



EMORY  
LAW

Emory Bankruptcy Developments Journal

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Volume 37  
Issue 3 *Developments Issue*

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2021

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Laura N. Coordes

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### Recommended Citation

Laura N. Coordes, *A Path Forward for the Postal Service*, 37 EMORY BANKR. DEV. J. 581 (2021).  
Available at: <https://scholarlycommons.law.emory.edu/ebdj/vol37/iss3/4>

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# A PATH FORWARD FOR THE POSTAL SERVICE

Laura N. Coordes\*

## INTRODUCTION

What is the United States Postal Service (USPS)? The entity's future, financial and otherwise, is wrapped up in the answer to this fundamental, yet surprisingly complicated, question.

The postal service in the United States began as a part of the federal government, but over the years, Congress has altered its structure. Today's USPS is an entity situated somewhere between a public, governmental agency and a private business. It has attributes resembling both, and while most observers agree that it is becoming more "privatized,"<sup>1</sup> it is still subject to a significant number of laws and regulations that do not apply to private businesses.<sup>2</sup> In addition, the USPS has a federally imposed "universal service obligation"—a requirement to deliver mail to every corner of the country—and a public-oriented mission that predates the birth of America itself.<sup>3</sup>

This Essay argues that the USPS's structural identity—or lack thereof—poses innumerable problems, including and especially the lack of a readily available safety net, such as bankruptcy, in the event of the entity's financial crisis. The need for more clarity on exactly what the USPS is—public agency or private business—is increasingly important as the USPS plunges deeper into a financial crisis that is decades in the making. Thus, this Essay contends that the way forward for the USPS is another restructuring, this time in the form of a commitment to transform the USPS into either a fully public agency or a fully

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\* Associate Professor of Law, Arizona State University Sandra Day O'Connor College of Law. Thanks to the presenters and attendees of the *EBDJ's* Developments Issue Workshop for their insightful and very helpful comments. Thanks as well to the *Emory Bankruptcy Developments Journal* editors and staff for the opportunity to contribute this Essay.

<sup>1</sup> Chris Edwards, *Restructuring the U.S. Postal Service*, 39 CATO J. NO. 3 (2019), <https://www.cato.org/publications/cato-journal/restructuring-us-postal-service> (noting that the USPS has become more "privatized" in recent years); Alex Wolf & Louis C. LaBrecque, *Postal Service Fix Requires Congress, Not Bankruptcy*, BLOOMBERG L. (Apr. 24, 2000), <https://news.bloomberglaw.com/bankruptcy-law/postal-service-fix-requires-lawmakers-not-bankruptcy-lawyers> (arguing that, from a functional perspective, the USPS is more similar to a private corporation than a governmental agency).

<sup>2</sup> See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-385, U.S. POSTAL SERVICE: CONGRESSIONAL ACTION IS ESSENTIAL TO ENABLE A SUSTAINABLE BUSINESS MODEL 1 (2020) [hereinafter GAO Report] (describing the federal laws and regulations that hamper the USPS's flexibility).

<sup>3</sup> Boyce Upholt, *The Tumultuous History of the U.S. Postal Service—And Its Constant Fight for Survival*, NAT'L GEOGRAPHIC (May 18, 2020), <https://www.nationalgeographic.com/history/2020/05/tumultuous-history-united-states-postal-service-constant-fight-survival/>.

private business. The status quo, in which it is unclear whether the USPS is one or the other, is simply untenable.

The Essay proceeds as follows. Part II provides a history of the USPS, while Part III describes its current financial predicament. Part IV discusses why bankruptcy is not an appropriate or workable option for the USPS to resolve its financial difficulties, while Part V sets forth this Essay's recommendations for the future structure of the USPS. Part VI briefly concludes by emphasizing the uniqueness of the USPS's situation and status.

## I. HISTORY OF THE USPS

Ask someone to describe what the USPS is today, and you may be in for a long lecture. A quick study of the origins and development of what is now the USPS illustrates how, over time, the entity morphed from a firm part of the federal government to a quasi-independent, quasi-governmental body that today exists somewhere on the spectrum between a full-fledged governmental agency and a completely private business.

### A. *Establishment & Original Vision*

The concept of the nation's postal service is older than the United States itself.<sup>4</sup> The Framers believed that a postal service was so important to the young nation that they specified Congress's powers with respect to the establishment and regulation of the postal service in the Constitution.<sup>5</sup> Thus, the Postal Clause of the Constitution gives Congress the power to create post offices and post roads.<sup>6</sup>

Early laws clearly envisioned postal services as a component of the federal government. In 1792, President George Washington signed into law the Postal Service Act (PSA), which established the Post Office as a part of the federal

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<sup>4</sup> *About the United States Postal Service*, <https://about.usps.com/who/profile/> [hereinafter *About USPS*] (noting that the history of the USPS "began with the Second Continental Congress and Benjamin Franklin in 1775"); Matthew Stuart & Clancy Morgan, *The Rise and Fall of USPS*, *BUS. INSIDER* (May 29, 2020), <https://www.businessinsider.com/usps-rise-fall-post-office-collapse-2020-5> ("The US Postal Service has been delivering mail since before the Declaration of Independence was even signed.")

<sup>5</sup> Jena Martin & Matthew Titolo, *The United States Postal Service—The One Word That Makes All the Difference*, 99 *TEX. L. REV. ONLINE* 72, 77 (2020). Prior to that, the Articles of Confederation had also given the federal government the power to establish and regulate postal services. *United States Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 739 (2004).

