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Abolishing the Letter-Box Monopoly

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The U.S. Postal Service has various statutory monopolies over the delivery of mail in the United States.[1] In addition to selling its reserved products, the Postal Service competes with private firms in the provision of nonreserved products, such as parcels and overnight mail. These statutory monopolies over mail delivery are called the Private Express Statutes,[2] the first elements of which Congress enacted in 1792 and did not fundamentally change in its most recent round of major postal legislation, the Postal Accountability and Enhancement Act (PAEA) of 2006.[3]

However, in addition to benefiting from the protection of the Private Express Statutes, the Postal Service has a separate monopoly over the use of the customer's letter box. Although a letter box is the customer's own private property, section 1725 of the U.S. Criminal Code prohibits the deposit of unstamped "mailable matter" in the letter box.[4] The letter-box monopoly raises the cost of delivery for the Postal Service's rivals in the markets for nonreserved delivery products that fit in the customer's letter box. United

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1 *See* 18 U.S.C. §§ 1693–97. For a legal and economic analysis of these provisions, see J. GREGORY SIDAK & DANIEL F. SPULBER, PROTECTING COMPETITION FROM THE POSTAL MONOPOLY 11–38 (AEI Press 1996). For analyses of the history of the U.S. postal monopoly, see William Ty Mayton, *The Mission and Methods of the Postal Power*, *in* GOVERNING THE POSTAL SERVICE 60 (J. Gregory Sidak ed., AEI Press 1994); George L. Priest, *Socialism, Eastern Europe, and the Question of the Postal Monopoly*, *in id.* at 46, 54; George L. Priest, *The History of the Postal Monopoly in the United States*, 18 J.L. & ECON. 33 (1975). These authors extend Ronald Coase's critiques of the British postal monopoly. *See* Ronald H. Coase, *The British Post Office and the Messenger Companies*, 4 J.L. & ECON. 12 (1961); Ronald H. Coase, *The Postal Monopoly in Great Britain: An Historical Survey*, *in* ECONOMIC ESSAYS IN COMMEMORATION OF THE DUNDEE SCHOOL OF ECONOMICS 1931–55, at 25 (Jack Kenneth Eastham ed., Coupar Angus 1955); Ronald H. Coase, *Rowland Hill and the Penny Post*, 6 ECONOMICA 423 (n.s. 1939).

2 18 U.S.C. §§ 1693–99; 39 U.S.C. §§ 601–06.

3 Pub. L. 109-435, 120 Stat. 3201 (2006). Congress gave the Post Office Department the new name of the United States Postal Service in the Postal Reorganization Act, Pub. L. 91-375, 84 Stat. 719 (1970). For simplicity of exposition, I will refer to the Post Office as the Postal Service unless the context requires otherwise.

4 18 U.S.C. § 1725.

Parcel Service (UPS) or FedEx, for example, may not leave their express letters in the letter box if the recipient is not home. Unless the sender designates that the urgent letter may be left at the door if the recipient is not available, the private carrier will need to attempt another delivery—at obvious cost. The letter-box monopoly also deters vertical integration into the delivery of parcels by high-volume shippers (such as Amazon or eBay) that have large numbers of routine mailings, thereby denying competitors the opportunity to achieve potential efficiency gains and denying consumers the opportunity to share in the benefits from such efficiency gains.

Pursuant to its own regulations, codified in the *Domestic Mail Manual*, the Postal Service allows private firms to place items in the letter box under one condition: that the items bear the (voided) stamps that the sender would need to include to send the item through the U.S. mail.[5] In other words, the Postal Service sets the price for access to the mailing network at the last stage of the supply chain—the customer's letter box—at the full price of door-to-door mailing. Because the Postal Service's competitors would need to bear the full cost of postage in addition to their own cost of delivery to gain access to the letter box, the Postal Service's access price effectively excludes even efficient competitors from using the letter box.

The letter-box monopoly is unlawful on both antitrust and constitutional grounds.[6] It reduces consumer welfare by increasing the price and decreasing the quantity of letter-box-sized parcels and extremely urgent mail shipped. The monopoly also raises the customer's costs of receiving mail from the Postal Service's competitors. Moreover, the letter-box monopoly violates the Due Process Clause of the Fifth Amendment[7] for at least two reasons. First, the Postal Service's authority to regulate its competitors' access to the customer's letter box violates those competitors' rights to due process. Second, the criminal statute that defines the letter-box monopoly fails by virtue of its vagueness to provide fair notice of the conduct prohibited or sufficiently specific guidelines for its enforcement. In addition, the letter-box monopoly is a *per se* taking of private property without just compensation

[5] Domestic Mail Manual § 508.3.1.3 [hereinafter DMM].

[6] In this article, I show how the letter-box monopoly violates the Fifth's Amendment's Due Process Clause and Takings Clause. Alternatively, one could analyze the Postal Service's broad authority to define the letter-box monopoly as an unconstitutional delegation of legislative authority. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–22, 541 (1935) (holding that the National Industrial Recovery Act, which empowered the President to approve "codes of fair competition" for a trade or industry "upon application by one or more trade or industrial associations," impermissibly delegated legislative authority); Panama Refining Co. v. Ryan, 293 U.S. 388, 405–06, 415, 430 (1935) (finding that the National Industrial Recovery Act of June 16, 1933 impermissibly delegated legislative power to the executive branch because it granted the President the power "to prohibit the transportation in interstate and foreign commerce of petroleum . . . in excess of the amount permitted to be produced . . . by any state law or valid regulation" and gave "to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit").

[7] U.S. Const. amend. V.

by the Postal Service, because the Postal Service physically occupies the letter box with its deliveries to the exclusion of deliveries by other carriers to whom the customer might wish to permit access to the customer's own private property. That exclusion imposes costs on the customer as well as the private carrier, as the customer who was not at home when the first delivery was attempted will need to wait for the private carrier to attempt another delivery of the parcel or urgent letter—or otherwise bear the risk that the parcel or urgent letter might be stolen if left at the customer's door.

In Part I, I analyze the statutory and regulatory basis of the letter-box monopoly. Given the jurisprudential principle that criminal statutes shall be narrowly construed, the differences in the terms used to describe the letter box in different statutory provisions indicate that the Postal Service's letter-box regulations impermissibly broaden the scope of the letter-box monopoly. I also explain that the Postal Service lacks antitrust immunity with respect to the products that it sells in competition with private firms, such that the Postal Service's exclusion of those nonreserved products from the customer's letter box is subject to antitrust liability—namely, for the acquisition or maintenance of a monopoly in violation of section 2 of the Sherman Act.[8]

In Part II, I show that the letter-box monopoly harms competition. I explain why the delivery of letter-box-sized parcels and extremely urgent mail are properly defined to be relevant product markets for antitrust analysis. The letter-box monopoly raises rivals' costs of delivering parcels and extremely urgent mail and discourages the entry of rivals into those services.

The letter-box monopoly also discourages innovation. It is telling that, in contrast to the development of devices like smart parking meters and smart watches, the letter box has remained virtually unchanged for a century or more. Firms that ship parcels in bulk (such as Amazon or eBay) would be more likely to integrate vertically into delivery if not for the letter-box monopoly. Furthermore, the access price that the Postal Service charges for an item placed in the letter box—the full price of mailing the item—is anticompetitive and contrary to sound access-pricing principles. The Postal Service itself follows those principles with respect to the "work-share discounts" that it offers to large mailers that inject their pieces into the mail stream at a higher level of the network that permits the Postal Service to avoid costs (such as the costs of collection and inward sortation).

I further show how the letter-box monopoly harms consumers. Higher costs to competitors increase prices for the delivery of letter-box-sized parcels and extremely urgent mail and decrease the quantity of those services demanded. The letter-box monopoly deprives consumers of the efficiency

[8] 15 U.S.C. § 2.

gains from vertical integration and the increased consumer surplus from the introduction of innovative products.

In Part III, I analyze two ways in which the letter-box monopoly might violate the Fifth Amendment's Due Process Clause.[9] I explain how the Postal Service's authority to regulate its competitors' access to the customer's letter box violates those competitors' right of due process. I also show that the criminal statute that defines the letter-box monopoly is unconstitutionally vague. Because it leaves key terms such as "mailable matter" undefined, the letter-box monopoly statute violates due process by failing both (1) to provide fair notice of the conduct that it prohibits and (2) to provide sufficient guidelines for its enforcement.

In Part IV, I explain how the letter-box monopoly is a physical occupation of the customer's letter box and therefore a per se taking of private property without just compensation, in violation of the Takings Clause of the Fifth Amendment. That the customer's letter box is personal property rather than real property does not preclude liability under the Takings Clause. The letter-box monopoly physically excludes competitors from having access to the customer's letter box, and it physically excludes the customer from placing unstamped mailable matter in the customer's own letter box. The monopoly is therefore not a mere restriction on use.

I. The Letter-Box Monopoly's Statutory and Regulatory Basis

The U.S. Criminal Code establishes the Postal Service's monopoly over private letter boxes. Although the PAEA ended the Postal Service's authority to issue regulations implementing criminal statutes, the Postal Service's pre-existing regulations implementing and extending the letter-box monopoly still stand. Those regulations, of course, are subordinate to the criminal statute, yet they do not narrowly construe the criminal statute. The PAEA also clarifies that the Postal Service's immunity from antitrust scrutiny with respect to its monopoly over reserved products does not extend to any action regarding its nonreserved products. Therefore, to the extent that the letter-box monopoly affects competition in the markets for the Postal Service's nonreserved products, the letter-box monopoly lacks antitrust immunity.

A. The Postal Monopoly

Article I of the Constitution empowers, but does not compel, Congress "[t]o establish post offices and post roads."[10] Nothing in this constitutional text requires Congress either to establish a public enterprise to deliver the

[9] U.S. Const. amend. V.
[10] *Id.* art. I, § 8, cl. 7.

mail or to create a monopoly over mail delivery. Nonetheless, the Supreme Court long ago said that the "power possessed by Congress embraces the regulation of the entire postal system of the country."[11] Rather than promote a competitive mail delivery industry, Congress chose to create and perpetuate through the Private Express Statutes a public enterprise with monopoly power. As the U.S. Court of Appeals for the D.C. Circuit observed in 2015, "Since the founding of the Republic, the Postal Service has been charged with 'bind[ing] the nation together through the personal, educational, literary, and business correspondence of the people.'"[12]

The American postal monopoly was first codified in a 1782 ordinance under the Articles of Confederation.[13] The earliest version of the Private Express Statutes under the Constitution was a 1792 law that granted the Post Office a monopoly over mail delivery on post roads and prohibited the establishment of private postal systems.[14] In 1794, Congress amended the Postal Service Act of 1792, ending the prohibition of private carriage by an individual—even for compensation—while maintaining the proscription against establishing a private postal system.[15] However, that private-carriage exception did not seriously threaten the government's postal revenues until the development of railroads and steamboat lines made private express companies—which could operate under that exception—feasible and profitable. Because the private express companies carried letters and parcels through railroads and steamboats without establishing relay stations or "foot posts," several court decisions in the early 1840s found that the private express companies were not postal systems under the postal monopoly laws.[16] As the private express companies flourished in the 1840s,[17] the Postmaster General demanded legislation to protect postal revenues.[18] In response, Congress enacted the Postal Act of 1845, which expressly prohibited the establishment

[11] *Ex parte* Jackson, 96 U.S. 727, 732 (1878).

[12] Alliance of Nonprofit Mailers v. Postal Reg. Comm., 790 F.3d 186, 189 (D.C. Cir. 2015) (quoting 39 U.S.C. § 101(a)).

[13] *See* James I. Campbell, Jr., *Postal Monopoly Laws: History and Development of the Monopoly on the Carriage of Mail and the Monopoly on Access to Mailboxes*, in Study on Universal Postal Service and the Postal Monopoly app. C, at 34–36 (George Mason Univ. Sch. of Pol'y, Gov't, and Int'l Aff. 2008), http://mars.gmu.edu/bitstream/handle/1920/3477/Appendix%20C.pdf?sequence=3&isAllowed=y.

[14] Postal Act of 1792, 2d Cong., ch. 7 § 14, 1 Stat. 232, 236 (1792) ("[I]f any person, other than the Postmaster General, or his deputies, or persons by them employed, shall take up, receive, order, dispatch, convey, carry or deliver any letter or letters, packet or packets, other than newspapers, for hire or reward, or shall be concerned in setting up any foot or horse post, wagon or other carriage, by or in which any letter or packet shall be carried for hire, on any established post-road, or any packet, or other vessel or boat, or any conveyance whatever, whereby the revenue of the general post-office may be injured, every person, so offending, shall forfeit, for every such offence, the sum of two hundred dollars.").

[15] Act of May 8, 1794, 3d Cong., ch. 23 § 15, 1 Stat. 354, 357, 360 (1794).

[16] *See* United States v. Kimball, 26 F. Cas. 782, 785 (D. Mass. 1844); United States v. Adams, 24 F. Cas. 761, 763 (S.D.N.Y. 1843); United States v. Gray, 26 F. Cas. 18 (D. Mass. 1840).

[17] Campbell, *supra* note 13, at 65 (citing *1841 Postmaster General Ann. Rept.*, *in* H.R. Doc. No. 2, 27th Cong., 2d Sess. 435, 438 (1842); 1842 *Postmaster General Ann. Rept.*, *in* S. Doc. No. 1, 27th Cong., 3d Sess. 721, 724 (1843)).

[18] *Id.* (citing 1844 *Postmaster General Ann. Rept.*, *in* H.R. Doc. No. 2, 28th Cong., 2d Sess. 663, 668 (1845)).

of "private expresses" that delivered mail between any origin and destination serviced by the Postal Service.[19] The 1845 act also imposed criminal penalties on private express customers and on operators and owners of vehicles—including railroad cars—that illegally transported mail.[20] Subsequent postal acts have amended the Private Express Statutes, but the current statutes retain the 1845 act's core prohibitions.[21]

The courts have since repeatedly upheld the Private Express Statutes in the face of constitutional challenges to the monopoly.[22] Despite their relative obscurity—and perhaps as an indication of the strain being placed on the postal monopoly—the Private Express Statutes generated four Supreme Court decisions between 1981 and 1991.[23] Writing for the Court in 1991 in *Air Courier Conference of America v. American Postal Workers Union*, Chief Justice William Rehnquist described the Private Express Statutes as a classic attempt by government to prevent cream skimming in the name of preserving universal service at a (subsidized) uniform price:

> The monopoly was created by Congress as a revenue protection measure for the Postal Service to enable it to fulfill its mission. It prevents private competitors from offering service on low-cost routes at prices below those of the Postal Service, while leaving the Service with high-cost routes and insufficient means to fulfill its mandate of providing uniform rates and service to patrons in all areas, including those that are remote or less populated.[24]

Thus, the postal monopoly is yet another example of one of the most enduring and contentious issues in regulated industries: the suppression of competitive entry to prevent cream skimming.[25]

Typically, a private firm subject to regulation has assumed "incumbent burdens" in return for the regulator's assurance that the firm will have the opportunity to earn a competitive return on, and recovery of, its invested

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19 *Id.* at 29 (citing Act of Mar. 3, 1845, 28th Cong., ch. 43 § 9, 5 Stat. 732, 735).

20 *Id.* (citing Act of Mar. 3, 1845, 28th Cong., ch. 43 § 10, 5 Stat. 732, 736).

21 *See id.* at 190–98.

22 *See, e.g.*, Associated Third Class Mail Users v. U.S. Postal Serv., 600 F.2d 824 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 837 (1979); U.S. Postal Serv. v. Brennan, 574 F.2d 712 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); United States v. Black, 569 F.2d 1111 (10th Cir. 1978), *cert. denied* 435 U.S. 944 (1978); Williams v. Wells Fargo & Co. Express, 177 F. 352 (8th Cir. 1910); Blackham v. Gresham, 16 F. 609 (C.C.N.Y. 1883); Associated Third Class Mail Users v. U.S. Postal Serv., 440 F. Supp. 1211 (D.D.C. 1977); United States v. Thompson, 28 F. Cas. 97 (D. Mass. 1846).

23 Air Courier Conf. of Am. v. Am. Postal Workers Union, 498 U.S. 517 (1991); Regents of Univ. of Cal. v. Pub. Emp't Relations Bd., 485 U.S. 589 (1988); Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981).

24 498 U.S. at 519 (internal citations omitted); *accord* Regents of Univ. of Cal. v. Public Employment Relations Bd., 485 U.S. 589, 598 (1988).

25 *See* 2 Alfred E. Kahn, The Economics of Regulation: Principles and Institutions 220–50 (John Wiley & Sons 1971).

capital, along with the compensation for the full cost of providing service.[26] The incumbent burdens usually include the obligation to provide universal service at a fixed price, regardless of the true cost of serving a particular customer. Chief Justice Rehnquist observed in *Air Courier Conference* that the legislative history of the Postal Act of 1845 revealed that one of the two intended purposes of the Act was to ensure subsidized universal mail service:

> [I]t was thought to be the duty of the Government to serve outlying, frontier areas, even if it meant doing so below cost. Thus, the revenue protection provisions were not seen as an end in themselves, nor in any sense as a means of ensuring certain levels of public employment, but rather were seen as the means to achieve national integration and to ensure that all areas of the Nation were equally served by the Postal Service.[27]

New entrants into regulated markets, of course, first target the customers who are required by regulators to pay prices exceeding cost so that other customers may be charged prices below cost. Furthermore, new entrants may be able to avoid regulations that thwart the use of the least-cost production technology and in this sense may be genuinely more efficient producers than the incumbent. Again, as *Air Courier Conference* indicates, the Supreme Court subscribes to that view that preventing the entry of more efficient competitors on given routes is a legitimate objective of the postal monopoly:

> The [Private Express Statutes] enable the Postal Service to fulfill its responsibility to provide service to all communities at a uniform rate by preventing private courier services from competing selectively with the Postal Service on its most profitable routes. If competitors could serve the lower cost segment of the market, leaving the Postal Service to handle the high-cost services, the Service would lose lucrative portions of its business, thereby increasing its average unit cost and requiring higher prices to all users.[28]

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[26] *See, e.g.*, J. Gregory Sidak & Daniel F. Spulber, Deregulatory Takings and the Regulatory Contract: The Competitive Transformation of Network Industries in the United States 104 (Cambridge Univ. Press 1997); William J. Baumol & J. Gregory Sidak, Transmission Pricing and Stranded Costs in the Electric Power Industry 101–02 (AEI Press 1995); William J. Baumol & J. Gregory Sidak, *Stranded Costs*, 18 Harv. J.L. & Pub. Pol'y 835, 837 (1995); Paul W. MacAvoy, Daniel F. Spulber & Bruce E. Stangle, *Is Competitive Entry Free?: Bypass and Partial Deregulation in Natural Gas Markets*, 6 Yale J. on Reg. 209, 210 (1989). Of course, incentive regulation has largely replaced pure cost-of-service regulation.

