* State of Iowa, *supra* note 39 (describing the general rule, at least in the State of Iowa, which states that "Bank service charges which are never assessed against the expense of maintaining a checking account are not subject to tax.")

147. *Cf.* Berger, *supra* note 138, at 26:

> Reliance on state and local sales taxation varies inversely with other taxes . . . . [As] the role of property taxes shrank over the course of the twentieth century, the role of sales taxes grew, until sales taxes comprised [a] . . . slightly larger portion of state tax revenue . . . in 2014 sales tax revenue was about 75% of property tax.

148. Joshua D. Rosenberg & Dominic L. Daher, THE LAW OF FEDERAL INCOME TAXATION 31–32 (2008) (describing the policy preferences that, often, implicitly inform the U.S. tax system.)

149. *Id.*

150. *See* JOSEPH M. DODGE, J. CLIFTON FLEMING, JR. AND ROBERT J. PERONI, FEDERAL INCOME TAX: DOCTRINE, STRUCTURE AND POLICY: TEXT, CASES, PROBLEMS 72–73 (4th ed. 2012). Per the casebook:

> The lack of alignment between taxing and spending is partly due to the fact that the deliberate creation of a . . . government deficit may be used as a macroeconomic tool to stimulate con-

VI. CONCLUSION

In order to realize the benefits of SM/DS reform, especially those benefits that accrue to U.S. cities in crisis, the USPS must avoid situations that reduce its long-term prospects.[151] For example, the USPS could limit potential conflicts of interest when it serves as a market participant. One way to do so is to set the rules, ex ante, in terms of how the USPS competes against other participants in non-postal markets.[152] Initial guidance could be provided by the USPS's own Inspector General,[153] which has recently released a series of useful publications.

The USPS also may make better use of its scarce public resources. Specifically, the USPS could become more efficient if it were to fully and unabashedly use its competitive advantages. The USPS could do so by reviewing its own work in building USPS.com, in the 1990s,[154] or its current work with the new USPS Premier Office Program.[155]

> sumer demand and/or private investment during economic recessions. At the same time, however, the deficit, which must be made up by . . . borrowing, can put upward pressure on interest rates and rises in interest rates may dampen economic activity. [In the process,] . . . government borrowing shifts the burden of paying for current spending to future years (where a portion of [future tax revenues] . . . must repay government debt and interest thereon).

151. *Compare* U.S. POSTAL SERV., supra note 49, at 19 (noting that reform that the Postal Service is unlikely to consider is closing small, unprofitable Post Offices. Third parties have advised that the Postal Service could save millions of dollars annually, but still adequately serve rural customers by replacing thousands of small, money-losing Post Offices with alternative services like contract offices or rural delivery routes. But instead of thousands of closings, the Postal Service has closed, on average, fewer than 150 Post Office each year.) *with* U.S. POSTAL SERV., supra note 49 at n.80 (noting that closing small, unprofitable Post Offices may not be viewed as a valid reform option, and noting further that it could violate Section 101(b), Title 39 of the U.S. Code, which states that: "No small post office shall be closed solely for operating a deficit, it being the specific intent of the Congress that effective postal services be insured to residents of both urban and rural communities.").

152. *See*, *e.g.*, PRESIDENT'S COMM'N ON THE U.S. POSTAL SERV., EMBRACING THE FUTURE: MAKING THE TOUGH CHOICES TO PRESERVE UNIVERSAL MAIL SERVICE (July 31, 2003), https://www.treasury.gov/press-center/press-releases/documents/pcusps_report.pdf (last visited June 7, 2016) (describing the reform options that are available to the USPS, at least with respect to preserving universal mail service in the United States).

153. *See* U.S. POSTAL SERV., *supra* note 131, at 18. The report states that

> [t]he Postal Service could create a 'win-win' situation by partnering with banks and other organizations to provide financial products and services to new customers. Postal financial services could complement the current offerings from banks by helping banks reach customers in new geographic areas, by offering products to customers who were not previously a main focus of banks, and by helping some customers transition to traditional savings or checking accounts . . . . The Postal Service offers trust, a vast physical network, and other critical assets. Banks offer reliability, expertise, and competence when it comes to financial transactions . . . . The end results could be new services for customers, more revenue for banks, and an easier way for the Postal Service to expand its presence in the financial services market.

154. *See id.* at 19. The report goes on to note:

> [The] Postal Service greatly increased access for customers in the 1990s with the launch of its public Web site, usps.com. Today, customers can buy stamps, look up ZIP Codes, calculate postage rates, learn about services, confirm package delivery, change their address, ask to

Lastly, the USPS could assure the political viability of SM/DS. For example, it could shield this non-postal service from third party criticism, especially in cases where a misunderstanding could lead to further reductions in its legal authority. Accordingly, USPS may want to maintain a dialogue with potential money transfer consumers, private sector competitors, and unrelated third parties such as U.S. cities in crisis.[156]

Regardless of how the USPS decides to proceed, SM/DS reform is likely to be cost-justified. There are three reasons why. First, this reform reduces transaction costs. It also produces fewer opportunity costs than other alternatives, such as a prospective expansion of USPS legal authority. Finally, this reform provides a way to encourage more local economic development on the ground.

have their mail held, print shipping labels, pay for postage, request free package pickup, and even design advertising mail pieces online.

155. *See* OFFICE OF THE INSPECTOR GEN., *supra* note 2, at 11. Per the report:

> the Postal Service launched the Premier Office Program . . . . The program offers many services . . . . For example, lobby assistants use handheld mobile Point-of-Sale (mPOS) devices to conduct simple consumer transactions. In addition, in certain locations, lobbies and kiosks are available to customers 24/7 to conduct postal business and obtain mail and packages.

156. *See id.* The report opines:

> New regulations could alter the financial services landscape . . . . These regulatory developments could affect the Postal Service in at least two ways. First, they could directly affect existing and potential financial products and services offered by the Postal Service. Second, there could be a role for the Postal Service to play in helping banks and other institutions [to] . . . comply with regulations. For example, the Postal Service might explore whether banks that partner with it could earn credit toward fulfilling their requirements under the 1977 Community Reinvestment Act.