<sup>6</sup> *About USPS*, *supra* note 4.

government.<sup>7</sup> The PSA also created mail routes and made it a crime to open anyone else's mail.<sup>8</sup> According to the PSA, the Post Office's basic function was to provide postal services to "bind the Nation together through the personal, educational, literary, and business correspondence of the people."<sup>9</sup>

In the years that followed, the Post Office was further integrated into the federal government. In the 1800s, the Postmaster General became a Cabinet member, and eventually, the Post Office Department was recognized as "an executive department of the Federal Government."<sup>10</sup> Thus, throughout much of the United States' history, the Post Office, as it was then called, was a part of the federal government, and even a part of the President's Cabinet.

### B. *Bailouts & Financial Difficulties*

Although the postal service has had periods of smooth sailing, it also has a history of financial struggle. In the 1840s, the Post Office received a taxpayer-funded bailout after private companies began using steamboats and railroads to compete with the Post Office to deliver mail more cheaply.<sup>11</sup> Subsequently, Congress passed a series of laws to give the agency a monopoly over letter-carrying, thus cutting out competition from the private firms.<sup>12</sup> Congress created an annual appropriation to further support the Post Office in 1851.<sup>13</sup> Thus, the federal government's early reactions to the Post Office's financial difficulties were in the form of support via both federal funding and new laws that differentiated the Post Office's functions from those of private businesses.

As the population spread across the land that is now the United States, the country's leaders continued to support the Post Office. The expense of delivering mail to far-flung rural America was alleviated by a combination of taxpayer funds and profits from urban delivery.<sup>14</sup> The use of taxpayer funds to support the Post Office was justified by the idea that the Post Office had a "universal service obligation" to provide mail delivery to every American.<sup>15</sup> Thus, in 1914, when the Post Office ran up a \$40 million deficit due to the cost of rural delivery,

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<sup>7</sup> Sarah Smarsh, *America's Postal Service Is a Rural Lifeline—And It's in Jeopardy*, NAT'L GEOGRAPHIC (Oct. 9, 2020), <https://www.nationalgeographic.com/history/2020/10/rural-post-office/>; *Flamingo Indus.*, 540 U.S. at 739 (noting that initially, the Post Office "was subordinate to the Treasury Department").

<sup>8</sup> Stuart & Morgan, *supra* note 4.

<sup>9</sup> See 39 U.S.C.A. § 101 (West).

<sup>10</sup> *Flamingo Indus.*, 540 U.S. at 740.

<sup>11</sup> Upholt, *supra* note 3.

<sup>12</sup> Upholt, *supra* note 3.

<sup>13</sup> Upholt, *supra* note 3.

<sup>14</sup> Upholt, *supra* note 3.

<sup>15</sup> Upholt, *supra* note 3.

Congress again provided taxpayer money to assist in correcting the agency's financial course.<sup>16</sup>

However, by the 1960s, the Post Office seemed to be testing the limits of Congress's generosity. Letter carriers, who had unionized starting in the 1860s, felt that they were on the losing end of their fight for better pay and working conditions.<sup>17</sup> Attempts to cut costs reduced overtime for the workers, leading to a backlog of mail so significant that in 1964, the Post Office was still delivering Christmas gifts on Valentine's Day.<sup>18</sup> Testifying before Congress in 1967, the postmaster general stressed that the agency was "in a race with catastrophe" due to all of the backlogged mail.<sup>19</sup>

These struggles suggested to the federal government that it was time to try a new approach. In 1968, a presidential commission studying the Post Office concluded that it would fare better if it were "run as a business" rather than as a government agency.<sup>20</sup> Postal unions strongly opposed such a shift, however, setting the stage for the clashes—and restructuring—to come.<sup>21</sup>

### C. *The Postal Reorganization Act*

In 1970, postal carriers in New York City went on strike; letter carriers across the nation quickly followed suit.<sup>22</sup> Although much of the American public did not receive mail for eight days, there was still public support for the strike.<sup>23</sup> In the negotiations that ensued, the unions and the government struck a deal: the unions would support a reorganization of the Post Office in exchange for higher pay and collective bargaining rights.<sup>24</sup>

Shortly thereafter, President Richard Nixon signed the Postal Reorganization Act (PRA) into law.<sup>25</sup> The PRA drastically changed the character of the postal system. The Post Office, previously a Cabinet-level government agency, transformed into the United States Postal Service, a government-owned

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<sup>16</sup> Upholt, *supra* note 3.

<sup>17</sup> Upholt, *supra* note 3.

<sup>18</sup> Upholt, *supra* note 3.

<sup>19</sup> Stuart & Morgan, *supra* note 4.

<sup>20</sup> Upholt, *supra* note 3.

<sup>21</sup> Upholt, *supra* note 3.

<sup>22</sup> Upholt, *supra* note 3.

<sup>23</sup> Upholt, *supra* note 3 (noting that news magazines characterized the shutdown as "the Revolt of the Good Guys").

<sup>24</sup> Upholt, *supra* note 3.

<sup>25</sup> Smarsh, *supra* note 7.

company that was expected to be self-funded and to function more like a business than an arm of the government.<sup>26</sup>

Thus, although the newly formed USPS remained under the government's wing, it was intended to operate more like a business.<sup>27</sup> Accordingly, while the PRA retained the postal service's monopoly over the delivery of letters, it began to phase out the USPS's direct government subsidies.<sup>28</sup> Since 1982, the USPS has not received any taxpayer funds for its operations.<sup>29</sup>

The PRA represented a dramatic restructuring of the United States' postal services. The Post Office was transformed "from a taxpayer subsidized cabinet-level agency to a self-supporting, independent entity within the Executive Branch."<sup>30</sup> Today, it is an "independent establishment of the Federal Government."<sup>31</sup> It is not quite a business, as it remains exempt from many federal laws and regulations that would normally apply to businesses.<sup>32</sup> Yet, it is not quite a government agency either, as it is exempt from many laws that apply to government agencies as well.<sup>33</sup> In striking a "grand bargain" with the unions, the PRA stuck the USPS somewhere between a government agency and a private business.<sup>34</sup> Although the USPS remains a part of the Executive Branch, it is not under that branch's direct control, as it is overseen by a Board of Governors.<sup>35</sup>

In 2004, a Supreme Court case brought the USPS's muddled nature into the spotlight. In *United States Postal Service v. Flamingo Industries*, the Supreme Court had to decide whether the USPS was subject to liability under federal antitrust law.<sup>36</sup> In deciding that it was not, the Court described the USPS as "part of the Government of the United States" but never explicitly described it as a "governmental agency."<sup>37</sup> Instead, it described the USPS as a "public

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<sup>26</sup> Smarsh, *supra* note 7.