[27] 498 U.S. at 527 (internal citations omitted). According to Chief Justice Rehnquist, the second purpose of the 1845 Postal Act was, perversely, to retard improvements in the information efficiency of markets: "[T]he Postmaster General and the States most distant from the commercial centers of the Northeast believed that the postal monopoly was necessary to prevent users of faster private expresses from taking advantage of early market intelligence and news of international affairs that had not yet reached the general populace through the slower mails." *Id.* (citing S. Doc. No. 66, 28th Cong., 2d Sess. 3–4 (1845)). Evidently, the federal government perceived a benefit in controlling who could engage in arbitrage. Even if one today were to consider this second justification to be a legitimate governmental objective, the advent of ubiquitous, instantaneous, and inexpensive telecommunications obviously renders this particular justification for the statutory monopoly over letter mail technologically obsolete and inefficacious.

[28] *Id.* at 527–28.

This analysis requires some modification when applied to a publicly owned and controlled enterprise like the Postal Service. Nonetheless, the policy concerns offered to justify the 1845 Postal Act are thoroughly familiar to anyone conversant in the economics of regulated industries.

The Private Express Statutes create the postal monopoly and establish the conditions under which private persons may carry letters. Yet those statutes are singularly vague as to what mail comprises a "letter." Thus, the scope of the monopoly, enforceable by criminal sanctions, is itself vague. The legislative and administrative histories of the Private Express Statutes do not cure the ambiguity, for one can simultaneously cite them to support both the broadest and narrowest possible interpretations of the scope of the Postal Service's monopoly.[29]

The Private Express Statutes define the Postal Service's monopoly over the carriage of "letters" and the archaic and now-irrelevant term "packets." The definition of "letters" consequently is critical to understanding the extent to which the letter segments of First-Class and standard mail are closed to competition.[30] The Postal Service has defined a letter to be "a message directed to a specific person or address and recorded in or on a tangible object," although that definition is subject to a multitude of qualifications and caveats.[31] The result has been unlike that in any other regulated industry. Because the Postal Service has (at least until passage of the PAEA) claimed for itself the term "letter," which defines the extent of its monopoly, the monopolist has had the power largely to define the scope of its own monopoly.[32] Thus, certain "nonletters"—such as bills, which constitute a substantial fraction of the mail stream—are construed, contrary to ordinary usage in the English language, to be letters. This ambiguity is particularly manifest with respect to that portion of standard mail previously called third-class mail, which consists primarily of advertising circulars and handbills—mail material so divorced from the common conception of a letter that it is colloquially known as "junk mail."[33] At the same time, some kinds of letters are exempted from the Private Express Statutes and may be carried "out of mail."

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[29] *See* Associated Third Class Mail Users v. U.S. Postal Serv., 600 F.2d 824, 827 (D.C. Cir. 1979) (Wright, J., dissenting) (finding that ambiguities and contradictions surrounding the definition of the term "letter" under the Private Express Statutes "belie any notion that a single definition of 'letter' flows ineluctably from the materials at hand").

[30] Second-class mail was renamed "periodicals" in 1996. In addition, third- and fourth-class mail were restructured into "standard mail." *See, e.g.*, Opinion and Recommended Decision, 1996, Dkt. No. MC95-1 (Postal Rate Comm'n 1996).

[31] 39 C.F.R. § 310.1(a).

[32] Pursuant to the PAEA, the Postal Service may no longer enact regulations whose effect is to preclude competition. 39 U.S.C. § 404(a). However, the existing regulations that significantly limit competition faced by the Postal Service remain in effect.

[33] Merriam-Webster defines junk mail as "unsolicited mail that consists mainly of promotional materials, catalogs, and requests for donations." *Definition of Junk Mail*, Merriam-Webster, http://www.merriam-webster.com/dictionary/junk%20mail.

The Private Express Statutes provide a blanket exemption for letters carried out of mail if the letter bears the full postage that would be necessary to send it through the Postal Service (and conforms to certain other conditions, such as enclosure in an envelope).[34] In addition, there are five general exceptions to the statutory monopoly on letter mail: letters accompanying cargo, letters of the carrier, letters carried by private hands without compensation, letters by special messenger, and carriage of letters before or after mailing.[35]

In addition, the Private Express Statutes codifies two specific exceptions.[36] The first statutory exception encompasses letters for which "the amount paid for the private carriage of the letter is at least the amount equal to 6 times the rate then currently charged for the 1st ounce of a single-piece first class letter."[37] The second statutory exception encompasses letters weighing "at least 12 ½ ounces."[38] In addition to these two statutory exceptions, the PAEA also explicitly recognizes additional exceptions codified in the Postal Service regulations.[39] Under those regulations, the Postal Service will suspend the Private Express Statutes for urgent letters if "the value or usefulness of the letter would be lost or greatly diminished if it is not delivered within [the] time limits" specified in the Service's regulations.[40] The applicable time limits depend on the distance of the delivery:

> For letters dispatched within 50 miles of the intended destination, delivery of those dispatched by noon must be completed within 6 hours or by the close of the addressee's normal business hours that day, whichever is later, and delivery of those dispatched after noon and before midnight must be completed by 10 A.M. of the addressee's next business day. For other letters, delivery must be completed within 12 hours or by noon of the addressee's next business day.[41]

The Postal Service has said, and at least one court has agreed, that, even if the time limits are met, the exception for extremely urgent letters does not apply if the value of the letter does not depend on meeting the time limit.[42] This rule has the absurd and highly intrusive implication that the Postal Service would need to make content-based determinations of a letter's urgency to determine whether the letter could be delivered by a private carrier.

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34 39 U.S.C. § 601.
35 18 U.S.C. §§ 1694, 1696.
36 39 U.S.C. § 601(b).
37 *Id.* § 601(b)(1).
38 *Id.* § 601(b)(2).
39 *Id.* § 601(b)(3).
40 39 C.F.R. § 320.6(b)(1).
41 *Id.*
42 U.S. Postal Serv. v. O'Brien, 644 F. Supp. 140, 143 (D.D.C. 1986) (citing 39 C.F.R. § 320.6(b)(1)).

Not surprisingly, as a practical business matter, the statutory price test—not the suspension for urgent letters—has become the operative standard for establishing that a letter is eligible for delivery by private carriers. That is so since the price test, unlike the test of timeliness of delivery, enables the private carrier to offer mailers the choice of delivery at any time, without regard to the letter's destination. Of course, one practical effect of the price test is that it sets a floor for the prices that private competitors may charge and pegs that floor to the Postal Service's own prices.

B. The Letter-Box Monopoly

In addition to the Postal Service's monopoly over the delivery of letters, the Postal Service has a monopoly over the customer's letter box: that is, no competitor of the Postal Service may place unstamped mail in the customer's letter box. The letter box is to the postal monopoly what the customer's telephone was to the Bell System in days of old.[43] The letter box is the customer premises equipment. Just as the Bell System assiduously fought, starting with the *Hush-A-Phone* case, any attempt by the customer to attach unapproved devices to his telephone (which is to say, devices not manufactured by the Bell System's own Western Electric),[44] so too does the Postal Service regulate what the customer may do with his own letter box. This restriction is actually more overreaching than that of the monolithic Bell System in its heyday because the letter box is clearly the customer's private property, whereas before the AT&T divesture the customer merely leased his telephone from the Bell System.

1. Statutes

Section 1725 of the U.S. Criminal Code prohibits the deposit of unstamped "mailable matter" in a customer letter box approved by the Postal Service:

> Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined under this title.[45]

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[43] Although various persons might have used this metaphor, I first heard it expressed by Judge Douglas Ginsburg at a conference I organized at the American Enterprise Institute in 1993. *See* Douglas H. Ginsburg, *Discussion*, *in* Governing the Postal Service 16, 19 (J. Gregory Sidak ed., AEI Press 1994).

[44] Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956); *see* Michael K. Kellogg, John Thorne & Peter W. Huber, Federal Telecommunications Law 171–75, 494–95, 499–502 (Little, Brown & Co. 1992) (discussing *Hush-A-Phone* and other "foreign attachment" cases).

[45] 18 U.S.C. § 1725.

Congress did not enact section 1725 in the 1845 Postal Act, nor did the 1845 act's predecessors include a letter-box monopoly.[46] Congress enacted section 1725 years later, in 1934, to counteract vertical integration into the delivery of bills by businesses with large numbers of routine mailings. The House and Senate reports for the 1934 legislation stated:

> Business concerns, particularly utility companies, have within the last few years adopted the practice of having circulars, statements of account, etc., delivered by private messenger, and have used as receptacles the letter boxes erected for the purpose of holding mail matter and approved by the Post Office Department for such purpose. This practice is depriving the Post Office Department of considerable revenue on matter which would otherwise go through the mails, and at the same time is resulting in the stuffing of letter boxes with extraneous matter.[47]

Section 1725 permits the deposit of mailable matter in the customer's letter box, provided that the mailable matter bears postage (rather than prohibiting access outright)—further evidence that the letter-box monopoly's primary purpose is to protect the Postal Service's revenue. Depositing unstamped mailable matter in a customer's letter box is punishable by a fine of up to $5,000 for individuals and up to $10,000 for organizations.[48]

That the term "letter box" appears alone in section 1725 stands in contrast to the broader language in other statutory prohibitions. Section 1705 of the Criminal Code prohibits destroying "any letter box *or other receptacle* intended or used for the receipt or delivery of mail on any mail route,"[49] and section 1708 prohibits theft or destruction of mail deposited in a "letter box, mail receptacle, . . . *or other authorized depository for mail matter*."[50] The Postal Service's *Domestic Mail Manual*, which is incorporated by reference into Title 39 of the Code of Federal Regulations,[51] nonetheless specifies that letter boxes *and other receptacles* designed for the delivery of mail "may be used only for matter bearing postage."[52] By this interpretation, the Postal Service expands the statutory definition of the letter box in section 1725 of the Criminal Code to include nearly any receptacle intended or used for the receipt or delivery of mail, with the exception of door slots and nonlockable bins or troughs used with apartment-house letter boxes.[53] Consequently, according to the Postal Service's expansive interpretation of its own statutory monopoly,

46 *See* Campbell, *supra* note 13, at 18.
47 H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934); S. Rep. No. 742, 73d Cong., 2d Sess. 1 (1934).
48 18 U.S.C. §§ 1725, 3571(b)(7).
49 *Id.* § 1705 (emphasis added).
50 *Id.* § 1708 (emphasis added).
51 39 C.F.R. § 111.1.
52 DMM § 508.3.1.3.
53 *Id.* §§ 508.3.1.1, 508.3.1.2.

letter boxes can include roadside receptacles, indoor receptacles, and clusters within apartment complexes. Although the letter box is personal property, some letter boxes are situated on the customer's real property, some are on the real property of the customer's landlord, and some are on public land not necessarily owned by the U.S. government. The Supreme Court recognized in *Rosen v. United States*—decided in 1918, sixteen years before the enactment of section 1725—that Congress gave the Postal Service the authority to define the scope of section 1705 and section 1708 when it left open-ended the interpretation of the depositories in those criminal statutes.[54] In contrast, one cannot infer that section 1725, which does *not* include an open-ended category of depositories, delegates to the Postal Service the same interpretive authority. The Postal Service's inclusion of mail receptacles other than letter boxes in its letter-box monopoly regulations therefore exceeds the scope of the statute. The resulting expansion of the Postal Service's letter-box monopoly is *ultra vires*.

In 1981 the Supreme Court considered in *United States Postal Service v. Council of Greenburgh Civic Associations* whether section 1725 violated the First Amendment on the grounds that a letter box is a "public forum."[55] The government may regulate the time, manner, and place of speech conducted in a public forum, but it may not exclude speakers entirely from the public forum.[56] In the course of deciding this constitutional question with respect to letter boxes in *Greenburgh*, the Court construed section 1725 in a way that has significant consequences for the growth of competitive mail delivery services.

In *Greenburgh*, the local postmaster notified a civic association that its practice of delivering messages to residents by placing unstamped notices in the letter boxes of private homes violated section 1725 and that, if the association persisted, it could be fined. The association then sued the Postal Service for declaratory and injunctive relief, contending that the enforcement of section 1725 would inhibit the association's communications with local residents and deny them the freedom of speech and press secured by the First Amendment.[57]

The Supreme Court disagreed. It upheld section 1725 in *Greenburgh*, holding that the statute was neutral with respect to the content of the message sought to be placed in the letter box.[58] Writing for the Court, then-Associate

[54] 245 U.S. 467, 472–73 (1918).
[55] 453 U.S. 114, 114 (1981).
[56] *See* McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985); *see also* Lillian R. BeVier, *Rehabilitating the Public Forum Doctrine: In Defense of Categories*, 1994 Sup. Ct. Rev. 79, 109.
[57] *Greenburgh*, 453 U.S. at 116–20.
[58] *Id.* at 126–27.

Justice Rehnquist extolled the role of the Post Office in binding the nation together:

> Given the importance of the post to our early Nation, it is not surprising that when the United States Constitution was ratified in 1789, Art. I, § 8, provided Congress the power "To establish Post Offices and post Roads" and "To make all Laws which shall be necessary and proper" for executing this task. The Post Office played a vital yet largely unappreciated role in the development of our new Nation. Stagecoach trails which were improved by the Government to become post roads quickly became arteries of commerce. Mail contracts were of great assistance to the early development of new means of transportation such as canals, railroads, and eventually airlines. During this developing stage, the Post Office was to many citizens situated across the country the most visible symbol of national unity.[59]

However, Justice Rehnquist then presented a puzzling rationale for the majority's view that a citizen has limited rights to offer access to his own letter box:

> Nothing in any of the legislation or regulations recited above requires any person to become a postal customer. Anyone is free to live in any part of the country without having letters or packages delivered or received by the Postal Service by simply failing to provide the receptacle for those letters and packages which the statutes and regulations require. Indeed, the provision for "General Delivery" in most post offices enables a person to take advantage of the facilities of the Postal Service without ever having provided a receptacle at or near his premises conforming to the regulations of the Postal Service. What the legislation and regulations do require is that those persons who *do* wish to receive and deposit their mail at their home or business do so under the direction and control of the Postal Service.[60]

This logic is bombastic and unpersuasive. The Court, having explained on one page why Congress considered universal mail service to be so essential to binding the republic together as to justify the creation of a public monopoly that became for "many citizens . . . the most visible symbol of national unity,"[61] a few pages later feigns indifference about the prospect of a nation of hermits who decline "to become . . . postal customer[s]."[62]

The Court then followed this reasoning with the strained assertion that a *quid pro quo* had taken place, whereby the postal customer conveyed control over his letter box to the Postal Service in return for the privilege of subjecting himself to its monopoly over letter mail:

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59 *Id.* at 121–22 (internal citations omitted).
60 *Id.* at 125–26 (emphasis in original).
61 *Id.* at 122.
62 *Id.* at 125.

> What is at issue in this case is solely the constitutionality of an Act of Congress which makes it unlawful for persons to use, without payment of a fee, a letterbox which has been designated an "authorized depository" of the mail by the Postal Service. As has been previously explained, when a letterbox is so designated, it becomes an essential part of the Postal Service's nationwide system for the delivery and receipt of mail. In effect, the postal customer, although he pays for the physical components of the "authorized depository," agrees to abide by the Postal Service's regulations in exchange for the Postal Service agreeing to deliver and pick up his mail.[63]

In all of its conjectures on the implicit contract between the citizen and the state, the Court evidently did not consider that some consumers might be willing to pay a higher price for the services of the Postal Service if they could keep the right to offer private express companies (or simply the local electric utility) access to their letter boxes. Although all the collected Private Express Statutes may be criticized for causing the allocative inefficiency and dynamic losses in innovation that economic analysis associates with statutory monopoly, none matches section 1725 in its reliance on facile and arrogant arguments to imply that consumers have willingly consented to the government's monopolization of their own private property. *Greenburgh* naturally invites the question, evidently not raised in the case, whether the federal government would be liable under the Takings Clause of the Fifth Amendment for the diminution of the value of the customer's letter box caused by the letterbox monopoly.[64]

In 2006, Congress enacted the PAEA to modernize and reform the Postal Service. Although the PAEA left the letter-box monopoly intact, it did circumscribe the Postal Service's regulatory authority in ways that have direct implications for the Postal Service's regulation of the customer's letter box. In particular, the PAEA narrowed the scope of the Postal Service's regulatory authority by amending section 401(2) of Title 39. Before the PAEA, section 401(2) granted the Postal Service the authority to issue regulations that it "deem[ed] necessary to accomplish the objectives of [Title 39]."[65] The PAEA amended section 401(2) to limit the Postal Service's authority to issue regulations "as may be necessary in the execution of its functions under [Title 39] and such other functions as may be assigned to the Postal Service under any provisions of law outside of this title."[66] The PAEA therefore made two significant changes to the language of section 401(2). First, the PAEA requires that the Postal Service's regulations be objectively necessary—that the Postal Service alone deems the regulations necessary is no longer

[63] *Id.* at 128.
[64] U.S. Const. amend. V.
[65] 39 U.S.C. § 401(2), *amended by* Pub. L. 109–435, § 504 (2006).
[66] *Id.*

a sufficient justification. Second, the PAEA limits the Postal Service's regulatory authority to the execution of its statutorily defined functions, rather than the broader criterion of accomplishing the objectives of Title 39. The PAEA therefore prohibits the Postal Service from issuing regulations that do not execute functions assigned to the Postal Service. Because the monopoly statutes are part of the Criminal Code and do not establish "functions" of the Postal Service, Congress effectively extinguished the Postal Service's authority to issue new regulations to enforce the monopoly statutes, including the letter-box monopoly statute.[67] Legislative history supports that interpretation. A House committee report explaining the PAEA states that the amendments to section 401(2) are "intended to make clear that the Postal Service is not, unless explicitly authorized by Congress, empowered to adopt regulations implementing other parts of the U.S. code, e.g., the criminal laws."[68] Moreover, no statute either explicitly grants the Postal Service the power to issue letter-box monopoly regulations or establishes any function of the Postal Service for the execution of which those regulations are plausibly *necessary*. Thus, the effect of the 2006 amendment is that the Postal Service cannot adopt further regulations implementing the letter-box monopoly statute without explicit congressional authorization.

2. Regulations

Although the PAEA removed the Postal Service's authority to issue new regulations interpreting criminal statutes, the Postal Service's pre-existing regulations that applied and extended the letter-box monopoly remain in force. The basis of the Postal Service's regulation of the customer's letter box is the letter box's designation as an "authorized depository" for mail. Section 3.1.1 of the *Domestic Mail Manual* provides that

> every letterbox or other receptacle intended or used for the receipt or delivery of mail on any city delivery route, rural delivery route, highway contract route, or other mail route is designated an authorized depository for mail within the meaning of 18 USC 1702, 1705, 1708, and 1725.[69]

Of the four statutes that section 3.1.1 references, only sections 1702 and 1708 of Title 18 contain the term "authorized depository." Section 1702 prohibits

> [taking] any letter, postal card, or package out of any post office or any *authorized depository for mail matter*, or from any letter or mail carrier, or

[67] *See, e.g.*, Campbell, *supra* note 13, at 244–45.

[68] H.R. Rep. No. 109–66, at 52 (2005). Similarly, a Senate committee report states that "[t]his amendment is intended to make clear that the Postal Service is not empowered to adopt regulations implementing other parts of the U.S. Code unless explicitly authorized to do so by Congress." S. Rep. No. 108 318, at 32 (2004).

[69] DMM § 508.3.1.1.

> which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence.[70]

Section 1708 prohibits theft from any "letter box, mail receptacle, or any mail route or other *authorized depository for mail matter*."[71] Section 1705 of Title 18, in contrast, prohibits damage to "*any letter box or other receptacle intended or used for the receipt or delivery of mail* on any mail route."[72] As I noted in Part I.B.1, section 1725 of Title 18 prohibits the deposit of unstamped mail matter in "any *letter box* established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter."[73] In defining an authorized depository "within the meaning" of these four statutes, the Postal Service regulations appear to interpret (without explanation) the terms "authorized depository," "receptacle intended or used for the delivery of mail," and "letter box" to be interchangeable. In defining the scope of the letter-box monopoly, the Postal Service's regulations drop the term "authorized depository" and instead specify that "every letterbox or other receptacle intended or used for the receipt or delivery of mail"[74]

> may be used only for matter bearing postage . . . . [N]o part of a mail receptacle may be used to deliver any matter not bearing postage, including items or matter placed upon, supported by, attached to, hung from, or inserted into a mail receptacle. Any mailable matter not bearing postage and found as described above is subject to the same postage as would be paid if it were carried by mail.[75]

The Postal Service's regulations explicitly exempt "door slots and nonlockable bins or troughs used with apartment house mailboxes" from the letter-box monopoly.[76] The only mailable matter that the *Domestic Mail Manual* exempts from the letter-box monopoly is Sunday and holiday delivery of newspapers.[77] Given that the Postal Service regulations refer explicitly to the letter-box monopoly statute in defining letter boxes and letter receptacles,[78] there is little doubt that the Postal Service intends the regulations to implement the criminal statute. As I explain below, the regulations exceed the scope of the Postal Service's lawfully delegated regulatory authority.

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70 18 U.S.C. § 1702 (emphasis added).
71 *Id.* § 1708 (emphasis added).
72 *Id.* § 1705 (emphasis added).
73 *Id.* § 1725 (emphasis added).
74 DMM § 508.3.1.1.
75 *Id.* § 508.3.1.3.
76 *Id.* § 508.3.1.2.
77 *Id.* § 508.3.2.10.
78 *Id.* § 508.3.1.1.

The Postal Service's control of the letter box also extends beyond prohibiting the deposit of unstamped mailable matter. The *Domestic Mail Manual* requires the letter-box owner to ensure that the letter box meets the Postal Service's aesthetic guidelines for, among other attributes, "flag, size, strength, and quality of construction."[79] The letter-box owner must ensure that the support post for the letter box is "neat and of adequate strength and size" and—curiously, in light of the First Amendment—that the letter box and post are free of advertising and "effigies or caricatures that tend to disparage or ridicule any person."[80] The Postal Service also dictates that on curbside letter boxes "[a] box number, if used, [must be] inscribed in contrasting color in neat letters and numerals at least 1 inch high on the side of the box visible to the carrier's regular approach."[81]

C. Do the Postal Service's Regulations Narrowly Construe the Letter-Box Monopoly?

The U.S. Criminal Code, which establishes the letter-box monopoly, makes it a criminal offense to place certain types of mailable matter in a letter box. The Postal Service regulations provide, under threat of criminal prosecution, that matter not bearing postage may not be placed in a mail *receptacle*. But that is not what section 1725 says. Differences in the wording of the statutory provision and the Postal Service's regulations reveal that its interpretation of the letter-box monopoly is impermissibly broad.

It is a basic principle of statutory construction that a specific statute has authority over a general statute.[82] Section 1725 of Title 18 is the specific statutory provision that establishes the letter-box monopoly. The Postal Service's regulations implementing the letter-box monopoly are issued under section 401(2) of Title 39 of the U.S. Code, which grants the Postal Service general authority to issue regulations necessary to execute the Postal Service's statutory functions.[83] Section 401(2) is therefore a general statutory provision with regard to the letter-box monopoly,[84] such that the Postal Service's authority to promulgate letter-box regulations pursuant to section 401(2) of Title 39 is subordinate to the language that Congress expressly enacted in section 1725 of the Criminal Code. That hierarchy of statutory provisions is illustrated by the prefatory sections of the letter-box monopoly regulations, which refer to section 1725.[85] In addition, the Postal Service has stated that

[79] *Id.* § 508.3.2.2.
[80] *Id.* §§ 508.3.4–508.3.5.
[81] *Id.* § 508.3.2.7(a).
[82] *See, e.g.*, Rogers v. United States, 185 U.S. 83, 92 (1902).
[83] 39 U.S.C § 401(2).
[84] *Cf.* Loving v. IRS, 917 F. Supp. 2d 67, 75–77 (D.D.C. 2013) (reasoning that the general statute allowing the Treasury Department to regulate practitioners cannot extend to tax-return preparers, given that other specific statutes establish a scheme for punishing malfeasant tax-return preparers).
[85] DMM §§ 508.3.1.1–508.3.1.2.

it derives its authority to promulgate letter-box regulations "in accordance with" section 1725.[86]

The Postal Service's letter-box regulations, however, are broader than section 1725 of the Criminal Code. Those regulations therefore exceed the permissible scope of the letter-box monopoly established by statute. The statutory provision is narrower than the regulations for at least four reasons.

First, the statute has an intent requirement, which prohibits "***knowingly and willfully*** deposit[ing] any mailable matter . . . ***with intent to avoid*** . . . ***postage***."[87] In contrast, the regulatory provisions impose strict liability on all persons who place unstamped mailable matter in a letter box. The regulations provide that "[a]ny mailable matter not bearing postage and found as described above is subject to the same postage as would be paid if it were carried by mail."[88]

Second, the statute applies to "statements of account, circulars, sale bills, or other like matter."[89] The *eiusdem generis* ("of the same kind") canon of statutory construction limits an open-ended category in a statute to the same order of the things specifically listed. Applying that canon of construction to the text of section 1725, which lists only flat "letter" items, one finds that the statute does not extend to items that differ in shape or character from flat letters, such as parcels. In contrast to the statutory text, the Postal Service regulations exclude "any matter not bearing postage" from the letter box[90] and therefore impermissibly extend the letter-box monopoly to items such as parcels, even though the Criminal Code does not define the letter-box monopoly to include such items.

Third, the Postal Service regulations apply to "every letterbox ***or other receptacle*** intended or used for the receipt or delivery of mail."[91] However, section 1725 of the Criminal Code refers only to "any letter box established . . . for the receipt or delivery of mail matter" and does not refer to other receptacles.[92] That definition in section 1725 contrasts with the other provisions of the Criminal Code that address the destruction or theft of mail, which define "authorized depositories" to include "every letter box or receptacle intended or used for the receipt or delivery of mail"[93] and "any letter box, mail receptacle . . . or other authorized mail depository."[94] As I explained in Part I.B.2, in *Rosen v. United States* the Supreme Court recognized that Congress gave the

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[86] U.S. Postal Service, Report on Universal Postal Service and the Postal Monopoly 16, 41 (2008), https://about.usps.com/universal-postal-service/usps-uso-report.pdf.
[87] 18 U.S.C. § 1725 (emphasis added).
[88] DMM §§ 508.3.1.3.
[89] *Id.*
[90] *See, e.g.*, DMM §§ 508.2.2.5, 508.2.3.3.
[91] *Id.* § 508.3.1.1.
[92] 18 U.S.C. § 1725.
[93] *Id.* § 1705.
[94] *Id.* § 1708.

Post Office the authority to define the scope of the criminal statutes when it left the interpretation of the depositories in section 1705 and section 1708 of the Criminal Code open-ended.[95] In contrast, Congress did not extend the scope of section 1725 to include an open-ended category of depositories or receptacles. Nor did Congress ever give the Postal Service the authority to extend the scope of section 1725 to any shape or size of mail. The Postal Service's regulations that extend the letter-box monopoly to receptacles other than letter boxes or to shapes other than flat letters therefore exceed the scope of the letter-box monopoly that Congress defined in section 1725 of the Criminal Code.

As I explain in Part II.A, the Postal Service has introduced new, large-capacity mailboxes that can accommodate over 70 percent of packages sent through the mail.[96] Is such a receptacle a *letter* box within the meaning of section 1725? The Postal Service explained in a press release that it began testing the large-capacity boxes because "as the mail mix continues to change—with fewer letters and a growing volume of packages—customers often find their mailbox is stuffed to overflowing" and "many parcels won't fit in standard curbside boxes."[97] Tellingly, the new mailboxes are not replacing traditional letter boxes entirely.[98] Unless a Postal Service customer wants to receive parcels in his mailbox (or unless he receives an overwhelming volume of letter mail—an unlikely scenario), he need not purchase a large-capacity mailbox. The large-capacity mailbox is effectively a specialty box intended for parcel delivery. Insofar as the Postal Service's regulations prohibit a Postal Service competitor from placing (1) a parcel rather than a flat letter in (2) a specialty box intended for parcel delivery rather than a traditional letter box, they might exceed the scope of section 1725.

Fourth, the Postal Service regulations extend to "items or matter placed upon, supported by, attached to, hung from, or inserted into a mail receptacle,"[99] whereas section 1725 addresses only items *deposited in* a letter box. The Postal Service regulations therefore improperly extend the letter-box monopoly beyond its statutory scope by prohibiting letter-box owners from attaching mailable matter to the exterior of the letter box.

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[95] 245 U.S. 467, 472–73 (1918).

[96] *See* Press Release, U.S. Postal Service, Shape of Things to Come (Jan. 20, 2015), https://liteblue.usps.gov/news/link/2015/01jan/news21s1.htm.

[97] *Id.*

[98] Standards Governing the Design of Curbside Mailboxes, 80 F.R. 48,702, 48,706–07 (Aug. 14, 2015) (incorporated by reference into 39 C.F.R. § 111).

[99] DMM § 508.3.1.3.

D. The Postal Service's Lack of Immunity from Antitrust Liability with Respect to Nonreserved Products

In its 2004 decision in *United States Postal Service v. Flamingo Industries (USA) Ltd.*, the Supreme Court construed the Postal Service to be a part of the federal government and consequently immune from federal antitrust law.[100] Two years later, the PAEA partially overruled that decision by specifying that the Postal Service's antitrust immunity does not extend to its provision of nonreserved products.[101] The letter-box monopoly grants the Postal Service exclusive access to the letter box to deposit nonreserved products, thereby shielding those products from competition. To the extent that the Postal Service attempts to apply the letter-box monopoly to nonreserved products, the monopoly is subject to antitrust scrutiny under the PAEA.

In *Flamingo Industries*, the Court considered whether the Postal Service is a "person" subject to antitrust liability under the Sherman Act.[102] The Court, in a unanimous opinion written by Justice Anthony Kennedy, began its analysis by noting that section 401 of Title 39, enacted in the Postal Reorganization Act (PRA) of 1970, states that the Postal Service has the general power "to sue and to be sued in its official name."[103] The Court considered section 401 to waive the Postal Service's sovereign immunity.[104] However, the Court emphasized that the PRA is silent on the specific question of antitrust immunity.[105] The Court applied a two-part analysis to determine whether the Postal Service was subject to antitrust liability. The Court considered, first, whether there existed a waiver of sovereign immunity for actions against the Postal Service and, second, whether the substantive prohibitions of the Sherman Act applied to the Postal Service as an independent establishment of the Executive Branch of the United States.[106]

Addressing the second question, the Court examined its finding in *United States v. Cooper Corp.* that a "person" under the Sherman Act does not include the U.S. government.[107] The Court next considered the unique responsibilities and obligations of the Postal Service to determine whether it was part of the federal government:

> The statutory designation of the Postal Service as an "independent establishment of the executive branch of the Government of the United States" is not consistent with the idea that it is an entity existing outside of the

100 540 U.S. 736, 737–38 (2004).
101 39 U.S.C. 409(e)(1).
102 540 U.S. at 741 (citing 39 U.S.C. § 401).
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.* at 743 (applying the two-step analysis established in FDIC v. Meyer, 510 U.S. 471, 484 (1994)).
107 312 U.S. 600, 606–07 (1941).

> Government. The statutory instruction that the Postal Service is an establishment "of the executive branch of the Government of the United States" indicates just the contrary.[108]

The Court reasoned that the characterization of the Postal Service as a part of the federal government was consistent with the "nationwide, public responsibilities of the Postal Service."[109] The Court emphasized the Postal Service's public-interest mandate and its monopoly:

> The Postal Service has different goals, obligations and powers from private corporations. Its goals are not those of private enterprise. The most important difference is that it does not seek profits, but only to break even, which is consistent with its public character. It also has broader obligations, including the provision of universal mail delivery, the provision of free mail delivery to certain classes of persons, and, most recently, increased public responsibilities related to national security. Finally, the Postal Service has many powers more characteristic of Government than of private enterprise, including its state-conferred monopoly on mail delivery, the power of eminent domain, and the power to conclude international postal agreements.[110]

Ultimately, the Court found that "[t]he Postal Service, in both form and function, is not a separate antitrust person from the United States."[111] The Court held that, absent an express congressional statement authorizing suits against the Postal Service for antitrust violations, the Postal Service is not subject to antitrust liability.[112] The Court did not distinguish between the Postal Service's conduct with respect to reserved and nonreserved products. To the contrary, the Court said that "[t]he new Postal Service's lines of business beyond the scope of its mail monopoly and universal service obligation do not show it is separate from the Government under the antitrust laws."[113] The Court's reasoning in *Flamingo Industries* would seem to extend antitrust immunity to all of the Postal Service's activities, regardless of whether they concerned reserved or nonreserved products.[114]

Two years after *Flamingo Industries*, the PAEA amended Title 39 to include section 409(e)(1), which partially overrules the Court's decision in *Flamingo Industries*. Section 409(e)(1) establishes that, insofar as the Postal Service engages in conduct concerning its nonreserved products, the Postal Service lacks sovereign immunity and is subject to the antitrust laws:

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108 540 U.S. at 746 (quoting 39 U.S.C. § 201).
109 *Id.*
110 *Id.* at 747 (quoting 39 U.S.C. § 3621).
111 *Id.* at 748.
112 *Id.* at 746–47.
113 *Id.* at 748.
114 *Id.*

> (e)(1) To the extent that the Postal Service, or other Federal agency acting on behalf of or in concert with the Postal Service, engages in conduct with respect to any product *which is not reserved to the United States under section 1696 of title 18*, the Postal Service or other Federal agency (as the case may be)—
>
> (A) shall not be immune under any doctrine of sovereign immunity from suit in Federal court by any person for any violation of Federal law by such agency or any officer or employee thereof; and
>
> (B) shall be considered to be a person (as defined in subsection (a) of the first section of the Clayton Act) for purposes of—
>
> (i) the antitrust laws (as defined in such subsection); and
>
> (ii) section 5 of the Federal Trade Commission Act to the extent that such section 5 applies to unfair methods of competition.
>
> For purposes of the preceding sentence, any private carriage of mail allowable by virtue of section 601 shall not be considered a service reserved to the United States under section 1696 of title 18.[115]

Section 409(1)(e) therefore establishes the boundaries of the Postal Service's sovereign immunity and antitrust immunity. It clarifies that antitrust immunity does not extend to nonreserved products, which it defines by reference to two statutes: section 1696 of Title 18 (which establishes the postal monopoly) and section 601 of Title 39 (which enumerates exceptions to the postal monopoly). Section 1696 of Title 18 prohibits the establishment of "any private express for the conveyance of letters or packets" over post routes or between any two places "between which the mail is regularly carried," except for "the conveyance or transmission of letters of packets by private hands without compensation, or by special messenger employed for the particular occasion only."[116] Section 601 of Title 39 enumerates additional exemptions for private letter carriage where "the amount paid for the private carriage of the letter is at least the amount equal to 6 times the rate then currently charged for the 1st ounce of a single-piece first class letter" and for letters weighing "at least 12 ½ ounces."[117] Section 409(e)(1) therefore specifies that the Postal Service's conduct related to the products that it provides in competition with private firms lacks sovereign or antitrust immunity.

The Postal Service's perpetuation and attempted expansion of the letter-box monopoly constitute anticompetitive conduct with respect to its nonreserved products and therefore are subject to antitrust liability pursuant

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115 39 U.S.C. § 409(1)(e) (emphasis added).
116 18 U.S.C. § 1696.
117 39 U.S.C. § 601(b)(1)–(2).

to section 409(e)(1) of Title 39. The Postal Service delivers letter-box-sized parcels and extremely urgent mail to the customer's letter box and excludes its competitors from having access to the same letter-box access. That exclusion protects the Postal Service's nonreserved products from competition by raising rivals' costs of delivery. To the extent that the letter-box monopoly harms competition in the markets for the Postal Service's nonreserved products, the PAEA makes clear that such conduct is subject to antitrust scrutiny.

II. Harm to Competition

The letter-box monopoly harms competition in the markets for the delivery of letter-box-sized parcels and extremely urgent mail. By excluding the Postal Service's competitors from using the letter box, the letter-box monopoly raises those competitors' costs and discourages entry into the markets for the delivery of letter-box-sized parcels and extremely urgent mail. Consumers consequently suffer a static loss in consumer surplus. The letter-box monopoly also retards innovation and reduces dynamic competition, which causes a dynamic loss in consumer surplus. In addition, the price that the Postal Service charges for access to the letter box—the entire end-to-end price of sending a piece of mail—is anticompetitive and inconsistent with sound access pricing principles. By distorting competition and costs, the letter-box monopoly reduces consumer welfare in the markets for the delivery of letter-box-sized parcels and extremely urgent mail.