<sup>27</sup> Stuart & Morgan, *supra* note 4.

<sup>28</sup> Stuart & Morgan, *supra* note 4.

<sup>29</sup> Stuart & Morgan, *supra* note 4.

<sup>30</sup> Darrell E. Issa, *The Postal Reform Act: A Plan for an Affordable, Sustainable Postal Service*, 38 J. LEGIS. 151, 154 (2012).

<sup>31</sup> *Id.* at 181.

<sup>32</sup> *See id.* (noting that the USPS is "exempted from most federal laws and regulations applicable to purchasing").

<sup>33</sup> *See id.* (discussing the USPS's exemptions from the Competition in Contracting Act and the Federal Acquisition Regulation).

<sup>34</sup> *Id.* at 155.

<sup>35</sup> *Id.* at 173 (describing the Board of Governors as "the chief management unit of the Postal Service").

<sup>36</sup> *United States Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 738 (2004).

<sup>37</sup> *Id.* at 744.

business”<sup>38</sup> and an “independent establishment.”<sup>39</sup> Although the Court did use the phrase “public business” to describe the USPS, it took pains to emphasize that “Congress debated proposals to make the [USPS] a Government corporation before it enacted the PRA.”<sup>40</sup> The Court’s descriptions of the USPS reinforce the idea that the USPS is distinct from other governmental agencies and that it is not a government-owned corporation.

#### *D. The Postal Accountability and Enhancement Act*

Despite the postal service’s substantial restructuring in the 1970s, Congress was not quite finished tinkering with it. In 2006, Congress passed the Postal Accountability and Enhancement Act (PAEA).<sup>41</sup> The PAEA restricted the definition of “postal services” to only include letters and packages, making it more difficult for the USPS to innovate by providing other services.<sup>42</sup> But most remarkably, the law requires the USPS to pay in advance for future employees’ retirement benefits.<sup>43</sup> With this step, Congress made the USPS even more of an outlier, as neither agencies nor businesses are required to pre-allocate this type of funding for their (future) retirees.<sup>44</sup>

Prior to the PAEA’s passage, the USPS had funded its retiree pension and healthcare accounts based on the needs of its current retirees, similar to the way that many other companies fund healthcare and pensions.<sup>45</sup> Under the PAEA, however, the USPS was required to determine all of its retiree pension and healthcare costs for the next seventy-five years and to fund those accounts according to that determination.<sup>46</sup> This meant that the USPS had to contribute approximately \$5.6 billion a year to cover those who had not yet retired, in addition to the amount it was already contributing for current retirees.<sup>47</sup> As a result, the USPS’s required contribution grew by 625% from 2006 to 2007.<sup>48</sup> Perhaps unsurprisingly, the USPS recorded a loss of over \$5 billion that year.<sup>49</sup>

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<sup>38</sup> *Id.* at 739.

<sup>39</sup> *Id.* at 740.

<sup>40</sup> *Id.* at 746.

<sup>41</sup> Upholt, *supra* note 3.

<sup>42</sup> Upholt, *supra* note 3.

<sup>43</sup> Upholt, *supra* note 3.

<sup>44</sup> Smarsh, *supra* note 7 (“[M]any see the rule as an intentional blow to a public function that some corporate lobbyists aim to privatize.”).

<sup>45</sup> Stuart & Morgan, *supra* note 4.

<sup>46</sup> Stuart & Morgan, *supra* note 4 (“To put this in perspective, that’d be like you only working from age 18 to 28 and then expecting to live on that income until you were 103 years old.”).

<sup>47</sup> Stuart & Morgan, *supra* note 4.

<sup>48</sup> Stuart & Morgan, *supra* note 4.

<sup>49</sup> Stuart & Morgan, *supra* note 4.

At the same time as it imposed a massive new funding obligation on the USPS, Congress took away much of the USPS's ability to set prices. The PAEA tied pricing for first-class mail, marketing mail, and other similar products to the consumer price index.<sup>50</sup> The USPS now cannot raise prices on these products above the rate of inflation.<sup>51</sup> These capped prices do not provide sufficient revenues for the USPS to pay for its legally-mandated costs, including costs associated with fulfilling the USPS's universal service obligation.<sup>52</sup> Notably, the retiree and health benefit costs imposed by the PAEA are growing faster than the rate of inflation.<sup>53</sup>

In its attempts to make the USPS more like a private business,<sup>54</sup> Congress actually tightened its control over the USPS, hamstringing it with new obligations while continuing to mandate that it serve the entire population. The PAEA functionally created “an ongoing and wholly manufactured budget crisis” for the USPS.<sup>55</sup> Since the PAEA's passage, there have been near-continuous calls to both loosen and tighten the federal government's hold on the institution.<sup>56</sup> These calls, along with the USPS's deepening financial crisis, strongly suggest that the status quo is not sustainable.