A. Relevant Product Markets for the Delivery of Letter-Box-Sized Parcels and Extremely Urgent Mail

Defining a market in antitrust law denotes identification of the proper boundaries within which to investigate the competitive effects of an economic agent's behavior. Because I analyze the competitive effects of the letter-box monopoly rather than the Postal Service's monopoly over mail delivery, the relevant products are those that fit in the letter box but are not reserved products of the Postal Service pursuant to the Private Express Statutes. I apply the hypothetical-monopolist test, a standard method of defining a market for purposes of antitrust analysis, to define the markets for the delivery of letter-box-sized parcels and extremely urgent mail.

To define a market, one begins by analyzing demand substitution—in other words, the extent to which consumers respond to a price increase by substituting to other products. The U.S. Department of Justice and the Federal Trade Commission use the hypothetical-monopolist test to identify

the demand substitutes for a given set of products.[118] One hypothesizes a small but significant nontransitory increase in price (SSNIP) in one or multiple products and then identifies the demand substitutes to which consumers would switch, and the percentage of consumers that would switch, as a result of that price increase. The relevant product market is the smallest set of products for which a SSNIP would not induce consumers to switch to substitutes in quantities sufficient to render the SSNIP unprofitable for the hypothetical monopolist. In other words, the relevant market is the set of products over which a hypothetical monopolist could profitably impose a SSNIP.

1. Parcel Delivery

Parcel weight, delivery distance, and delivery speed likely delineate separate markets for the delivery of parcels. However, because the letter-box monopoly affects the delivery of parcels that fit in the letter box regardless of the parcels' weight, regardless of the distance that the parcels travel, and regardless of the speed of the parcels' delivery, it is not necessary to determine where those boundaries lie. Instead, I analyze the competitive effects of the letter-box monopoly on the markets for the delivery of letter-box-sized parcels collectively.

Any market in which a parcel product that fits in the customer's letter box competes is relevant for evaluating the competitive effects of the letter-box monopoly. However, the size of the parcel relative to the letter box does not define the boundaries of the markets. If a hypothetical monopolist over the delivery of letter-box-sized parcels were to implement a SSNIP, consumers would readily substitute to slightly larger parcels. Instead, the markets around letter-box-sized parcels include all parcels that are close substitutes for the letter-box-sized parcels. For example, the markets might include the delivery of parcels the size of a toaster oven (only slightly too large to fit in the average letter box) but would certainly exclude the delivery of a refrigerator-sized parcel. In addition, the Postal Service in 2015 issued a rule that authorizes new large-capacity letter boxes that must accommodate small parcels (up to 7 inches by 13 inches by 16 inches, or over 2.5 times the minimum volume requirement for the traditional letter box).[119] As consumers switch

[118] *See* U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 4.1.1 (2010) [hereinafter Horizontal Merger Guidelines], http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

[119] The new, large-capacity letter boxes must admit a test gauge measuring 7 inches by 13 inches by 16 inches, or 1456 cubic inches in volume. The corresponding standard for the smallest "traditional" letter box is a test gauge measuring 18.5 inches by 5 inches by 6 inches, or 555 cubic inches in volume. Standards Governing the Design of Curbside Mailboxes, 80 F.R. 48,702, 48,706–07 (Aug. 14, 2015) (incorporated by reference into 39 C.F.R. § 111). The test gauge is therefore 2.62 times larger than the traditional test gauge (that is, 1456 ÷ 555 = 2.62).

to the new, larger letter boxes, the scope of the market for letter-box-sized parcels will expand accordingly.

2. Extremely Urgent Mail Delivery

The letter-box monopoly also affects competition in the markets for the delivery of extremely urgent mail. As with the delivery of parcels, delivery speed and the weight of the piece of mail likely define several overlapping markets for the delivery of extremely urgent mail. Because the letter-box monopoly affects all of those markets, I analyze them collectively.

However, one must also consider whether the markets around the delivery of extremely urgent mail include other products. First-Class mail is the fastest reserved product for the delivery of letters (and therefore the most likely substitute for extremely urgent mail). However, the regulatory definition of extremely urgent mail creates a class of products for which First-Class mail is not a close substitute. As I explained in Part I, the regulatory exception to the postal monopoly for the delivery of extremely urgent mail requires that "the value or usefulness of the letter would be lost or greatly diminished if it [were] not delivered within [the] time limits" specified in the Postal Service's regulations.[120] Therefore, by the Postal Service's own regulatory definition, consumers of extremely urgent mail highly value fast delivery and would not readily substitute to slower First-Class mail. Applying the hypothetical monopolist test to this regulatory distinction yields the same results. In practical terms, the Postal Service's competitors use the price-based exemption (not the timing-based exemption) to ensure that their extremely urgent mail offerings fall outside the Postal Service's reserved area. That consumers of extremely urgent mail are willing to pay "6 times the rate then currently charged"[121] for a First-Class letter to send extremely urgent mail indicates that they value urgent delivery highly.

Suppose that delivery of the first ounce of a First-Class letter costs $0.50,[122] such that the corresponding minimum price of sending a letter by extremely urgent mail is $3.00 (that is, $0.50 × 6 = $3.00). Any consumer who sends a letter by extremely urgent mail values that service at least $2.50 more than First-Class mail (that is, $3.00 – $0.50 = $2.50). Intuitively, if extremely urgent mail delivery were not worth $2.50 more to the consumer than First-Class delivery, the consumer would purchase First-Class mail instead. Suppose that a monopolist over the delivery of extremely urgent mail implements a 5-percent SSNIP, such that the new price of an extremely

120 39 C.F.R. § 320.6(b)(1).
121 39 U.S.C. § 601(b)(1).
122 As of June 2016, the price of the first ounce of a First-Class letter was $0.47. *Price List*, U.S. Postal Service, http://pe.usps.com/text/dmm300/Notice123.htm#2682960. I use $0.50 here to simplify the calculations.

urgent letter is $3.15 (that is, $3.00 + ($3.00 × 5%) = $3.15). For the SSNIP to be unprofitable, demand would then need to decrease by more than 5 percent. That is, 5 percent of consumers of extremely urgent mail would need to value extremely urgent mail by at least $2.50 more than First-Class mail but not by $2.65 more than First-Class mail.[123] Put differently, at least 5 percent of consumers would need to be willing to pay at least 6 times as much for extremely urgent mail delivery but be *unwilling* to pay 6.05 times as much. Such an outcome is unlikely given that most extremely urgent mail is priced far above the "6 times" threshold.[124] For example, as of June 2016, UPS advertised a minimum price of $15.43 and FedEx advertised a minimum price of $17.26 for delivery of an individual letter for most destinations.[125] Even when one compares those prices, which apply for letters weighing up to eight ounces, to the price of mailing an eight-ounce letter by First-Class mail ($2.41),[126] the price difference is sufficiently large to preclude substantial substitution. Therefore, a SSNIP in extremely urgent mail is unlikely to induce sufficient demand substitution to First-Class mail to render the SSNIP unprofitable.

Another potential substitute for extremely urgent mail is electronic communication. Although electronic communication was once a substitute for extremely urgent mail, substitution to electronic communication is likely complete as of 2016. Most consumers use extremely urgent mail only when physical copies of documents are required. For example, whereas businesses once might have mailed urgent documents to clients to sign, multiple services and applications now allow consumers to sign time-sensitive documents electronically.[127] Scanned documents sent as email attachments are another potential electronic substitute for extremely urgent mail. Electronic communication might or might not be an acceptable legal or commercial substitute for extremely urgent mail. However, given the low cost and high speed of electronic communication, the remaining demand for extremely urgent mail is likely for items that cannot be sent electronically. Therefore, a SSNIP in the delivery of extremely urgent mail would likely cause little if

[123] For simplicity, I implicitly assume in this example that each consumer has the same volume of First-Class mailings.

[124] *See, e.g.*, *Mail & Shipping Prices*, U.S. Postal Service, https://www.usps.com/business/prices.htm (reporting flat rates for Priority Mail that range from $5.60 to $22.95).

[125] United Parcel Service, UPS Rate and Service Guide 60 (2016), http://www.ups.com/media/en/daily_rates.pdf. FedEx, FedEx Standard List Rates 2, (2016), http://images.fedex.com/us/services/pdf/FedEx_StandardListRates_2016.pdf. FedEx also offers a special rate of $7.00 for next-day letter delivery within Hawaii. *Id.* at 27.

[126] *Price List*, *supra* note 22.

[127] *See, e.g.*, *Legally Sign Documents Online*, DocuSign, https://www.docusign.com/esignature/legally-sign-documents-online; HelloSign, https://www.hellosign.com/; *Whitson Gordon, What's the Best Way to Sign Documents Electronically (Without Scanning Them)?*, LifeHacker (Mar. 13, 2013), http://lifehacker.com/5990172/whats-the-best-way-to-to-sign-documents-electronically-without-scanning-them; *see also* 15 U.S.C. § 7001(a)(1) ("[A] signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form.").

any substitution to electronic communications. The markets for extremely urgent mail therefore include no additional substitutes.

3. The Postal Service's Market Power Over the Delivery of Letter-Box-Sized Parcels and Extremely Urgent Mail

The Postal Service's letter-box monopoly gives it market power over the delivery of letter-box-sized parcels and extremely urgent mail. Because the Postal Service's market power derives from statutory rather than economic conditions and the Postal Service's incentives for pricing differ from those of a private firm, traditional measures of market power are ill-suited for antitrust analysis of the Postal Service's behavior in the relevant product markets. However, the presence of barriers to entry and the harm to competition that the letter-box monopoly causes together indicate that the Postal Service has market power over the delivery of letter-box-sized parcels and extremely urgent mail.

The Supreme Court has defined market power as the ability to raise prices above a competitive level profitably.[128] Economists often evaluate market power using indirect measures—for example, the Lerner Index—that determine whether a firm's current prices exceed competitive levels.[129] However, an antitrust analysis using such an index presumes that a firm with the ability to price above a competitive level will do so. In other words, the analysis presumes that the firm in question maximizes its profits. The Postal Service, in contrast, likely does not price its nonreserved products to maximize its profits. Like many state-owned enterprises (SOEs), the Postal Service has the incentive to sacrifice profit to expand its scale.[130] In addition, the Postal Service's incentive compensation explicitly rewards managers with bonuses that are tied to measures of scale, including deliveries per hour and total revenue.[131] One therefore cannot determine the Postal Service's *ability* to raise prices above a competitive level by analyzing the prices that the Postal Services charges. Unlike a private firm, the Postal Service might have the ability to raise prices above a competitive level and choose not to do so. Therefore, that the Postal Service's prices do not exceed competitive levels provides no evidence that the Postal Service lacks market power.

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128 NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 n.38 (1984); *see also* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 937 (1981); Robert S. Pindyck & Daniel L. Rubinfeld, Microeconomics 340 (David Alexander ed., Pearson 6th ed. 2005).

129 *See, e.g.*, Landes & Posner, *supra* note 128, at 939; Pindyck & Rubinfeld, *supra* note 128, at 353.

130 For a formal model of an SOE's maximization of a weighted objective function consisting of profit and revenue (the most tractable measure of scale in a multiproduct firm), see David E.M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 Antitrust L.J. 479, 499–503 (2003).

131 *See* Jeffrey C. Williamson, U.S. Postal Service, Fiscal Year 2014 Pay for Performance Program and National Performance Assessment Corporate and Unit Indicators 4 (2013); U.S. Government Accountability Office, U.S. Postal Service New Delivery Performance Measures Could Enhance Managers' Pay for Performance Program (2008).

Nor does the Postal Service's weak financial condition indicate a lack of market power. As I have previously written with Judge Robert Bork, profits are a poor indicator of market power.[132] Such a measure cannot account for inefficiencies in a firm's cost structure. The Postal Service frequently runs at a loss. Because the Postal Service does not maximize profits, profits are even less informative for an analysis of the Postal Service's market power. Therefore, indirect measures of market power derived from profit margins or pricing behavior are uninformative in this case.

Persistent barriers to entry into the markets for the delivery of letter-box-sized parcels and extremely urgent mail indicate that the Postal Service has market power over those services. Historically, economists have defined a barrier to entry in either of two ways. The first approach, which Joe Bain developed in 1956, defines a barrier to entry as any means by which incumbent firms can earn supracompetitive profits without threat of entry.[133] The Bain definition includes government regulation, economies of scale, and absolute cost advantage by incumbents, among others.[134] The second definition, propounded by Nobel laureate George Stigler, holds more narrowly that a barrier to entry is "a cost of producing . . . [that] must be borne by a firm which seeks to enter an industry but is not borne by firms already in that industry."[135] The letter-box monopoly creates a regulatory barrier to entry into the markets for the delivery of letter-box-sized parcels and extremely urgent mail under both definitions. As I explain in Part II.B, the letter-box monopoly imposes additional costs on the Postal Service's competitors that the Postal Service does not need to bear. The letter-box monopoly is therefore a Stiglerian barrier to entry. Any Stiglerian barrier entry is also a Bainian barrier to entry: if new entrants must bear extra costs, the incumbent can raise prices above a competitive level without threat of entry. In other words, it will not be profitable for firms to enter the markets after a small price increase. That barrier to entry confers market power on the Postal Service by allowing it to raise prices without threat of entry.

The barrier to entry that the letter-box monopoly creates is persistent: it will continue until Congress amends the Criminal Code to abolish the letter-box monopoly. The Postal Service's market power is therefore sheltered from

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[132] *See* Robert H. Bork & J. Gregory Sidak, *The Misuse of Profit Margins to Infer Market Power*, 9 J. Competition L. & Econ. 511, 512 (2013); *see also* Jean Tirole, The Theory of Industrial Organization 284 (MIT Press 1992) ("[A]n empirical finding that firms do not make supranormal profits in an industry should not lead one to conclude that firms do not have market power.").

[133] *See* Tirole, *supra* note 132, at 305 (citing Joe S. Bain, Barriers to New Competition (Harvard Univ. Press 1956)).

[134] *Id.* at 305–06.

[135] George Stigler, The Organization of Industry 67 (Richard D. Irwin, Inc. 1968); *see also* Richard A. Posner, Antitrust Law 74 (Univ. of Chicago Press 2d ed. 2001).

the creative destruction that tends, over time, to erode market power that derives from some cost or product attribute advantage.[136]

In addition to the barriers to entry into the markets for letter-box-sized parcels and extremely urgent mail, the harm that the letter-box monopoly causes to competition in those services provides direct evidence of the Postal Service's market power. As I show in Part II.B, the Postal Service harms competition by raising its rivals' costs in the markets for the delivery of letter-box-sized parcels and extremely urgent mail. That increase in rivals' costs would harm competition even if the Postal Service did not hold traditional market power over the delivery of letter-box-sized parcels and extremely urgent mail. The Postal Service's statutory monopoly over a production input—access to the customer's letter box—for those delivery services allows the Postal Service to harm competition in the relevant markets. By excluding its rivals from using the letter box, the Postal Service raises its rivals' costs of delivery. Holding other factors constant, those increased costs raise the prices that the Postal Service's competitors must charge, which in turn increases the Postal Service's profit-maximizing price. In other words, by raising its competitors' costs, the Postal Service gains the *ability* to raise its prices profitably above a competitive level—even if it chooses not to do so. The letter-box monopoly therefore confers market power upon the Postal Service in the markets for letter-box-sized parcels and extremely urgent mail.

B. Raising Rivals' Costs of Delivering Parcels and Extremely Urgent Mail

By preventing the Postal Service's competitors from leaving letter-box-sized parcels and extremely urgent mail in the customer's letter box, the letter-box monopoly raises competitors' delivery costs. Unlike the Postal Service, private delivery firms must deliver parcels and extremely urgent mail to the customer's doorstep, even if the item being delivered is small enough to fit in a letter box.

The letter-box monopoly increases rivals' costs by increasing the average amount of time that it takes to make a delivery. For example, if the letter boxes in a neighborhood or apartment complex are clustered in one area, the Postal Service's mail carrier can deliver all letter-box-sized parcels and extremely urgent mail to one location. A delivery person for a private firm, in contrast, will need to spend substantially more time to walk or drive between houses or apartments. The letter-box monopoly thereby raises rivals' labor and transportation costs. In short, to cover the same deliveries in the same neighborhood in the same amount of time, a private firm will need to deploy

136 *See, e.g.*, J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. Competition L. & Econ. 581 (2009) (discussing the relevance of Joseph Schumpeter's theory of creative destruction to antitrust law).

more delivery personnel—in more vehicles, using more fuel—than it would need to deploy if it could access the customer's letter box.

In addition, if the customer does not explicitly allow the private carrier to leave parcels and extremely urgent mail on the doorstep, the firm will need to return to make any delivery that the customer is not present to receive. Even if the customer allows the private carrier to leave a parcel or overnight mail on the doorstep, the private carrier will incur additional costs. Simply leaving the parcel or extremely urgent mail at the doorstep increases the risk of damage or theft. A private carrier would need to incur additional costs to ensure the same quality (and security) of delivery that it could provide if it were permitted to leave deliveries in the letter box. For example, the private carrier could provide insurance or create its own delivery boxes to ensure delivery with the same quality as delivery to a letter box. Moreover, as consumers make more purchases online and parcel deliveries increase accordingly, parcel theft might increase disproportionately. As consumers receive parcels more frequently, parcel theft will become easier and more lucrative, because the number of parcels sitting unsecured on doorsteps or in letter boxes in a neighborhood that a thief might canvass on any given day will increase. The probability that any given package will be stolen might then increase. Depending on the refund policies of the shipper and seller, the consumer, the shipper, or the seller of the product will bear the cost of those increased thefts.

The Office of Inspector General (OIG) for the Postal Service estimated that delivery to centralized letter boxes costs the Postal Service $160 per-delivery point, per-year, that delivery to a curbside letter box costs $224 per-delivery point, per-year, and that delivery to a customer's door costs $353 per-delivery point, per-year.[137] In other words, it would cost the Postal Service between 1.6 and 2.2 times as much to deliver door-to-door—as its competitors do—than to deliver to letter boxes.[138] The costs of door-to-door delivery in comparison with curbside or centralized delivery are significant enough to draw the attention of legislators concerned with the Postal Service's finances: a comprehensive postal reform bill introduced in the Senate in September 2015 would require the Postal Service to convert some door-to-door delivery points to other delivery modes on a voluntary basis.[139] If a private carrier faces the same cost savings as the Postal Service, it would save $129 (that is, $353 – $224 = $129) in delivery costs per year from

[137] Robert J. Shapiro, *The Basis and Extent of the Monopoly Rights and Subsidies Claimed by the United States Postal Service* 16, Sonecon (Mar. 2015), http://www.sonecon.com/docs/studies/Study_of_USPS_Subsidies-Shapiro-Sonecon-March_25_2015.pdf; *see also* U.S. Postal Service Office of Inspector General, DR-AR-11-006, Audit Report on Modes of Delivery 9 (2011), https://www.uspsoig.gov/sites/default/files/document-library-files/2013/dr-ar-11-006.pdf.

[138] That is, $353 / $160 = 2.21 and $353 / $224 = 1.58.

[139] Improving Postal Operations, Service & Transparency Act of 2015, S. 2051, 114th Cong. § 3692 (2015).

its being able to deliver to the letter box. It will be efficient for the private carrier to offer to install a free delivery box on a customer's premises when the cost of the delivery box, its installation, and its maintenance is less than the discounted present value of the private carrier's cost savings from using the delivery box over its useful life—that is, the private carrier's cost savings discounted for the time value of money. Assume conservatively that a new delivery box has a five-year useful life and that the private carrier's weighted average cost of capital (WACC) is 10 percent. The discounted present value of cost savings for the private carrier from its being able to deliver to the letter box over a five-year period is $537.92.[140] Therefore, the private carrier will offer to install a free delivery box if the costs are less than $537.92. In addition, large mailers of parcels, such as Amazon and eBay, might subsidize the delivery-box installation. If large mailers bear some installation costs, the private carrier will offer delivery boxes whose total costs of installation and maintenance exceed $537.92.

To determine the actual amount of cost savings that the Postal Service's competitors (for example, UPS and FedEx) would experience if they were able to use existing letter boxes, one would need access to proprietary cost information of these private carriers. However, it is reasonable to suppose that competitors' cost savings would be substantial. If UPS and FedEx decreased their costs by even a fraction of the Postal Service's own reported cost savings from its being able to deliver to the customer's letter box, the benefits to consumers from lower prices and higher output would be significant.

C. Discouraging Innovation and Reducing Dynamic Competition

In addition to raising the delivery costs that the Postal Service's rivals must bear, the letter-box monopoly also discourages innovation and deters vertical integration into mail delivery by businesses with large numbers of routine mailings—such as banks, utilities, publishers, advertisers, and online sellers of goods, such as Amazon and Google.

As I noted in Part I, at least one motivation for the creation of the letter-box monopoly in 1934 was plainly to counteract vertical integration by such businesses into the delivery of bills.[141] In the absence of the letter-box monopoly, a high-volume mailer could choose to be vertically integrated into mail delivery, either on its own or through contract. Whether or not preventing vertical integration was justifiable in 1934, it is undeniable that the letter-box monopoly has discouraged (or explicitly foreclosed) entry into

[140] In the first year, the firm will save $129. In the second year, the firm will save $129 / (1 + 0.10) = $117.27. In the third year, the firm will save $129 / $(1 + 0.10)^2$ = $106.61. In the fourth year, the firm will save $129 / $(1 + 0.10)^3$ = $96.92. In the fifth year, the firm will save $129 / $(1 + 0.10)^4$ = $88.11. The total cost savings for the five-year period is therefore $129.00 + $117.27 + $106.61 + $96.92 + $88.11 = $537.91.

[141] H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934); S. Rep. No. 742, 73d Cong., 2d Sess. 1 (1934).

the markets for the delivery of letter-box-sized parcels and extremely urgent mail. Vertical integration increases efficiency and is typically welfare-enhancing, not only for the integrated firm, but also for consumers.[142] To the extent that the letter-box monopoly prevents or discourages vertical integration, consumers suffer.

Ultimately, many of the highest-volume mailers, such as utilities, have bypassed the letter box and instead vertically integrated through electronic bill delivery. However, the letter-box monopoly still forces high-volume mailers of items that cannot be delivered electronically, such as products purchased from Amazon, to bear higher delivery costs. Because the letter-box monopoly increases the expected cost of a (potential) vertically integrated firm, the letter-box monopoly discourages high-volume package shippers from expanding into last-mile delivery. Package shippers have resorted to extreme alternatives to standard delivery, including the possibility of delivering packages by airborne drones.[143] Consumers bear the increased costs of delivery, including the explicit costs of higher delivery prices and the implicit increase in costs from reduced entry and innovation. For example, the price that the consumer pays to purchase a product on Amazon and pay separate shipping fees likely exceeds the price that the consumer would pay for the product and delivery if Amazon could vertically integrate into delivery. In other words, if Amazon could vertically integrate, efficiency gains would lower the combined price of the product and its delivery to the consumer. According to news reports from early 2014, Amazon was considering expanding its fleet of delivery vehicles to vertically integrate into last-mile delivery.[144] Those reports are evidence that a marginal difference in the cost of delivery—and therefore in Amazon's expected profit from expanding into delivery—might suffice to induce Amazon to vertically integrate.

The letter-box monopoly harms not only static competition in the markets for the delivery of letter-box-sized parcels and extremely urgent mail, but also dynamic competition in those markets. Unlike static competition, which is the level of competition in a market at a given time, dynamic competition occurs over time through product or process innovation.[145] The

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142 *See, e.g.*, Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. Econ. Literature 629, 680 (2007).

143 *See, e.g.*, *Hearing on Unmanned Aircraft Systems: Key Considerations Regarding Safety, Innovation, Economic Impact, and Privacy, Before the S. Subcomm. Aviation Operations, Safety, and Security, Comm. on Commerce, Science, and Transportation*, 114th Cong. 1 (Mar. 24, 2015) (statement of Paul Misener, Vice President for Global Public Policy, Amazon.com), http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=8711c6f8-cf1b-42b9-8ebc-26971c245f7f.

144 *See, e.g.*, Jillian D'Onfro, *SOURCE: Amazon Is Planning Its Own Private Fleet of Delivery Trucks*, Business Insider (Mar. 13, 2014), http://www.businessinsider.com/source-amazon-is-planning-its-own-private-fleet-of-delivery-trucks-2014-3; Greg Bensinger & Laura Stevens, *Amazon, in Threat to UPS, Tries Its Own Deliveries*, Wall St. J. (Apr. 24, 2014), http://www.wsj.com/articles/SB10001424052702304788404579521522792859890.

145 *See generally* Sidak & Teece, *supra* note 136.

effects of the letter-box monopoly on static competition—taking the form of higher prices, decreased quantities demanded, and reduced incentives for entry—all are observable. In contrast, one might overlook the letter-box monopoly's impact on dynamic competition. For the same reasons that the letter-box monopoly discourages entry generally, it also discourages entry by heterogeneous firms—that is, firms that differentiate themselves significantly from current competitors—and the introduction of potentially disruptive technologies that one cannot easily predict.

The Postmaster General selected and approved the familiar, tunnel-shaped rural letter box (with a flag to indicate outgoing mail) in 1915.[146] As Figure 1 illustrates, the "next generation mailbox" that the Postal Service developed in 2015 to "bring [the mailbox] into the 21st century" is simply a larger version of the 1915 letter box—complete with the red flag.[147]

Figure 1. A Century of Letter-Box Innovation
by the Postmaster General, 1915–2015

Rural Letter Box, 1915 "Next Generation Mailbox," 2015

Sources: *Rural Mailboxes*, *supra* note 146; U.S. Postal Service, Shape of Things to Come, *supra* note 147.

It is telling that, in contrast to the development of devices like smart parking meters and smart electricity meters, the letter box has remained virtually unchanged for a century, and the Postal Service, as of 2016, proposes to keep it that way.[148]

The expansion of the physical capacity of the letter box, though clearly welfare-enhancing, is long overdue. Consumers' reactions to the 2015 letter box anecdotally reveal how the retarded pace of letter-box innovation has

[146] *Rural Mailboxes*, Smithsonian National Postal Museum, http://postalmuseum.si.edu/exhibits/current/customers-and-communities/reaching-rural-america/rural-mailboxes.html.

[147] *See* Press Release, U.S. Postal Service, Shape of Things to Come (Jan. 20, 2015), https://liteblue.usps.gov/news/link/2015/01jan/news2151.htm; Standards Governing the Design of Curbside Mailboxes, 80 F.R. 48,702, 48,706–07 (Aug. 14, 2015) (incorporated by reference into 39 C.F.R. § 111).

[148] *See* Standards Governing the Design of Curbside Mailboxes, *supra* note 147.

deprived consumers of the increased welfare from receiving packages in their letter boxes. One consumer indicated that she would no longer need to go to the post office to retrieve packages—a considerable time savings.[149] Another consumer using the larger letter box had already increased her online purchases,[150] which indicates that for at least some consumers the constrained capacity of the current letter-box suppresses demand for goods from online retailers and for the delivery of those goods.

In addition, many potential improvements to the letter box that have been developed and patented have not been implemented in the United States. For example, a 2005 IBM patent describes a letter box secured using a radio frequency identification (RFID) reader.[151] Unlike in many other developed countries, letter boxes throughout the United States are unlocked or use a physical key.[152] Both electronic and RFID security systems are obvious improvements over using a physical key. For example, France's VIGIK system can provide multiple parties access to the same letter box for different periods: a letter-box owner can provide access to a private delivery firm only during normal business hours or for a certain delivery window only.[153] VIGIK also records access by each individual and can deactivate lost keys.[154] A mailbox marketed in Australia provides similar multiple access (through electronic codes) and proof of delivery.[155] In the United States, however, the letter box remains little more than a metal tube with a hatch on the end. The letter box in the United States is archaic, like a metal hotel key in a time of electronic key cards. The letter box is a bulky, inefficient tool for receiving mail, and the letter-box monopoly has denied American consumers the benefits from Schumpeter's "gale[s] of creative destruction."[156] In the absence of the letter-box monopoly, private companies could offer consumers incentives to adopt letter-box innovations by providing the improved letter boxes for free or by offering discounted delivery. The feasibility of replacing dumb letter boxes with smart ones is not limited by any paucity of data that the latter could productively record, process, transmit, or receive. The *New York Times* reported in 2013 that, pursuant to "the Mail Isolation Control and

149 *USPS Testing Next Generation Mailbox*, Postal Reporter (Jan. 20, 2015), http://www.postal-reporter.com/blog/usps-testing-next-generation-mailbox/.

150 *Id.*

151 U.S. Patent No. 6957767 (filed June 30, 2003).

152 *See* Gretchen Anderson, *Identity Theft: Who's at Risk?*, AARP Research (Sept. 2014), http://www.aarp.org/money/scams-fraud/info-2014/identity-theft-incidence-risk-behaviors.html; U.S. Postal Service, USPS-STD-7B, U.S. Postal Service Standard Mailboxes (1992), http://about.usps.com/publications/engineering-standards-specifications/spusps-std-7b.pdf.

153 *Quels Sont les Avantages de VIGIK?*, VIGIK, http://www.vigik.com/rubrique.php3?id_rubrique=52.

154 *Id.*

155 *Oz-eBox?*, Oz-eBox, http://www.australianparcelbox.com.au/Industrial-double-door-built-in-parcel-mail-letter-box.

156 Joseph A. Schumpeter, Capitalism, Socialism and Democracy 84 (Harper & Brothers 2d ed. 1947).

Tracking program, . . . Postal Service computers photograph the exterior of every piece of paper mail that is processed in the United States—about 160 billion pieces [in 2012]."[157] The letter-box monopoly keeps the customer's mail receptacle a dumb terminal in what is otherwise already a highly intelligent network. Moreover, apartment complexes already use technology that scans each incoming parcel, determines the shipping carrier (the Postal Service or any private competitor), and sends an automatic text message or other notification to the recipient.[158] Absent the letter-box monopoly, individual letter boxes could perform those same functions.

The letter-box monopoly's deterrent effect on heterogeneous entry also deprives consumers of potential welfare gains. For example, the introduction of environmentally friendly services into the markets for the delivery of letter-box-sized parcels and extremely urgent mail could increase consumer welfare, as similar services have done in other industries. During the period following the deregulation of Pennsylvania's retail electricity markets, new entrants and incumbent providers both began offering environmentally friendly options to residential electricity subscribers.[159] Retail electric consumers gained not only from increased competition in traditional power, but also from the value they impute to the introduction of new differentiated power products. If some retail electricity consumers value environmentally friendly power, it is reasonable to expect that some recipients of parcels and extremely urgent mail also would value the opportunity to choose environmentally friendly delivery.

By analogy, in telecommunications markets, the deregulation of customer-premises equipment (CPE) enabled new product differentiation that increased consumer welfare. Before the deregulation of CPE, fixed-line handsets were bland, clunky, and homogeneous. The introduction of even simple devices such as touchtone and cordless handsets and early phone-answering machines made using fixed-line phone networks more convenient and consequently increased consumer welfare in that market.[160] Before deregulation, most fixed-line handsets were highly durable, but were quickly replaced by less durable, less expensive, and highly differentiated alternatives after deregulation.[161] Under regulation, consumers were forced to use a more expensive product, which those same consumers later rejected after

[157] Ron Nixon, *Postal Service Is Watching, Too: Outside of All Mail Is Recorded*, N.Y. Times, July 4, 2013, at A1, http://www.nytimes.com/2013/07/04/us/monitoring-of-snail-mail.html?_r=0; Ron Nixon, *U.S. Postal Service Logging All Mail for Law Enforcement*, N.Y. Times (July 3, 2013), http://www.nytimes.com/interactive/2013/06/30/us/30postal-mail-cover-documents.html?ref=us&_r=1&.

[158] *See, e.g.*, ReceivingRoom, https://www.receivingroom.com/.

[159] *See, e.g.*, PA Office of Consumer Advocate's Electric Shopping Guide, http://www.oca.state.pa.us/Industry/Electric/elecomp/ElecGuide.pdf.

[160] Ginsburg, *supra* note 43, at 19 (comparing the letter box to the rotary-dial Western Electric phone offered by AT&T before its breakup).

[161] *Id.*

substitute products became available. Not every consumer prefers to purchase a Cadillac—or a black Model-T, for that matter. Differentiated substitutes for the letter box, offered by new entrants, will better reflect heterogeneous consumer preferences than the current letter box does.

Finally, innovations would increase the security of current letter-box designs and make the letter box a tool for law enforcement and intelligence gathering. Compare a letter box to an automated teller machine (ATM). One could easily incorporate many of an ATM's security-related features into a letter box. Modern ATMs include features that deter theft, primarily by making it more difficult for a potential thief to access an account illegally.[162] At an even simpler level, compare the simple digital safe now found in many hotel rooms. Consumers can purchase such safes for their homes at stores like Home Depot or Staples for about $50.[163] Simple security measures, such as requiring a PIN to access an account, or more advanced measures, such as biometric scanners, could deter such theft. Depending on the particular security needs of the letter-box owner, such features could easily be incorporated into the access protocol for a letter box. (The current access protocol is nonexistent—one simply pulls down on a metal hatch to open the tube.) If private companies can design and sell secure ATMs and inexpensive digital home safes, what would prevent similar development of secure letter boxes? Or, consider the example of intelligent doorbells that use motion detectors and a live video stream to allow the user to virtually "answer" the door from his smartphone.[164] Some areas now have intelligent streetlights, which not only can control and monitor electricity usage, but can also be deployed for unrelated functions, such as gathering information for surveillance purposes.[165] Similar applications for the letter box will lead to a more secure mail stream. Yet the letter-box monopoly discourages those innovations by limiting the potential revenue that use of the letter box can generate.

The lost consumer surplus from the delayed or forgone entry of new products due to regulatory barriers is significant.[166] For example, Jerry Hausman estimated the regulatory delay in the offering of voice messaging by local exchange carriers that were formerly part of the Bell system (a service for which there already existed a low-cost substitute, the answering machine)

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[162] *See, e.g.*, *Diebold 429 Multifunction Lobby ATM*, Diebold, http://www.diebold.com/-/media/diebold/diebold-asset-library/dbd_product-card_hardware_opteva429_vi_20150601.pdf?la=en (describing ATM security features, including biometric scanning for enhanced security).

[163] *See, e.g.*, *Electronic Deluxe Digital Steel Safe*, Staples, http://www.staples.com/Electronic-Deluxe-Digital-Steel-Safe/product_1181373; *0.16 cu. ft. Deluxe Digital Lock Safe*, Home Depot, http://www.homedepot.com/p/Stalwart-0-16-cu-ft-Deluxe-Digital-Lock-Steel-Safe-in-Black-65-E17-B/205258432.

[164] *See* Ring, https://ring.com/.

[165] Mikael Thalen, *"Intelligent" Streetlights to "Watch" Florida Residents*, Infowars.com (Apr. 17, 2015), http://www.infowars.com/intelligent-streetlights-to-watch-florida-residents/.

[166] *See* Jerry A. Hausman, *Valuing the Effect of Regulation on New Services in Telecommunications*, 1997 Brookings Papers on Economic Activity: Microeconomics 1, 13–24 (1997).

to have cost consumers over a billion dollars annually in lost surplus.[167] The letter-box monopoly has delayed the introduction of new products since the Great Depression. It is reasonable to expect that the harm to consumers from that prolonged suppression of innovation is similarly enormous.

Moreover, as consumers substitute more online retail purchases for purchases in brick-and-mortar stores, the harm that the letter-box monopoly causes to competition and consumer welfare will increase. As consumers receive more parcels, both the forgone value to the consumer of receiving parcels from private shippers in his existing letter box and the forgone value of innovations in letter-box security and design will increase. A consumer who receives only one parcel every few months might not forgo much welfare by receiving that parcel on his doorstep (if delivered by a private shipper) or in his antiquated, poorly secured letter box (if delivered by the Postal Service). However, as that consumer makes more purchases online (or even signs up for one of the proliferating monthly subscription delivery services for food, cosmetics, clothing, or virtually any conceivable product[168]), the forgone value to that consumer of an advanced letter box accessible by all shippers will increase.

In sum, the static inefficiencies that the Postal Service causes by raising its rivals' delivery costs are only part of the cost of the letter-box monopoly. In other industries, dynamic competition has greatly benefited consumers through the introduction of new products and services that were not generally anticipated when regulatory barriers to entry constrained those industries. Outside the world of regulated industries, various consumer appliances have changed significantly in the past several decades. Refrigerators, washing machines, televisions, personal computers, HVAC control systems (including smart thermostats), electric meters, and many other household appliances bear little resemblance to their predecessors. Yet the letter box in the United States has remained unchanged for a century, and the Postmaster General's vision of the letter box for the twenty-first century is disturbing for its lack of foresight. Abolishing the letter-box monopoly is necessary to unleash true innovation in the delivery of letter-box-sized parcels and extremely urgent mail.

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[167] *Id.* at 15.

[168] *See, e.g.*, HelloFresh, http://www.lifehealthhq.com/best-food-subscription-boxes/ (pre-portioned meal ingredients); Birchbox, https://www.birchbox.com/ (cosmetics); Golden Tote, https://www.goldentote.com/ (women's clothing); BarkBox, https://barkbox.com/ (dog toys); Dollar Shave Club, https://www.dollarshaveclub.com/ (razors); *DIY Moss of the Month Club*, Etsy, https://www.etsy.com/ (search "DIY moss of the month club" and select first result) (moss).