An examination of the USPS's history demonstrates the difficulty with finding a label and attempting to classify the entity that provides the United States with postal services. In practice, the USPS is a hybrid, sharing characteristics with both governmental agencies and private businesses. As the remainder of this Essay shows, the USPS's lack of ready classification makes it difficult, in turn, to assess or design options for its financial relief.

## II. THE USPS'S CURRENT PREDICAMENT

Today, the USPS is in a financial fix. Its situation is hardly new: the USPS has been on the Government Accountability Office's (GAO) high-risk list since

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<sup>50</sup> Stuart & Morgan, *supra* note 4.

<sup>51</sup> Stuart & Morgan, *supra* note 4.

<sup>52</sup> U.S. POSTAL SERV., THE U.S. POSTAL SERVICE FIVE-YEAR STRATEGIC PLAN 8 (2020) (outlining the plan for the USPS's fiscal year 2020 through 2024).

<sup>53</sup> *Id.*

<sup>54</sup> Issa, *supra* note 30, at 156 (noting that the PAEA, in combination with the PRA, enabled “the Postal Service to operate even more like a business”).

<sup>55</sup> Martin & Titolo, *supra* note 5, at 80.

<sup>56</sup> *See, e.g.*, Issa, *supra* note 30, at 183 (proposing legislation to loosen congressional control); Martin & Titolo, *supra* note 5, at 92 (arguing against privatization and for more congressional action); Peter Hettich, *Governance by Mutual Benchmarking in Postal Markets: How State-Owned Enterprises May Induce Private Competitors to Observe Policy Goals*, 32 U. DAYTON L. REV. 199, 201 (2007) (asserting that “there are valid reasons to consider private involvement in the provision of postal service”).

2009, and its financial status has worsened ever since.<sup>57</sup> In a report released last year, the GAO identified three primary factors for the USPS's financial decline: "[1] declining mail volume, [2] increased [employee] compensation and benefit costs, and [3] increased unfunded liabilities and debt."<sup>58</sup> These three factors together prohibit the USPS from fulfilling Congress's vision of a financially self-sustaining entity.<sup>59</sup>

Although mail volume is the USPS's primary source of revenues,<sup>60</sup> the public's demand for "snail mail" has been dropping ever since email entered the picture.<sup>61</sup> A private business might respond to declines in demand for its product by innovating—finding new goods and services to offer and coming up with new ways to deliver those goods and services by, for example, closing down brick-and-mortar storefronts and developing a more robust online presence. But the USPS is not like a private business in this respect, and it lacks much of the leeway it needs to respond to declining demand. Federal law prohibits the USPS from closing its retail facilities due to unprofitability.<sup>62</sup> The price cap imposed by the PAEA limits the USPS's ability to adjust its prices to correspond with supply and demand.<sup>63</sup> And federal law also prohibits the USPS from expanding its business to provide new, non-postal products and services.<sup>64</sup>

The PAEA's requirements for pre-funding employee pension and healthcare accounts also represent a large financial burden on the USPS, but even its current employee expenses are ballooning out of control. Since 2014, the USPS's compensation and benefits costs for its current employees have steadily increased, due in part to increasing work hours.<sup>65</sup> Although the USPS's total number of employees has decreased since 2007, its employees are working longer hours and incurring substantial overtime pay.<sup>66</sup> Once again, the USPS is limited in the steps it can take to address these costs. For example, the USPS is

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<sup>57</sup> GAO Report, *supra* note 2, at 1 (noting that USPS's net losses totaled approximately "\$78 billion from fiscal years 2007 through 2019").

<sup>58</sup> GAO Report, *supra* note 2, at 8.

<sup>59</sup> GAO Report, *supra* note 2, at 8.

<sup>60</sup> GAO Report, *supra* note 2, at 8 ("As online communication and payments have expanded, USPS continues to face decreases in mail volume, its primary revenue source.").

<sup>61</sup> Upholt, *supra* note 3. ("Faster, and free, [email] chewed into demand for the Postal Service's products. First-class and marketing mail is dwindling—dropping by 34 percent since 2007."); Issa, *supra* note 30, at 152 ("[F]ew places have witnessed as dramatic a decline in mail volume as has the United States.").

<sup>62</sup> GAO Report, *supra* note 2, at 10.

<sup>63</sup> GAO Report, *supra* note 2, at 10.

<sup>64</sup> GAO Report, *supra* note 2, at 10.

<sup>65</sup> GAO Report, *supra* note 2, at 11.

<sup>66</sup> GAO Report, *supra* note 2, at 11.

subject to statutory requirements regarding its employees' pay and benefits.<sup>67</sup> The USPS is also beholden to collective bargaining agreements with its unions. In some cases, the terms of these agreements were decided by a third-party panel in binding arbitration, and these terms have included salary increases and cost-of-living adjustments that the USPS must abide by.<sup>68</sup>

Finally, the USPS's unfunded liabilities and debt have ballooned to 226% of its annual revenues for fiscal year 2019.<sup>69</sup> These unfunded liabilities are due in part to the USPS failing to fund its retiree health and pension benefits in accordance with the PAEA's mandates.<sup>70</sup>

The USPS's current predicament illustrates how far it has deviated in practice from the federal government's vision of the agency beginning in the 1970s. Recall that, prior to the PRA, the Post Office was a taxpayer-subsidized cabinet-level agency.<sup>71</sup> When Congress restructured the agency, it expected that the newly formed USPS would pay for itself through the revenues it generated and would no longer need to be reliant on taxpayer funds.<sup>72</sup> In addition to generating revenue, the USPS also has the ability to issue debt, but this ability is, once again, subject to congressional control.<sup>73</sup>

It is worth noting that the PRA's new structure for the postal service worked—for a time. Indeed, when Congress passed the PAEA in 2006, the USPS's financial situation was arguably quite healthy: from 2004 to 2006, the USPS saw profits of \$6 billion.<sup>74</sup> Yet, with first-class mail volume beginning to decline, Congress and the White House also believed that reforms were needed.<sup>75</sup> "Congress had realized for some time that the post office was dealing with an outdated business model."<sup>76</sup> For this reason, although the PAEA did allow the USPS to raise rates on some products, it also gave the Postal Regulatory Commission, which oversees the USPS, more say over how the

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<sup>67</sup> GAO Report, *supra* note 2, at 12–13 (citing the Federal Employees Health Benefits Program, federal pension, and federal workers' compensation programs as examples of these statutory requirements).