D. The Postal Service's Anticompetitive Access Price for Letter Boxes

The Postal Service allows other private citizens or private delivery services to deposit a letter or parcel in the letter box only if full retail postage is attached to the letter or parcel and cancelled (to render the postage unsuitable for further use).[169] That is, the Postal Service prices access to the letter box at the Postal Service's full retail price for the delivery of a letter or parcel. As a matter of elementary economic theory, this access-pricing rule grossly overcompensates the Postal Service. The opportunity cost to the Postal Service of the out-of-mail delivery of a letter is the forgone contribution that the letter would make to the recovery of the Postal Service's common fixed costs (which the cognoscenti of postal rate regulation call "institutional costs"). The opportunity cost is *not* the full price of postage for that piece of mail: the Postal Service, after all, *avoids* costs when a third party performs out-of-mail delivery. In contrast, the Postal Service is required by statute to base prices on its avoided costs when giving mailers discounts for presorted mail.[170] Overcompensating the Postal Service for its opportunity cost deters efficient entry into the provision of end-to-end mail services for letters. That result is not surprising, because the overt purpose of the Private Express Statutes is to suppress competition.

The determination of the optimal access price to an incumbent firm's bottleneck input is a familiar concern in regulated network industries.[171] An incumbent firm often controls some bottleneck component of a network (such as a local loop in fixed-line telephony). Entrants wish to lease access to that component, which is usually characterized as not being feasibly duplicated. A regulator will often force the incumbent to provide access to the entrant at a regulated price. If the regulated price is inefficiently low, the incumbent will be unable to recover its investment in the network, which will discourage the incumbent from investing in optimal network maintenance, upgrades, and expansion. If the regulated price is inefficiently high, entrants might be forced to make inefficient investments to bypass the bottleneck input.

Early regulation of access pricing focused on the incumbent's cost of providing the input to its competitors. For example, the Federal Communications Commission, promulgating regulations to implement

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169 39 U.S.C. § 601(a).

170 39 U.S.C. § 3622.

171 *See, e.g.*, William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 Yale J. on Reg. 171 (1994); Jean-Jacques Laffont & Jean Tirole, *Access Pricing and Competition*, 38 Eur. Econ. Rev. 1673 (1994); Ingo Vogelsang, *Price Regulation of Access to Telecommunications Networks*, 41 J. Econ. Literature 830 (2003). For overviews of this literature, see Jean-Jacques Laffont & Jean Tirole, Competition in Telecommunications (MIT Press 3d ed. 2002); Sidak & Spulber, Deregulatory Takings and the Regulatory Contract, *supra* note 26.

sections 251 and 252 of the Telecommunications Act of 1996,[172] set the access price for an unbundled network element at "the total element long-run average incremental cost" (TELRIC) of the incumbent's bottleneck component plus a reasonable share of its forward-looking common costs.[173] An access-pricing rule that tends to generate a higher access price for the incumbent than the FCC's TELRIC model is the efficient component pricing rule (ECPR),[174] first developed by William Baumol and Robert Willig, under which the incumbent is compensated for the long-run average incremental cost (LRAIC) of its bottleneck component plus the opportunity cost of its supplying that component to its competitor. In other words, the ECPR adds to the LRAIC the contribution to the recovery common costs (and any profits) that the incumbent firm would have earned by using the bottleneck component to supply a unit of the downstream product.

Under TELRIC pricing or even under the ECPR, it is clear that the optimal price for competitor access to the letter box should be below the Postal Service's retail price for end-to-end delivery. The LRAIC (or TELRIC) of the letter box is zero for the Postal Service, and it is implausible that 100 percent of the price of the delivery of letter-box-sized parcels or extremely urgent mail consists of some combination of recovery of common costs (institutional costs) and profits (which the Postal Service certainly does not earn from its overall operations with any regularity). Consequently, the access price for private use of the customer's letter box cannot plausibly exceed the retail price for nonreserved products that the Postal Service delivers to the letter box. The LRAIC of the letter box is zero for the Postal Service because the mail recipient, not the Postal Service, erects and maintains the letter box.[175] The opportunity cost to the incumbent of providing access to a bottleneck facility will only approach (or possibly exceed) the full price of the retail product if the bottleneck input is used to produce other products, such that the incumbent's opportunity cost of allowing access includes forgone profit from those other products.[176] Opening the letter box to competitors in the markets for the delivery of letter-box-sized parcels and extremely urgent mail does not fall into this category. The optimal access price might approach the retail price if the Postal Service were to risk losing other

172 47 U.S.C. §§ 251–52.

173 *See* Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 Yale L.J. 417 (1999) (discussing AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999)).

174 Robert D. Willig, *The Theory of Network Access Pricing*, *in* Issues in Public Utility Regulation 109 (Harry Trebing ed., Mich. St. Univ. 1979); William J. Baumol, *Some Subtle Issues in Railroad Regulation*, 10 J. Transp. Econ. 1 (1983); Baumol & Sidak, *supra* note 171, at 181–89.

175 *See* DMM § 508.3; *see also* Mailbox Guidelines, U.S. Postal Service, https://www.usps.com/manage/mailboxes.htm.

176 *See, e.g.*, J. Gregory Sidak, *Abolishing the Price Squeeze as a Theory of Antitrust Liability*, 4 J. Competition L. & Econ. 279, 302 (2008).

revenue sources from offering competitors access to the letter box. However, the *other* products that the Postal Service provides are its reserved products, which are already protected by a statutory monopoly. Consequently, the Postal Service cannot lose the revenue from its reserved products by offering letter-box access to large mailers or parcel-delivery firms. Put differently, competitive access to the letter box could not be the proximate cause of the Postal Service's (hypothetically) forgone revenues from reserved products. Therefore, the full retail price will necessarily exceed the optimal access price for the letter box.

The Postal Service prices access to the letter box at neither a socially optimal level nor a profit-maximizing level. Instead, the Postal Service sets the access price at the full retail price of sending a piece of mail, which effectively eliminates any competition from firms using the letter box. The supracompetitive access price ensures that the Postal Service is a monopolist over the delivery of nonreserved products to the customer's letter box, because any other firm that wished to access the letter box to make such deliveries would need to bear the full cost of postage in addition to its own delivery costs. In other words, the delivery cost of any firm that uses the letter box to make deliveries of nonreserved products necessarily exceeds the Postal Service's retail price of such nonreserved products. The Postal Service's supracompetitive access price forces its competitors to bypass the letter box inefficiently in their delivery of letter-box-sized parcels and extremely urgent mail. That inefficient bypass of the letter box not only increases the costs of the Postal Service's competitors, but also harms society through the exhaustion of duplicative resources. When UPS or FedEx constructs a private mail receptacle where a letter box already exists, or when it returns to a customer's door multiple times to deliver letter-box-sized parcels and extremely urgent mail, the firm exhausts resources that it would more efficiently use in other applications.

One defining feature of letter boxes that differs from network elements in other industries is that the network operator's cost of acquiring, building, and maintaining a letter box is *zero*. Unlike common network elements for which access pricing is a regulatory or competitive concern—such as elements of rail lines, fixed-line telephone networks, or electricity networks—consumers currently bear the entire cost of the letter box. The Postal Service has no investment to recover from the (private) construction or maintenance of letter boxes. It makes no sense for the Postal Service to charge access prices at all, because there is no need to maintain incentives for future Postal Service investment in letter boxes. Perhaps the most apt analogy is a cable television monopolist that restricted the uses of consumer-owned television receivers that were connected to cable television. That is, the closest analog to the letter-box monopoly is a cable-television provider declaring, with the force

of federal law, that a subscriber cannot view DVDs, Blu-rays, Netflix, video games, or any other programming unless the consumer pays the cable television monopolist its full cable-television rate for each of those other services (in addition to the price of procuring such programming from a rival firm).

Finally, some large mailers assist the Postal Service by presorting their First-Class mail or by depositing drop shipments of outgoing mail at central sorting facilities (rather than at local post offices) in exchange for a discount from standard postage. In exchange for reducing the Postal Service's cost of delivering mail, these mailers receive significant discounts on postage. The PAEA expressly requires, subject to limited exceptions, that those "workshare" discounts "not exceed the cost that the Postal Service avoids as a result of workshare activity."[177] In contrast, to leave parcels or extremely urgent letter mail in a letter box, the Postal Service's competitors need to pay an access fee that equals the full retail price of delivery.

An individual who delivers a letter to a letter box has accessed the mail stream at its most downstream point. The Postal Service need not perform any services or incur any direct costs for the delivery of that letter. In contrast, a large mailer that performs some tasks internally, such as presorting mail, accesses the mail stream somewhere between the endpoints of the network. The Postal Service still must deliver that presorted mail and will incur the costs of delivery. Nonetheless, the Postal Service prices access to the most downstream component of the mail stream (the letter box) at its full retail price, but (through workshare discounts) prices access to the middle of the mail stream at a discount.

E. Harm to Consumers

The letter-box monopoly raises costs for the Postal Service's rivals in the markets for delivery of letter-box-sized parcels and extremely urgent mail. The monopoly discourages entry, harms dynamic competition, and slows innovation in those markets. All of those effects will reduce consumer welfare in the markets for the delivery of letter-box-sized parcels and extremely urgent mail and in the markets for the products that those services deliver.

In imperfectly competitive markets, such as the relevant product markets that the letter-box monopoly affects, as a firm's marginal costs increase, its profit-maximizing price will also increase.[178] The marginal cost to the Postal Service's competitors is the cost of making one additional delivery.

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[177] 39 U.S.C. § 3622(e).

[178] *See, e.g.*, Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization 162–63 (Pearson 4th ed. 2005). In imperfectly competitive markets, firms must compete with one another, but each firm has a downward-sloping demand curve, such that each firm will not lose all of its sales in response to a price increase. Except for perfect competition and pure monopoly, one can classify virtually any market structure as imperfectly competitive.

As I explained in Part II.B, the letter-box monopoly increases the cost of an additional delivery for the Postal Service's rivals. That increase in marginal cost increases the prices that the Postal Service's competitors must charge consumers.

A rival firm will respond to a competitor's price increase by increasing its own price. The magnitude of that price increase will depend on the degree to which the products are differentiated, with larger price increases occurring for closer substitutes. Because of that strategic response, the letter-box monopoly increases the prices that competing delivery firms must charge and, as a straightforward matter of economic theory, increases the Postal Service's profit-maximizing prices.[179] Even if the Postal Service is charging less than its profit-maximizing prices—and therefore might not charge higher prices than it would in the absence of the letter-box monopoly—the existence of the letter-box monopoly harms two groups of consumers. First, the letter-box monopoly harms consumers who purchase services from the Postal Service's competitors by increasing the prices of letter-box-sized parcels and extremely urgent mail. Second, the letter-box monopoly harms consumers who purchase services from the Postal Service, but who would purchase from its competitors in the absence of the letter-box monopoly. That is, even consumers who purchase services from the Postal Service are worse off because of the letter-box monopoly if those consumers would instead purchase services from a competitor were it not for the monopoly. Consumers sacrifice welfare when they must pay a higher price for a product or when they must switch to a less preferred product (even if the price of that product does not change).

Higher prices for the delivery of letter-box-sized parcels and extremely urgent mail decrease the quantity demanded of those services. As a result, consumer welfare in the relevant product markets will necessarily decrease. However, the harm to consumers is not confined to the relevant product markets. Compared with the lower delivery prices that firms will charge in the absence of the letter-box monopoly, delivery prices in 2016 cause consumers to decrease their demand for parcel delivery by either (1) forgoing some purchases of products that require delivery, or (2) purchasing the same or substitute products in-store. Consumers who forgo purchasing products reallocate their income to their next-best alternative, which is necessarily inferior in terms of consumer welfare. For consumers who opt for in-store pickup of their purchases, the total price of acquiring the purchased product is higher, which reduces consumer welfare. Although this price will exclude

[179] As I explain elsewhere, the Postal Service does not necessarily charge profit-maximizing prices. *See* Sappington & Sidak, *Competition Law for State-Owned Enterprises*, *supra* note 130, at 479–80. The letter-box monopoly increases the degree to which the Postal Service charges below its profit-maximizing prices. Thus, the letter-box monopoly increases the inefficiencies created by the Postal Service's suboptimal pricing.

the cost of delivering the parcel to the consumer's residence, it will include the opportunity cost to the consumer (of time and travel costs) of driving (or otherwise traveling) to the store. As real wages increase, the opportunity cost to the consumer of making in-store purchases also increases. Thus, the letter-box monopoly decreases consumer welfare not only in the relevant product markets for delivery services, but also in the markets for the products that would be delivered through the relevant product markets in the absence of the letter-box monopoly.

Moreover, the letter-box monopoly denies the letter-box owner the right to exclude unwanted material from the letter box. The Postal Service forces the letter-box owner to receive unsolicited advertising mail as a condition of receiving First-Class letter mail. As I explain in more detail in Part IV.A, the letter-box owner cannot (in practical terms) refuse some mail without refusing all mail. In addition to excluding its competitors from the consumer's personal property, the Postal Service also denies the property owner the right to exclude unwanted categories of mail.

That the Postal Service forces the letter-box owner to accept unwanted advertising mail contrasts starkly with Congress' treatment of unsolicited marketing distributed through another means: by telephone and fax. In 1991, Congress passed the Telephone Consumer Protection Act (TCPA) to protect consumers from invasive phone calls from abusive telemarketers.[180] In the 1980s and 1990s, telemarketers used autodialers to dial every active phone number in a given area code at random, which resulted in a steady stream of advertising calls to consumers' home phones—much like the steady stream of bulk advertising mail that the Postal Service forces letter-box owners to accept. Calls to mobile telephones and faxes imposed high costs on consumers—both actual costs and the nuisance value of such communications to consumers.

Under the TCPA, it is illegal for advertisers to

> make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a paging service, cellular telephone service . . . [or] to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party.[181]

Courts have interpreted a "call" to include text messages, such that the TCPA's restrictions apply equally to text messages and phone calls.[182] The

[180] 47 U.S.C. § 227.
[181] *Id.* §227(b)(1)(A)(iii)–(B).
[182] *See, e.g.*, Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 952 (9th Cir. 2009).

TCPA also prohibits the use of "any [fax] machine, computer, or other device to send to a telephone facsimile machine . . . an unsolicited advertisement," unless the sender has an established business relationship with the recipient or the recipient agreed to receive the faxes.[183]

The TCPA enables plaintiffs to seek actual monetary loss or $500, whichever amount is greater, per violation of the Act's prohibitions of unsolicited advertisements by telephone, cell phone, or fax machine.[184] The plaintiff's actual monetary loss amounts to a negative externality—the public harm—that the violation generates, because an unwanted telemarketing effort is an involuntary transaction from the recipient's perspective that forces her to bear costs that the telemarketer does not internalize.

Unwanted advertising mail imposes analogous costs on the letter-box owner that neither the Postal Service nor the advertiser internalizes. Although consumers can easily exclude unsolicited phone calls or fax messages to mobile and residential phones,[185] to stop receiving junk mail a consumer must individually contact the senders of the mail in question—a time-consuming (if not impossible) task.[186] In fact, some firms now offer services aimed solely at reducing the amount of junk mail that a consumer receives.[187] One can estimate the direct harm to consumers from their inability to exclude unwanted mail using available data (unlike the harm to consumers from raising the costs of the Postal Service's rivals). The average adult in the United States spends approximately 70 hours per year disposing of junk mail.[188] The opportunity cost of the 70 hours that consumers annually spend reading and processing junk mail is a substantial loss in consumer welfare. In the United States, there were approximately 247 million adults in 2015.[189] At 70 hours per adult, the winnowing of junk mail by consumers therefore wastes approximately 17 billion hours annually.[190] The standard measure of the opportunity cost of an hour of an individual's time is that person's hourly wage.[191] The average hourly wage for nonfarm, private-sector

183 47 U.S.C. § 227(b)(1)(C).

184 *Id.* § 227(b)(3)(B).

185 *See Do Not Call List*, Federal Communications Commission, https://www.fcc.gov/encyclopedia/do-not-call-list.

186 *Junk Mail*, Montana Department of Environmental Quality, https://deq.mt.gov/Land/recycle/junkmail.

187 *See, e.g.*, 41pounds, http://www.41pounds.org/ (offering to reduce unwanted catalogs and junk mail for a fee of $35 per household for 5 years of service).

188 Montana Department of Environmental Quality, *Junk Mail*, *supra* note 186.

189 *See* United Sates Census Bureau, *State & Country Quick Facts*, http://quickfacts.census.gov/qfd/states/00000.html (reporting a population of 321,418,820 in 2015 and that 23.1 percent of the U.S. population was under 18 as of 2014). I calculate the number of adults in 2015 by multiplying the population of 321,418,820 by 76.9 percent (the approximate proportion of the population over 18 years old) to get 247 million.

190 247 million adults × 70 hours / adult = 17 billion hours.

191 *See, e.g.*, Carlton & Perloff, *supra* note 178, at 34.

workers in the United States in May 2016 was approximately $26.[192] However, the Postal Service's Household Survey reports that households with higher earnings receive more advertising mail. Therefore, the average opportunity cost of an hour spent on reading and disposing of unwanted advertising mail likely exceeds the average hourly wage in the United States. An opportunity cost of $26 per hour spent reading advertising mail is therefore a conservative estimate. Assuming an opportunity cost of lost time at $26 per hour, the harm to consumers in the United States from junk mail is almost $450 *billion* per year. Even with a low estimate of the opportunity cost of lost time at $10, the annual harm to consumers is approximately $170 billion. As junk mail's share of the mail stream increases, the harm imposed on consumers will only grow relative to the benefit of receiving the mail.

In addition to the lost consumer surplus in the relevant product markets, the use of resources to create, deliver, and remove junk mail indirectly harms consumers. Disposing of discarded junk mail costs municipalities over $320 million per year.[193] Unsolicited junk mail generates a substantial amount of waste. One estimate places the total amount of junk mail at 41 pounds per adult per year.[194] On a national level, the production of those 41 pounds of junk mail per adult consumes about 100 million trees and 28 billion gallons of water annually.[195]

Restrictions on the consumers' right to exclude unwanted products from a firm possessing market power have been held to violate antitrust laws in other industries. In the case of software bundling, the U.S. Court of Appeals for the D.C. Circuit held that forcing a consumer to accept an unwanted product whose disposal is costly to the consumer harms the consumer—even if the unwanted product is provided at no additional cost. In *United States v. Microsoft*, the D.C. Circuit affirmed a finding of antitrust liability against Microsoft for, among other reasons, limiting or preventing the removal of Internet Explorer by original equipment manufacturers and consumers of PCs with a Windows operating system.[196] The D.C. Circuit ruled that by not including Internet Explorer as part of its Add/Remove Programs utility in Windows 98, Microsoft was reducing the share of its rivals through "something other than competition on the merits," an action that was anticompetitive.[197] The district court found, and the D.C. Circuit upheld, that, through

192 Press Release, Bureau of Labor Statistics, Economics News Release (May 6, 2016), http://www.bls.gov/news.release/empsit.t19.htm.

193 Montana Department of Environmental Quality, *Junk Mail*, *supra* note 186.

194 Eviana Hartman, *How to Junk Junk Mail and Other Paper Clutter*, Wash. Post (Jan. 20, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/01/17/AR2008011701793.html.

195 Montana Department of Environmental Quality, *Junk Mail*, *supra* note 186; Doug Moss & Roddy Scheer, *Junk Mail Impacts Carbon Levels*, Poughkeepsie J. (May 30, 2015), http://www.poughkeepsiejournal.com/story/life/2015/05/30/junk-mail-impacts-carbon-levels/28076557/.

196 United States v. Microsoft Corp., 253 F.3d 34, 65–66 (D.C. Cir. 2001).

197 *Id.* at 65.

limiting the right to exclude an unwanted application, Microsoft harmed its operating system consumers.[198] Likewise, the design of Windows 98 was found to be anticompetitive because the difficulty in installing competing browsers could "deter[] consumers from using a browser other than [Internet Explorer] even though they might prefer to do so."[199] The district court argued that, although consumers received the unwanted product at no additional cost, because of the inability to exclude or remove the unwanted product, consumers paid for this product indirectly and competition was harmed by the forced purchase.[200] The inability of postal consumers to exclude junk mail harms consumers indirectly by harming competition in the market for similar advertisements and directly through the actual cost of disposing of any unwanted mail.

Another competitive consequence of the letter-box monopoly is that it raises the consumer's cost of substituting an alternative delivery service for the Postal Service, because switching to a new delivery service and maintaining the benefits of receiving parcels in a letter box requires constructing a new receptacle for private express deliveries. To the extent that the letter-box monopoly reduces consumer switching in this manner, it will also discourage new entry into the relevant product markets. Consumers will switch to an alternative service only if the expected consumer surplus from that service exceeds the expected consumer surplus of using the incumbent provider—the Postal Service. However, the expected costs of the new service will necessarily include the expected average fixed costs of the new service. For the incumbent, the fixed costs to consumers are likely sunk (since they already have letter boxes or other receptacles for mail delivery) and will not affect expected consumer surplus. Any factors that increase the cost of using the new service will decrease its expected consumer surplus and discourage switching. Because an additional receptacle will increase the cost of using an alternative service, fewer consumers will switch. Even if a delivery company (such as FedEx or UPS, or a high volume mailer, such as Amazon) bears this cost, the costs of erecting such a receptacle will lead to higher consumer prices, thereby decreasing the quantity demanded of services using the receptacle. Because fewer consumers will purchase a new service offering, a potential entrant has a lower expected profit and will be less likely to enter. In sum, the letter-box monopoly harms consumer surplus by distorting

198 *Id.*; United States v. Microsoft Corp., 87 F. Supp. 2d 30, 47, 50 (D.D.C. 2000).

199 *Microsoft*, 253 F.3d at 65.

200 *Microsoft*, 87 F. Supp. 2d at 64. I disagree with the D.C. Circuit's reasoning to the extent that the consumer's hard drive has so much excess capacity that the opportunity cost of physically storing an unused software program is essentially zero. *See* J. Gregory Sidak, *An Antitrust Rule for Software Integration*, 18 Yale J. on Reg. 1, 66 (2001). However, my opinion is not the law. Moreover, in relative terms the capacity of a hard drive is much vaster than the volume of a letter box.

competition and costs in the relevant product markets and the markets for products that are (or could be) delivered to the letter box.

III. Does the Letter-Box Monopoly Violate Due Process?

In addition to exceeding the scope of Postal Service's regulatory authority under the PAEA, the Postal Service's regulation of its competitors' access to the customer's letter box might violate the Fifth Amendment's Due Process Clause.[201]

A. Does the Postal Service's Authority to Regulate its Competitors' Access to the Letter Box Violate Due Process?

By regulating letter-box access, the Postal Service exercises regulatory authority over its competitors in the markets for parcels and extremely urgent mail. That vesting of regulatory authority in a self-interested market participant might violate the rights of the Postal Service's competitors to due process.

In 2016, the U.S. Court of Appeals for the D.C. Circuit considered in *Association of American Railroads v. Department of Transportation* (the "*Amtrak*" case) "whether it violates due process for Congress to give a self-interested entity rulemaking authority over its competitors."[202] In *Amtrak*, the Association of American Railroads (AAR) had challenged the constitutionality of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) on due process grounds and, separately, as violating the nondelegation doctrine.[203] Section 207 of the PRIIA empowers Amtrak—jointly with the Federal Railroad Administration—to "develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations."[204] The metrics that Amtrak developed include provisions that apply to the private rail carriers whose rail infrastructure Amtrak uses.[205] For example, the standards require that "[w]ith respect to 'host-responsible delays'—that is to say, delays attributed to the railroads along which Amtrak trains travel—. . . '[d]elays must not be more than 900 minutes per 10,000 Train-Miles.'"[206] Amtrak conductors determine whether Amtrak or the private rail carrier is responsible for each delay.[207] The AAR filed suit, alleging that its members suffered injury as a

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201 U.S. Const., amend. V.
202 Ass'n of Am. RRs. v. Dep't of Transp. (*Amtrak IV*), 2016 WL 1720357, at *5 (D.C. Cir. Apr. 29, 2016).
203 Ass'n of Am. R.Rs. v. Dep't of Transp. (*Amtrak I*), 865 F. Supp. 2d 22, 24 (D.D.C. 2012).
204 Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110–432, § 207, 122 Stat. 4907, 4916.
205 *Amtrak I*, 865 F. Supp. 2d at 24–25.
206 Dep't of Transp. v. Ass'n of Am. R.Rs. (*Amtrak III*), 135 S. Ct. 1225, 1230 (2015) (internal quotation marks omitted).
207 *Id.*

result of having to modify their rail operations to satisfy the metrics and standards.[208]

As I explain in Part IV.B, the D.C. Circuit first considered the AAR's challenge to the PRIIA in 2013, on appeal from the District Court for the District of Columbia, which had granted summary judgment in favor of the government.[209] The D.C. Circuit reversed the lower court's decision and invalidated the PRIIA as an unconstitutional delegation of regulatory authority to a private entity but declined to reach the AAR's due process argument.[210] On appeal, the Supreme Court reversed the D.C. Circuit's decision, finding that Amtrak was part of the U.S. government (and therefore not a private entity).[211] The Court remanded the case to the D.C. Circuit for consideration of other questions that the D.C. Circuit had not yet addressed, consistent with the determination that Amtrak is a government entity.[212]

On remand, the D.C. Circuit considered, among other questions, whether the PRIIA violates due process by empowering Amtrak to regulate its competitors. The court first considered whether "authorizing an economically self-interested actor to regulate its competitors" in general violates due process.[213] The panel cited the Supreme Court's decision in *Carter v. Carter Coal Co.*, in which the Court invalidated a New Deal statute empowering a set of private coal companies to regulate its competitors.[214] The Supreme Court in *Carter Coal* said that "[t]he power to self-interestedly regulate the business of a competitor is . . . anathema to 'the very nature of things,' or rather, to the very nature of governmental function."[215] The D.C. Circuit reasoned that, although the offending regulatory authority in *Carter Coal* was vested in a set of private companies, the violation of due process in that case arose from the coal companies' economic self-interest rather than their status as private entities.[216] The D.C. Circuit concluded that "due process of law is violated when a self-interested entity is '[e]ntrusted with the power to regulate the business . . . of a competitor.'"[217]

The D.C. Circuit reasoned that, although Amtrak is charged with meeting numerous statutory goals outside its own economic interests, is subject to congressional control over its daily operations, and depends on over $1 billion of federal funding annually for those operations, Amtrak remains

208 *Id.*
209 Ass'n of Am. R.Rs. v. Dep't of Transp. (*Amtrak II*), 721 F.3d 666, 670 (D.C. Cir. 2013).
210 *Id.* at 668, 677.
211 *Amtrak III*, 135 S. Ct. at 1228.
212 *Id.*
213 Ass'n of Am. R.Rs. v. Dep't of Transp. (*Amtrak IV*), 2016 WL 1720357, at *1 (D.C. Cir. Apr. 29, 2016).
214 298 U.S. 238 (1936).
215 *Amtrak IV*, 2016 WL 1720357, at *6 (quoting *Carter Coal*, 298 U.S. at 311).
216 *Id.* at *6 ("[W]hat *primarily* drives the Court to strike down this provision is the self-interested character of the delegatees.") (emphasis in original).
217 *Id.* at *9 (quoting *Carter Coal*, 298 U.S. at 311).

an economically self-interested actor.[218] The D.C. Circuit cited Amtrak's mandate to maximize profit as evidence of its "economic self interest as it concerns other market participants."[219] The D.C. Circuit said that, regardless of Amtrak's position on the spectrum of public to private enterprises, any ability that Amtrak might have to "impose a disadvantageous regulatory regime on its market competitors would be problematic."[220] Moreover, the court reasoned that the PRIIA granted Amtrak such regulatory power by giving Amtrak the power to "force freight operators to alter their behavior."[221] Thus, the court concluded that the PRIIA granted an economically self-interested entity the power to regulate its competitors and thereby violated due process.

Each of the arguments for why the PRIIA violated due process applies to the letter-box monopoly and the Postal Service. Like Amtrak, the Postal Service is an economically self-interested entity. Although it has no explicit mandate to maximize profits, the Postal Service's economic self-interest *as it concerns other market participants* is an equal, if not greater, threat to their due process rights than is Amtrak's self-interested regulation of freight operators. Like Amtrak, the Postal Service is subject to statutory and congressional requirements in its provision of services and receives government support, in the form of subsidies and special privileges.[222] However, the Postal Service should, in principle, offer its competitive products with the implicit goal of maximizing its profits, to minimize the financial burden of its institutional costs that must be borne by its monopoly products.[223] Moreover, to the extent that the Postal Service maximizes some measure of economic activity other than profits,[224] such as scale or volume, it remains economically self-interested with respect to other market participants. As I explained in Part II.A.3, the pursuit of objectives other than profit creates the incentive for the Postal Service to make decisions that harm its competitors. Moreover, for objectives other than profit, the Postal Service's optimal decisions might be even more disadvantageous to its competitors than those made by a profit-maximizing entity.[225] Thus, the Postal Service's power to regulate the business of its competitors in its own self-interest poses a threat

218 *Id.* at *9–10.
219 *Id.* at *10.
220 *Id.* at *9 (citing Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 Harv. J. L. & Pub. Pol'y 931 (2004)).
221 *Id.* at *10–12.
222 *See generally* Shapiro, *supra* note 137.
223 *See e.g.,* J. Gregory Sidak, *Maximizing the U.S. Postal Service's Profits from Competitive Products*, 11 J. Competition L. & Econ. 617 (2015).
224 *See, e.g.,* Sappington & Sidak, *Competition Law for State-Owned Enterprises, supra* note 130, at 479.
225 *Id.* at 479–80; *see also* David E.M. Sappington & J. Gregory Sidak, *Are Public Enterprises the Only Credible Predators?*, 67 U. Chi. L. Rev. 271 (2000).

to its competitors that equals, if not exceeds, the threat to freight operators from Amtrak's track-usage regulations.

In addition, the Postal Service's competition with the private shippers whose letter-box access it regulates is more direct than Amtrak's competition with the freight-service providers that Amtrak regulates. Whereas Amtrak competes with freight-services providers only indirectly, in input markets,[226] the Postal Service competes directly with private shippers in retail markets for the delivery of parcels and extremely urgent mail. The Postal Service might therefore have a greater incentive to issue regulations that disadvantage its competitors than does Amtrak.

The Postal Service's letter-box monopoly regulations clearly constitute regulation of its competitors. Just as Amtrak's standards alter the freight operators' behavior, the letter-box monopoly regulations alter private shippers' behavior by preventing them from placing parcels and extremely urgent mail in the customer's letter box. In addition, as I showed in Part II.B, the Postal Service's letter-box regulations restrict access to a critical input and raise its rivals' costs, in a manner similar to how Amtrak's standards harmed its competitors by limiting their access to track usage. That harm is arguably even greater for the Postal Service's competitors: whereas Amtrak's competitors might simply need to modify their track usage to comply with Amtrak's standards, the Postal Service's competitors are entirely foreclosed from using any letter box that the Postal Service contrues to be an "authorized depository for mail."[227]

In sum, the Postal Service's regulation of its competitors' letter-box access violates due process by subjecting shippers to regulation by a competitor—the Postal Service—that has every incentive to regulate in its own self-interest, at the expense of private shippers.[228] I have argued that the Postal Service's current letter-box regulations exceed its grant of regulatory authority; however, to the extent that foreclosing access to the letter box is *within* the Postal Service's regulatory authority, that authority is likely unconstitutionally granted to the Postal Service. Therefore, the Postal Service's imposition of the letter-box monopoly regulations either (1) exceeds its regulatory authority or (2) is within its authority but enforces an unconstitutional law. In either case, the Postal Service's imposition of the letter-box monopoly

226 *Amtrak IV,* 2016 WL 1720357, at *1 n.1.

227 DMM § 508.3.1.1, 508.3.1.3.

228 Formally, the PAEA prohibits the Postal Service from "establish[ing] any rule or regulation . . . the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself or any entity funded (in whole or in part) by the Postal Service." 39 U.S.C. § 404(a)(1). However, there is no evidence that that prohibition either (1) satisfies the due process requirements of the Fifth Amendment or (2) offers the Postal Service's competitor any remedy that did not also exist for Amtrak's competitors.

regulations might support a finding of antitrust liability when combined with the letter-box monopoly's harm to competition, which I analyzed in Part II.

B. Is the Letter-Box Monopoly Statute Void For Vagueness?

Under the void-for-vagueness doctrine, a criminal statute violates due process if it is so vague that an ordinary person must guess which actions are punishable under the law.[229] The Supreme Court has reasoned that such a vague statute can violate due process by either (1) failing to provide fair notice of what is prohibited or (2) inviting arbitrary enforcement of criminal laws.[230] Therefore, the Court has reasoned, a statute that meets either criterion is unconstitutional and void.[231] The letter-box monopoly statute provides:

> Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined under this title.[232]

As I explain below, the statute's vague language—including the undefined term "mailable matter" and the requirement that the violator act "with intent to avoid payment of lawful postage thereon"—causes it to fail both prongs of the Supreme Court's void-for-vagueness test. Moreover, that the government evidently has declined to enforce the statute is further evidence that the statute is void for vagueness.

1. The Void-For-Vagueness Doctrine

The void-for-vagueness doctrine provides that a law is void if "it fails to give ordinary people fair notice of the conduct it punishes, or [if it is] so standardless that it invites arbitrary enforcement."[233] Although each legal provision necessarily embodies some level of uncertainty, the Supreme Court has voided laws when it has found that the statutory language was so vague as to violate due process. The Court initially applied the void-for-vagueness

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229 *See, e.g.*, Skilling v. United States, 561 U.S. 358, 364 (2010) (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

230 *Id.*

231 *See, e.g., id.*

232 18 U.S.C. 1725.

233 Welch v. United States, 136 S. Ct. 1257, 1261 (2016) (citation omitted); Johnson v. United States, 135 S. Ct. 2551, 2556 (2015) (citation omitted). For analysis of the doctrine, see Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 Cardozo Pub. L., Pol'y & Ethics J. 255 (2010); Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).

doctrine in reviewing criminal sanctions for violations of economic regulations,[234] but later it applied the doctrine to a broader array of criminal statutes, including those penalizing obscenity, vagrancy, and abortion.[235]

a. The Development of the Void-for-Vagueness Doctrine

The void-for-vagueness doctrine has no explicit basis in constitutional text. Nonetheless, the Court has typically invoked the Due Process Clause of the Fifth Amendment when applying the void-for-vagueness doctrine to federal law[236] and the Fourteenth Amendment when applying the doctrine to state law.[237]

Two main concerns motivated the development of the void-for-vagueness doctrine. First, the Court reasoned that a vague legal provision does not give fair notice regarding what conduct the law prohibits.[238] The Court voiced this concern in its 1875 decision in *United States v. Reese*, in which it held that "[e]very man should be able to know with certainty when he is committing a crime."[239] The Court reiterated those concerns in subsequent decisions in which it applied the void-for-vagueness doctrine.[240] In its 1978 decision in *Sewell v. Georgia*, for example, the Court said that "vague laws may trap the innocent by not providing fair warning."[241]

A second concern that the Court expressed in applying the void-for-vagueness doctrine—which became the Court's primary concern over time—is that a law that is too vague may encourage arbitrary and discriminatory enforcement.[242] The Court articulated those concerns in *Papachristou v. City of Jacksonville*, in which it voided a law on the grounds that it not only failed to give a fair notice of what conduct was prohibited, but also "encourage[d] arbitrary and erratic arrests and convictions."[243] In subsequent decisions, the Court cited the protection from arbitrary enforcement as an important right

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234 *See, e.g.*, Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 243 (1932); Cline v. Frink Dairy Co., 274 U.S. 445, 453 (1927); International Harvester Co. of Am. v. Kentucky, 234 U.S. 216, 223 (1914); Lochner v. New York, 198 U.S. 45, 57 (1905).

235 *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Winters v. New York, 333 U.S. 507 (1948); Lanzetta v. New Jersey, 306 U.S. 451 (1939); *see also* Lockwood, *supra* note 233, at 267.

236 *See, e.g.*, Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012); United States v. Williams, 553 U.S. 285, 304–07 (2008); *see also* Johnson v. United States, 135 S. Ct. 2551, 2569 (2015) (Thomas, J., concurring) (discussing the history of the void-for-vagueness doctrine).

237 *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 353–54 (1983); Cline v. Frink Dairy Co., 274 U.S. 445, 453 (1927).

238 *See, e.g.*, *Williams*, 128 S. Ct. at 1845; City of Chicago v. Morales, 527 U.S. 41, 58 (1999); Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1962).

239 92 U.S. 214, 220 (1875).

240 *See, e.g.*, *Grayned*, 408 U.S. at 108.

241 435 U.S. 982, 986 (1978).