<sup>68</sup> GAO Report, *supra* note 2, at 12.

<sup>69</sup> GAO Report, *supra* note 2, at 13.

<sup>70</sup> GAO Report, *supra* note 2, at 14.

<sup>71</sup> Issa, *supra* note 30, at 154.

<sup>72</sup> Upholt, *supra* note 3; GAO Report, *supra* note 2, at 15 (noting that, via the PRA, Congress designed the USPS to be a self-sustaining business-like entity that would cover its operating costs primarily with revenues generated through sales of postage and postal-related products and services).

<sup>73</sup> Wolf & LaBrecque, *supra* note 1 ("Congress controls how much the Postal Service can borrow . . .").

<sup>74</sup> Jacob Bogage, *The Postal Service Needs a Bailout. Congress Is Partly to Blame.*, WASH. POST (Apr. 15, 2020), <https://www.washingtonpost.com/business/2020/04/15/postal-service-bailout-congress/>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (quoting Tom Davis, the former Virginia congressman who introduced the PAEA).

USPS used its resources.<sup>77</sup> And even as Congress saddled the USPS with the burden of paying for all of its worker and retiree benefits, it also relieved the USPS of certain other responsibilities, such as a previous requirement to pay veteran employees' military pensions.<sup>78</sup> Through these measures, members of Congress believed that the PAEA would "make the Postal Service a high-performing, self-sufficient, efficiency-based business."<sup>79</sup>

What is odd about the PRA and the PAEA is that even as both Acts nominally sought self-sufficiency for the USPS, they both tethered the USPS more tightly to the federal government, through the restrictions and funding requirements outlined above. Thus, in recent years, the GAO has urged Congress to reassess the extent to which the USPS should be self-sustaining.<sup>80</sup> Indeed, a key problem, according to the GAO, is that "there is no consensus on [what] USPS's level of financial self-sustainability should be."<sup>81</sup>

It is clear, however, that the USPS's current operating model is not leading to financial self-sustainability. Further, in order to make the USPS self-sustainable, considerable outside assistance is likely required.<sup>82</sup> This is particularly the case because any restructuring of the USPS would require changes to federal law.<sup>83</sup>

Over the years, Congress has altered the structure of the nation's postal system, and today's USPS is situated somewhere in the middle of the spectrum running between a federal government agency and a private business. The problem with this current structure is that no one seems to really know what the USPS actually is. It is described as "an independent establishment of the executive branch," but this does not tell us very much.<sup>84</sup> For example, to what extent is the USPS a component of the federal government, and to what extent

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (quoting Lori Rectanus, Director of Physical Infrastructure at the GAO).

<sup>80</sup> GAO Report, *supra* note 2, at 31 ("A fundamental reassessment of USPS's business model would include determining the degree to which USPS should be financially self-sustaining . . .").

<sup>81</sup> GAO Report, *supra* note 2, at 35.

<sup>82</sup> Press Release, Comm. on Oversight and Reform, Government Report Shows that the U.S. Postal Service Desperately Needs Long-Term Fixes from Congress (May 7, 2020), <https://republicans-oversight.house.gov/release/government-report-shows-that-the-u-s-postal-service-desperately-needs-long-term-fixes-from-congress/> [hereinafter House Oversight Committee Press Release] ("The USPS needs to be a self-sufficient, competitive enterprise, and a legislative overhaul for the long-term is the only way to make it one.").

<sup>83</sup> GAO Report, *supra* note 2, at 36.

<sup>84</sup> GAO Report, *supra* note 2, at 35.

is it something else?<sup>85</sup> As the next Part will show, this question is not merely of theoretical importance, but has significant practical consequences for the USPS's ability to take advantage of the bankruptcy system upon financial failure.

### III. BANKRUPTCY IMPLICATIONS

At first glance, the USPS may seem like a good candidate for bankruptcy. It has significant debt and burdensome contracts and pension commitments. The GAO, in an effort to consider all possible restructuring options, even asked the National Bankruptcy Conference (NBC) to assess whether bankruptcy would be an “effective or appropriate means” to assist the USPS in freeing itself from its financial difficulties.<sup>86</sup>

The NBC, however, found that bankruptcy was not a good option for the USPS.<sup>87</sup> Indeed, a close look at what the USPS owes and to whom reveals that it cannot and should not use bankruptcy at all. In its 2019 report to the GAO, the NBC first concluded that the USPS was ineligible to be a debtor under any chapter of the Bankruptcy Code.<sup>88</sup> However, even if the USPS had been eligible for bankruptcy, the NBC further advised that bankruptcy was not a viable way forward. In part, this is because the USPS's most significant burdens arise due to statutes, not via contract.<sup>89</sup> Instead, the NBC recommended that Congress directly address the challenges and financial burdens that the USPS is facing.<sup>90</sup>

As an alternative to a restructuring under the Code, the NBC considered whether a bankruptcy-like process might be used to help the USPS. For example, the NBC's report discussed whether Congress could devise a statute similar to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), which combines bankruptcy mechanisms with other, more

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<sup>85</sup> See NAT'L BANKR. CONF., NATIONAL BANKRUPTCY CONFERENCE PRELIMINARY REPORT UNITED STATES POSTAL SERVICE RESTRUCTURING 16 (2019) [hereinafter NBC Report].

<sup>86</sup> GAO Report, *supra* note 2, at preamble (“What GAO Found”).

<sup>87</sup> GAO Report, *supra* note 2, at 40 (“[A]lthough the bankruptcy process and bankruptcy tools raise interesting ideas for restructuring USPS's existing and future obligations . . . all roads for doing so lead back to Congress.”).

<sup>88</sup> NBC Report, *supra* note 85, at 2 (“Legislation would be required to make [a bankruptcy] process available for USPS.”).

<sup>89</sup> NBC Report, *supra* note 85, at 2 (noting that “because the major obligations are imposed primarily by statute,” these obligations “would continue to bind USPS after a reorganization,” making bankruptcy “not an effective or appropriate means to address the important issues associated with a potential restructuring of USPS”).

<sup>90</sup> NBC Report, *supra* note 85, at 21 (“[A]ll roads for [restructuring USPS's obligations] lead back to Congress.”).

tailored provisions to address unique aspects of Puerto Rico's debt, for the USPS.<sup>91</sup> However, the NBC concluded that even a more tailored, bankruptcy-like statute would face significant statutory and constitutional challenges. For example, Congress would need "to repeal the applicability of all the statutes that currently constrain USPS's operations, revenues, and expenses."<sup>92</sup> Without this step, no court, bankruptcy or otherwise, could remove the statutorily imposed burdens on the USPS.<sup>93</sup> Finally, policy concerns over allowing a court to change the ownership structure of the USPS also make bankruptcy, or a bankruptcy-like court-supervised process, an unattractive option.<sup>94</sup> Put differently, the problems the USPS is facing are simply too big for bankruptcy.

Another problem relates to what the USPS is—or, rather, what it is not. The NBC concluded that a court would most likely characterize the USPS as a governmental entity, which would make it ineligible to file for chapter 11 bankruptcy.<sup>95</sup> Yet, because the USPS is not under the control of any particular state, it would not be eligible for chapter 9 bankruptcy either, because chapter 9 only applies to "municipalities" that are instrumentalities or agencies of a state (rather than the federal government).<sup>96</sup> Once again, the federal government's choice to make the USPS not *quite* a private business has ramifications—this time, in the sense that the USPS is barred from accessing bankruptcy relief.

In short, because of what the USPS is and what it owes, there are too many statutory, constitutional, and policy issues involved to make any bankruptcy or bankruptcy-like process viable or appropriate. The USPS's predicament thus shines a light on the limitations of bankruptcy access and the limits of what bankruptcy law itself can do. Over the years, the federal government has created an entity akin to Frankenstein's monster: not quite fitting in either the world of government or the world of private business. Surrounding this entity is a complex, statutorily enforced system of debts and mandates that, combined with the entity's status itself, make it impervious to bankruptcy relief.

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<sup>91</sup> NBC Report, *supra* note 85, at 17.

<sup>92</sup> NBC Report, *supra* note 85, at 21.

<sup>93</sup> NBC Report, *supra* note 85, at 16–17 ("Legislation that would permit a court to discharge or otherwise avoid USPS's obligations . . . raises constitutional separation of power questions of whether a court may void the application of a statute, even if Congress itself authorized the court to do so.").

<sup>94</sup> NBC Report, *supra* note 85, at 15 (noting that the USPS "should not fall into private ownership based on the rulings of a bankruptcy court, rather than on considered public policy debate in and decision by Congress").

<sup>95</sup> NBC Report, *supra* note 85, at 15.

<sup>96</sup> NBC Report, *supra* note 85, at 15.

The USPS's predicament raises a question: if an entity evades easy classification, how can policymakers properly assess or design its options for financial relief? There are two different aspects to this problem. The first is legal: it is difficult to figure out what laws apply to an entity that is unique among its peers and hybrid in nature. The second is social and political: it is hard to predict how the public and other stakeholders will react to any particular relief proposal, because there is no ready point of comparison.

With the USPS, Congress has created a situation where an entity with severe financial distress cannot access the "safety valve" of bankruptcy.<sup>97</sup> At the same time, congressional appetite for the types of reforms the GAO and NBC are calling for seems quite thin; after all, the USPS has been on the GAO's high-risk list for over a decade.<sup>98</sup> What, then, is the way forward for the USPS? The next Part argues that the USPS can no longer occupy a middle ground between a government agency and a business.

#### IV. RECOMMENDATIONS

To give the USPS a clear path forward, including clearer restructuring options, Congress should either fully privatize the USPS or make it a full-fledged governmental agency. Congress should not leave the USPS in limbo between these two extremes.

The status quo is untenable for the USPS, in part because there is no other entity that is quite like it. Although Amtrak, which provides passenger rail service in the United States, shares many similarities to the USPS, making it a natural point of comparison, at bottom, the two entities are different in ways that are important to the issue of how to resolve financial distress. Both Amtrak and the USPS are "nominally independent extensions of the federal government," and cross-subsidization (the concept that profits from easy-to-serve parts of the country can subsidize service in more expensive areas) is a key component of both entities' business models.<sup>99</sup> However, Amtrak, a government-controlled corporation, has significantly more flexibility and fewer restrictions than the USPS and has thus been in a comparatively better position to innovate. For example, Amtrak has no universal service obligation, fewer restrictions on

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<sup>97</sup> Adam J. Levitin, *Op-ed: Reform Our Bankruptcy Laws Before a Tsunami of Covid Debt Comes Due*, CNBC (Jan. 11, 2021), <https://www.cnbc.com/2021/01/11/op-ed-reform-bankruptcy-laws-before-covid-debt-comes-due.html> ("Bankruptcy has long been the economy's safety valve for financial distress.").

<sup>98</sup> House Oversight Committee Press Release, *supra* note 82.

<sup>99</sup> Nick Zaiac, *What Can the Postal Service Learn From Amtrak?*, R STREET (Sept. 10, 2019), <https://www.rstreet.org/2019/09/10/what-can-the-postal-service-learn-from-amtrak/>.

where it can invest its pensions, and no mandatory minimum staffing levels for its trains.<sup>100</sup> Amtrak also has the ability to provide better service to states and regions that can pay for it; the USPS does not.<sup>101</sup> Thus, although Amtrak may be the natural point of comparison for the USPS, in reality, the USPS is significantly more restricted.

Although in prior work, I have argued that bespoke bankruptcy, or customized debt relief designed for a particular group of debtors, can provide debt relief to entities where none is otherwise available, the USPS's situation poses challenges even to the development of a bespoke debt relief system.<sup>102</sup> First, Congress would have to design such a system and get on board with it, which Congress may not want to do if it views a bankruptcy process as resulting in loss of control of the entity. However, even if Congress did demonstrate the will necessary to create a bespoke system, it is likely that such a system would still run into the constraints the NBC outlined, such as the inability of a bankruptcy court to remove the USPS's statutorily imposed obligations.

Thus, under the status quo, the USPS has neither the ability to significantly adjust its business model nor the ability to access meaningful debt relief. To ameliorate this problem, Congress should adopt a more familiar model for the USPS. This Essay suggests two such possible models: a private business or a full-fledged government agency.

Ever since the USPS began experiencing financial difficulties, advocates have made the case for its full privatization.<sup>103</sup> A fully privatized USPS, untethered from all of the currently applicable statutes and federally-imposed mandates, could innovate and become financially self-sufficient.<sup>104</sup> Opening the USPS to more competition from other private business may also result in improved services for consumers.<sup>105</sup> Advocates of a privatized (or more privatized) USPS often point to Europe, where some countries there have taken steps to privatize their previously state-owned postal services.<sup>106</sup> Furthermore, a

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Laura N. Coordes, *Bespoke Bankruptcy*, HARVARD L. SCH. BANKR. ROUNDTABLE (Mar. 9, 2021), <http://blogs.harvard.edu/bankruptcyroundtable/2021/03/09/bespoke-bankruptcy/>; Laura N. Coordes, *Bespoke Bankruptcy*, 73 FLA. L. REV. 359 (2021).

<sup>103</sup> Upholt, *supra* note 3 (“Some advocates for privatization want to go even further and eliminate federal postal service entirely, which they see as an untaxed business distorting the marketplace.”); Bogage, *supra* note 74 (“Conservatives see a chance to remake the Postal Service in the image of a private corporation.”); see Edwards, *supra* note 1, at 674.

<sup>104</sup> Edwards, *supra* note 1, at 674.

<sup>105</sup> Edwards, *supra* note 1, at 677.

<sup>106</sup> See, e.g., Hettich, *supra* note 56, at 200.

fully privatized USPS would presumably also qualify as a “person” eligible for chapter 11 (or chapter 7) bankruptcy, just like its current private competitors, such as UPS, Federal Express, and Amazon. Although managing bankruptcy for highly regulated companies can present its own challenges,<sup>107</sup> it is safe to say that if the USPS were a private business, its eligibility for bankruptcy relief would not be in question.

Yet, there are many tradeoffs to full privatization, as others have explored in depth.<sup>108</sup> For example, privatization of the USPS would cause its public mission to disappear.<sup>109</sup> The USPS’s public purpose has existed since before the founding of the country; arguably, sacrificing the USPS’s public mission for full privatization would come into tension with the Constitution, since that document itself specifies that *Congress* has the power to establish *and regulate* a postal service.<sup>110</sup> Finally, a shift to privatization, with its focus on profits, would almost certainly mean that the USPS would have to disregard its universal service obligation, since it is highly unprofitable for it to deliver mail to many rural (and already underserved) areas.<sup>111</sup>

Perhaps tellingly, despite calls over the years to privatize the USPS, Congress has never done so. If Congress seeks to retain authority over the USPS, why not bring it back fully within the arm of the government? Since taxpayers—via congressional action—will almost certainly play a significant role in helping the USPS out of its current predicament, returning the USPS to full-fledged agency status, rather than “an independent establishment of the federal government,”<sup>112</sup> may make sense.

If the federal government were to fully embrace the USPS once again, the USPS would still lack access to bankruptcy for the reasons the NBC found. However, relieving the USPS of its self-sufficiency requirement and funding it once again, at least in part, with taxpayer dollars, would give the USPS the equivalent of a bailout. Although the words “taxpayer-funded bailout” may cause some to wince, the fact is that the USPS is in many ways a better candidate

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<sup>107</sup> See, e.g., Laura N. Coordes, *Reorganizing Healthcare Bankruptcy*, 61 B.C.L. REV. 419 (2020) (describing the particular challenges of balancing regulators’ interests with those of others in the context of a healthcare business bankruptcy).

<sup>108</sup> See generally Martin & Titolo, *supra* note 5, at 72 (arguing against privatization of the USPS).

<sup>109</sup> Martin & Titolo, *supra* note 5, at 76 (observing that some of the benefits the USPS provides “are solely within the domain of a public function that cannot be mimicked by a similar for-profit business”).

<sup>110</sup> U.S. CONST. art. I § 8, cl. 7.

<sup>111</sup> Martin & Titolo, *supra* note 5, at 94 (“The USO [universal service obligation] would need to be seriously scaled back, as is already happening, because the truth of the matter is that universal delivery is not profitable.”).

<sup>112</sup> Issa, *supra* note 30, at 181.

for such a bailout than other entities that have received taxpayer funds. The USPS serves the entire nation; it is “the nation’s oldest and largest public business.”<sup>113</sup> Its universal service obligation requires it to serve every American, in every corner of the country.<sup>114</sup> And compared to other government agencies, the USPS is beloved by the public, consistently ranking as Americans’ favorite agency in multiple polls.<sup>115</sup> As unpalatable as the words “taxpayer-funded bailout” may be, the American public regularly pays for public goods and services that it uses, such as public schools. The USPS provides a public service and has a public service-oriented mission.<sup>116</sup> It does not seem untoward to ask the public to help support a universally used service that, per the Constitution, was intended to be a part of the federal government itself.<sup>117</sup>

As early as 1970, Congress began taking steps to make the USPS function more like a private business. But Congress has never been willing to completely relinquish its grip on the USPS; it still exerts significant control over the USPS’s operations, the goods and services it provides, and its borrowing power. Congress’s efforts to make the USPS self-sufficient have backfired, largely because they are half-measures that hamstring the USPS even as they nominally grant it more freedom. In this way, Congress has created problems that only it can solve. At the same time, Congress appears to lack the appetite to solve these self-created problems.

Bringing clarity to what the USPS is will be beneficial from both a business and a financial distress perspective. If the underlying business model is bad, neither bailout nor bankruptcy will save the business. Neither can turn liabilities into assets. But pushing the USPS to one extreme or the other has the potential to force a conversation about the value of the services it provides. Consumer demand for postal services has certainly changed since the days of the American Revolution. Today, legitimate questions abound about what value the USPS provides to the public and the extent to which it does perform and should continue to perform a public service. If the USPS provides an important, critical public service, perhaps the federal government should prop it up. By contrast, if the services the USPS provides are not critical, perhaps we can allow it to

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<sup>113</sup> *United States Postal Serv. v. Flamingo Industries (USA) Ltd.*, 540 U.S. 736, 739 (2004) (quoting JOHN T. TIERNEY, *POSTAL REORGANIZATION: MANAGING THE PUBLIC’S BUSINESS* vii (1981)).

<sup>114</sup> Upholt, *supra* note 3.

<sup>115</sup> Upholt, *supra* note 3.

<sup>116</sup> Martin & Titolo, *supra* note 5, at 74 (describing the USPS as having a “public service mission”).

<sup>117</sup> This is not to say that an entity must be a public entity in order to receive a bailout. Rather, there may be more comfort with and acceptance of a bailout from a political perspective if the USPS were part of the US government.

innovate. The problem is that under the status quo, the USPS receives neither government aid nor the opportunity for innovation. It is essentially set up to fail.

Another problem is that any major change to the structure of the USPS will encounter resistance. The USPS has numerous stakeholders with competing interests, including labor unions, private-delivery corporations, households, and the federal government.<sup>118</sup> Any change that the USPS makes to its structure or functions will therefore impact different stakeholders differently.<sup>119</sup> Indeed, because stakeholders themselves interact with the USPS in multiple roles, any changes that the USPS makes will sometimes have differing impacts within a stakeholder group.<sup>120</sup> One of the reasons the USPS has struggled to date is that whenever it makes a change, that change is likely to be both supported and opposed by different groups of stakeholders.<sup>121</sup> For this reason, it has been difficult if not impossible for the USPS to undergo significant reforms.<sup>122</sup>

Thus, substantial work remains to be done to more thoroughly evaluate the pros and cons of the options presented here for the USPS's path forward and to develop ways to overcome stakeholder reluctance and resistance. What this Essay has sought to highlight is the danger to the USPS and all of its stakeholders of simply maintaining the status quo.

The importance of clarifying what, exactly, the USPS is so that its financial and restructuring options can similarly be clarified cannot be overstated. Allowing the USPS to persist in its current status as a hybrid, quasi-governmental entity uniquely situated among American public and private operations, is unworkable, in part because the USPS's financial relief options are so muddled, and in part because Congress has not proven itself up to the task of running the USPS like a private business. Under the status quo, the USPS is barreling toward a financial precipice, without either the flexibility to innovate or the safety net of bankruptcy. Although Congress could of course bail out the USPS today if it so chose, a bailout may be substantially more palatable if it came along with a restructuring, and particularly one in which the USPS is brought back under the federal government's wing.

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<sup>118</sup> GAO Report, *supra* note 2, at 6.

<sup>119</sup> GAO Report, *supra* note 2, at 29.

<sup>120</sup> GAO Report, *supra* note 2, at 5 (noting, for example, that the USPS is "both a competitor and partner" to private delivery companies such as the United Parcel Service and FedEx).

<sup>121</sup> GAO Report, *supra* note 2, at 30 ("[K]ey postal stakeholders hold opposing views on many other options that have been proposed.").

<sup>122</sup> GAO Report, *supra* note 2, at 43 ("Comprehensive postal reform has not taken place in part because of the difficulty in obtaining compromise among various stakeholders with divergent views.").

### CONCLUSION

When a socially important enterprise experiences extreme financial distress, bankruptcy, bailout, or both may be used to rescue it. The USPS serves an important public function, yet the way out of its immediate financial predicament is complicated by the lack of clarity surrounding what the USPS is. The bankruptcy system cannot resolve the USPS's financial problems because statutory, constitutional, and policy concerns all weaken the bankruptcy toolkit in this case. Instead, scholars and policymakers alike have realized that Congress must provide the way out of the USPS's current financial predicament. A taxpayer-funded bailout, coupled with a significant restructuring of the USPS, is the most likely way forward. When that occurs, it will be important for Congress to choose to either cut the USPS free or embrace it as part of the federal government. Doing so will clarify both the USPS's structural status and its options for future financial relief.