242 *See* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (quoting Smith v. Gougen, 415 U.S. 566, 574 (1974)) ("Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine . . . [is] 'the requirement that a legislature establish minimal guidelines to govern law enforcement.'"); Lockwood, *supra* note 233, at 258.

243 405 U.S. 156, 162 (1972).

that a vague statute violates.[244] In 1974, the Court said in *Smith v. Gougen* that "the *most meaningful aspect*" of the void-for-vagueness doctrine is to avoid arbitrary enforcement.[245] The Court said that a law that fails to provide minimal guidelines for its enforcement "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis."[246]

Failure to provide fair notice, and encouragement of the arbitrary application of a statute, remain the two criteria that the Court examines in determining whether a statute is unconstitutionally vague. The Court has said that "vagueness may invalidate a criminal law for either of [those] two independent reasons."[247]

b. The Two-Pronged Analysis

The Supreme Court's decisions establish guidelines for the two-pronged analysis that the Court applies in determining whether a law is void for vagueness.

Under the first prong, the Court asks whether a law gives a person of ordinary intelligence fair notice of what conduct is prohibited.[248] The Court typically refers to a "person of ordinary intelligence,"[249] "ordinary people,"[250] or the "public,"[251] which indicates that the Court's inquiry does not focus on the knowledge of a sophisticated party. The Court's decisions also consistently refer to the concept of "fair notice." However, the Court has not provided a definition of that term. The Court has emphasized, nonetheless, that the law must be sufficiently clear for the "regulated parties . . . [to] know what is required of them."[252] The Court found that a law fails to give fair notice if "men of common intelligence must necessarily guess at its meaning."[253] Although the Court does not require statutory language to provide an absolute degree of certainty,[254] it has voided laws that use vague language when "further precision in the statutory language [was] [n]either impossible [n]or impractical."[255] The Court also found statutes void on the grounds

244 *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 60 (1999); *Kolender*, 461 U.S. at 357; *Smith*, 415 U.S. at 574; *Grayned*, 408 U.S. at 108–09.

245 *Smith*, 415 U.S. at 574.

246 *Grayned*, 408 U.S. at 108–09.

247 *Morales*, 527 U.S. at 56.

248 United States v. Williams, 128 S. Ct. 1830, 1845 (2008).

249 Johnson v. United States, 135 S. Ct. 2551, 2554 (2015) (citing *Williams*, 128 S. Ct. at 1845).

250 *Id.* at 2554 (citing *Kolender*, 461 U.S. at 357–58); *see also Morales*, 527 U.S. at 58 ("ordinary citizen").

251 *Morales*, 527 U.S. at 56.

252 Federal Commc'ns Comm'n v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2009).

253 Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

254 Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952); *see also* Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) ("we can never expect mathematical certainty from our language"); United States v. National Dairy Prods. Corp., 372 U.S. 29, 32 (1963) (holding that statutes are not void simply because they do not determine whether a marginal offense falls within the language of the statute).

255 Kolender v. Lawson, 461 U.S. 352, 361 (1983).

that the language of the statute "reach[ed] a substantial amount of innocent conduct."[256]

Under the second prong, the Court examines whether a statute provides sufficiently objective criteria for its enforcement.[257] The Court has emphasized that "[t]he Constitution does not permit a legislature to set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."[258] The Court has held instead that the legislature must provide "explicit standards"[259] or "minimal guidelines" to those who enforce the law.[260] Because the Court has consistently identified the "statute,"[261] "the statutory language,"[262] and the "legislature" as the necessary source of such standards, one can conclude that guidelines that the *enforcer* issues cannot substitute for the explicit standards that the *legislature* must provide. In *Morales*, for example, the Court explicitly rejected the argument that a general order issued by a police department is sufficient to resolve a statute's vagueness and limit the enforcer's discretion in enforcing the law, which supports the conclusion that the statutory language itself must provide sufficient guidelines for the statute's enforcement.[263]

The Court has found statutes void for vagueness when they tie criminal culpability with standards that require "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings," such as the determination that a conduct is "annoying" or "indecent."[264] The Court has found that a law that requires the analysis of a specific conduct through the application of a qualitative standard, such as "substantial risk," can provide sufficient criteria for the law's enforcement.[265]

However, on at least one occasion the Court has found that a qualitative standard might be unconstitutionally vague if applied to abstract, insufficiently defined circumstances. In *Johnson v. United States*, for example, the Court found unconstitutionally vague the residual clause of the Armed Career Criminal Act, which prohibited "conduct that presents a serious potential risk of physical injury to another."[266] The Court said that, because the statute "require[d] application of the 'serious potential risk' standard

256 *Morales*, 527 U.S. at 60, 62–63; *see also* Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972).
257 *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 126 (2007).
258 *Morales*, 527 U.S. at 60 (internal quotation omitted).
259 Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
260 *Kolender*, 461 U.S. at 358; *see also* Smith v. Goguen, 415 U.S. 566, 574 (1974).
261 *Morales*, 527 U.S. at 61; *Kolender*, 461 U.S. at 357.
262 *Kolender*, 461 U.S. at 361; *Smith*, 415 U.S. at 576.
263 *Morales*, 527 U.S. at 63.
264 United States v. Williams, 553 U.S. 285, 306 (2008).
265 Johnson v. United States, 135 S. Ct. 2551, 2561 (2015) ("As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct.").
266 *Id.*

to an idealized ordinary case of the crime"—rather than an inquiry dealing with an individual's conduct in specific conditions—"the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect."[267] The Court added that the residual clause left "grave uncertainty about how to estimate the risk posed by the crime" and "uncertainty about how much risk it takes for a crime to qualify as a violent felony."[268] The Court found that, "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates."[269] The Court consequently voided the residual clause for its vagueness.[270]

In sum, the Supreme Court might find a law void for vagueness if the law's statutory language requires an ordinary person to guess the scope of the law's statutory prohibition. The Court might also void a law if the statutory language fails to provide clear guidelines for its enforcement, thereby encouraging arbitrary enforcement of the law.

c. Federal Communications Commission v. Fox Television Stations, Inc.

The Supreme Court's 2012 decision in *Federal Communications Commission v. Fox Television Stations, Inc*.[271] provides a particularly informative application of the void-for-vagueness doctrine, where the Court's analysis of "fair notice" was not limited to the statutory language, but instead examined the agency's enforcement practice. The case concerned a dispute over the correct interpretation of section 1464 of the U.S. Criminal Code, which prohibits the broadcasting of "obscene, indecent, or profane language."[272] Although Congress had in 1948 given the Federal Communications Commission (FCC) authority to enforce section 1464, the FCC did not begin enforcement until 1970.[273] Even then, the FCC's enforcement was limited. For example, the FCC did not bring any indecency enforcement actions between 1978 and 1987.[274] In 1987, the FCC announced its intention to adopt a stricter standard.[275] In 2001, the FCC issued a policy statement listing the guidelines it would apply in determining when indecent broadcasting had occurred, including an assurance that it would not consider a "fleeting moment[]" of indecency to

267 *Id.*
268 *Id.* at 2554.
269 *Id.* at 2561.
270 *Id.* at 2563.
271 132 S. Ct. 2307 (2012).
272 18 U.S.C. § 1464.
273 *Fox Television Stations*, 132 S. Ct. at 2312.
274 *Id.* at 2313.
275 *Id.*

violate section 1464.[276] In 2004, the FCC issued a notice of apparent liability sanctioning NBC for broadcasting an offensive word. On that occasion, the FCC found that a fleeting incident of indecency *did* violate section 1464, thus reversing the agency's 2001 enforcement guidelines.[277] On the basis of the revised enforcement policy manifested in the 2004 notice of apparently liability, the FCC condemned other broadcasters—namely Fox Television and ABC—for acts committed *before* the 2004 notice.[278] Both companies petitioned for review of the FCC's order. The U.S. Court of Appeals for the Second Circuit vacated the order, and the Supreme Court granted certiorari.[279]

The Supreme Court found that the FCC violated due process by failing to give the broadcasters fair notice of what conduct the Criminal Code prohibited.[280] The Court reiterated the "fundamental principle that laws regulating persons or entities must give fair notice of what conduct is required or proscribed."[281] The Court found that the FCC's lack of notice about its changed interpretation of section 1464 failed to give the defendants fair notice of what conduct was prohibited.[282] The Court also rejected the FCC's argument that a notice that the FCC gave in the 1960s could indicate what constituted indecent action and could provide sufficient notice for the litigation,[283] particularly because the FCC's subsequent enforcement decisions contradicted its own notice. In addition, the Court rejected the argument that the FCC elected not to sanction Fox Televisions for conduct that occurred before the 2004 notice.[284] The Court said that "the due process protection against vague regulations 'does not leave [regulated parties] . . . at the mercy of *noblesse oblige*.'"[285] It emphasized that "the Government's assurance [that] it [would] elect not [to punish conduct] . . . is insufficient to remedy the constitutional violation."[286] The central question was whether the statutory language permitted the FCC to sanction conduct for which the litigant received no fair notice that the conduct was prohibited.

Therefore, the Court's decision in *Federal Communications Commission v. Fox Television Stations* suggests that the Court might consider not only the statutory language of the challenged statute, but also the enforcement of the statute in practice, to determine whether the a party had fair notice of the prohibited conduct.

276 *Id.*
277 *Id.* at 2314.
278 *Id.* at 2318.
279 *Id.* at 2307.
280 *Id.*
281 *Id.* at 2317.
282 *Id.* at 2307.
283 *Id.*
284 *Id.* at 2317–18 (internal quotation omitted).
285 *Id.* (internal citation omitted) (alteration in original).
286 *Id.*

2. Applying the Two-Pronged Test to the Letter-Box Monopoly Statute

The Supreme Court's void-for-vagueness doctrine asks whether a statute is so vague that it either (1) fails "to provide a person of ordinary intelligence fair notice of what is prohibited" or (2) is "so standardless that it invites arbitrary enforcement."[287] The letter-box monopoly statute fails both prongs of this test.

The first source of vagueness in the letter-box monopoly statute is the undefined term "mailable matter." Section 1725 of the U.S. Criminal Code prohibits the deposit of "mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid" in a customer letter box approved by the Postal Service.[288] Yet, the statute does not define mailable matter, nor is that term's meaning clear in context. For example, is a fresh rhubarb pie left in a glass plate mailable, because it is permissible in general to send pies through the mail? Or is it nonmailable, because it clearly would not be accepted as mail by the Postal Service? The Postal Service certainly does not consider the term "mailable" to be self-explanatory; it devotes dozens of regulations to determining what is and is not mailable. The Postal Service defines mailability as "[t]he eligibility of an item or mailpiece to be accepted into the mail because it meets size, weight, and other preparation criteria and its contents are not prohibited by law as mail."[289] The Postal Service then defines "mailpiece" to include letters, flats, cards, and parcels.[290] Finally, the Postal Service defines "mail" as "mailable matter accepted for mail processing and delivery."[291]

Circular definitions notwithstanding, according to the Postal Service an item is mailable if it is not prohibited from inclusion in the mail and meets certain size and weight requirements. The Postal Service's prohibitions on the content and packaging of mail are far from straightforward. For example, eggs are "mailable in domestic mail" according to Postal Service regulations only if they are (1) "individually cushioned," (2) "otherwise packed to withstand shocks encountered during normal Postal Service handling," and

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[287] Skilling v. United States, 561 U.S. 358, 416 (2010) (citing United States v. Williams, 553 U.S. 285, 304 (2008)).

[288] 18 U.S.C. § 1725.

[289] *See* U.S. Postal Service, Publication 32—Glossary of Postal Terms (2013), https://about.usps.com/publications/pub32/pub32_terms.htm ("[Mailability is t]he eligibility of an item or mailpiece to be accepted into the mail because it meets size, weight, and other preparation criteria and its contents are not prohibited by law as mail. Some mailpieces are prohibited because they do not meet required size or weight standards. Other mailpieces that meet size and weight standards are prohibited because of legally mandated content restrictions (such as certain hazardous materials).").

[290] *Id.* (defining "mailpiece" as "[a] single addressed article of mail, usually a letter, flat, card, or parcel[, n]ormally written as one word and often shortened to piece").

[291] *Id.* (defining "mail" as "[a]ny mailable matter that is accepted for mail processing and delivery by USPS," or "[t]he sum total of the mail at any time that is in USPS custody," or "to deposit a mailable item into a collection box or present the item (or a mailing for large quantities of mailpieces) at a Post Office or business mail entry unit").

(3) "not likely to be harmed by anticipated temperature changes while in Postal Service custody."[292] Items categorically excluded from the mail include air bags, ammunition, explosives, and gasoline.[293] From the perspective of either obeying or enforcing the prohibition on placing unstamped mailable matter in a letter box, it is confusing that the Postal Service's regulations state that "[t]he placement of the address on a letter-size mailpiece may render a piece nonmailable."[294]

Is an individual or organization, when deciding whether to place an unstamped item in a letter box, or a postal inspector, judge, or jury, when deciding whether such a placement violates the statute, to refer to the Postal Service's mailability regulations to determine the scope of the prohibition? May a law-abiding citizen freely place an unmailable Easter basket full of eggs in her letter box, but not an unstamped full Styrofoam egg carton that is sufficiently cushioned to qualify as being mailable?[295] Even if such standards were practicable, it is the duty of the legislature, not the regulator, to define key terms that clarify the scope of the criminal activity that a statute prohibits. As I explained in Part III.B.1.b, the Supreme Court has consistently required the *legislature* to provide definitions and guidelines for the enforcement of criminal statutes.[296] Allowing the Postal Service to define the bounds of the term "mailable" in the letter-box monopoly statute is analogous to allowing banks to define what constitutes a bank for purposes of enforcing federal laws prohibiting bank robbery. Wells Fargo might be able to deter office theft by declaring the supply room of its corporate office to be a "bank," but granting a bank that power would undermine the legitimacy of the federal bank robbery statutes. Similarly, Congress may not delegate the definition of "mailable matter" in the letter-box monopoly statute to the Postal Service.

If any doubt remained about the relevance of the Postal Service's regulations for defining the term "mailable" in section 1725 of the Criminal Code, the conflict between those regulations and the meaning of "mailable" implicit in the statutory language would dispel it. As I explained in Part I.C,

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[292] U.S. Postal Service, Publication 52—Hazardous, Restricted, and Perishable Mail (2015), http://pe.usps.com/text/pub52/pub52c5_010.htm.

[293] *Shipping Restrictions*, U.S. Postal Service, https://www.usps.com/ship/shipping-restrictions.htm.

[294] DMM § 601.1.1.3.

[295] Even placing an Easter basket in a letter box would violate the Postal Service's regulations, which impermissibly extend the letter-box monopoly to prohibit any use of a letter box other than for mail. *See* DMM § 508.3.1.3 ("Except under 3.2.11, the receptacles described in 3.1.1 may be used only for matter bearing postage. Other than as permitted by 3.2.10, or 3.2.11, no part of a mail receptacle may be used to deliver any matter not bearing postage, including items or matter placed upon, supported by, attached to, hung from, or inserted into a mail receptacle. Any mailable matter not bearing postage and found as described above is subject to the same postage as would be paid if it were carried by mail."). However, placing a *nonmailable* item in a letter box is not a *criminal* act (unless it violates some other criminal statute by, for example, damaging the letter box).

[296] *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 60 (1999); Kolender v. Lawson, 461 U.S. 352, 357–58 (1983); Smith v. Goguen, 415 U.S. 566, 574, 576 (1974).

the statute refers to "mailable matter *such as statements of accounts, circulars, sale bills, or other like matter*,"[297] which indicates that Congress's definition of "mailable matter" under the statute extends only to flat, letter-like items and does not extend to parcels. Therefore, the Postal Service's regulations clearly do not define "mailable matter" as used in section 1725.

Absent recourse to the Postal Service's regulations, the term "mailable matter" is sufficiently vague both to deprive an ordinary person of fair notice of the type of behavior that the letter-box monopoly statute prohibits and to invite arbitrary enforcement of that statute. The Supreme Court has said that "a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved."[298] That is, "regulated parties should know what is required of them so they may act accordingly."[299] An ordinary person reading the letter-box monopoly statute would have no way of knowing which items fall within the scope of the statute's prohibition on placing "mailable matter" in a letter box. The statute therefore fails to provide fair notice of the prohibited behavior.

Moreover, to enforce the statute as written, a postal inspector or other law enforcement officer would need to make arbitrary determinations of what is mailable. For example, one law enforcement officer might deem virtually anything that fits in a letter box "mailable" on the grounds that it *could* be mailed if properly packaged, whereas another might reason that only an item properly packaged for mailing—such as a parcel delivered by a private shipper—is subject to the prohibition. By leaving law enforcement officers, judges, and juries to determine what is "mailable," the letter-box monopoly statute invites arbitrary enforcement of its prohibition on depositing unstamped mailable matter in a letter box.

In addition, the letter-box monopoly statute's *mens rea* requirement, which conditions violation of the statute on the offender's specific intent to avoid postage, is sufficiently vague to violate due process independently of the question of mailability. Section 1725 prohibits "knowingly and willfully deposit[ing] any mailable matter . . . in any letter box . . . with intent to avoid payment of lawful postage thereon."[300] The meaning of "with intent to avoid lawful postage" for purposes of obeying or enforcing the statute is exceedingly unclear. If I decide to hand-deliver a letter to my neighbor's house because the weather is pleasant, and the price of postage has no effect on my decision, may I deposit the letter in my neighbor's letter box? Would depositing the letter be illegal if the thought "at least I'll save a few cents on postage" were to occur to me on the way to my neighbor's house? The

297 18 U.S.C. § 1725 (emphasis added).
298 Federal Commc'ns Comm'n v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012).
299 *Id.*
300 18 U.S.C. § 1725.

mens rea requirement could even exempt parcels delivered by a UPS or FedEx driver from the letter-box monopoly: what if the driver places a parcel in the customer's letter box to secure the parcel, to protect the parcel from the elements, or simply to avoid walking to the customer's door?

The vague language of the letter-box monopoly's *mens rea* requirement both fails to give fair notice to a person of common intelligence of the conduct prohibited by the statute and invites arbitrary enforcement. An ordinary person could not determine when the deposit of mailable matter in a letter box is illegal, even if that person were to understand perfectly the definition of "mailable matter." Moreover, how is a postal inspector or judge to determine reliably what is required for a person or organization to have the specific intent to avoid postage in placing mailable matter in a letter box? The letter-box monopoly statute's *mens rea* requirement invites by its vagueness arbitrary enforcement and fails to provide fair notice of the scope of the prohibition on placing mailable matter in a letter box.

The absence of criminal convictions for violation of the letter-box monopoly statute also places an additional fair-notice burden on the government. In *Greenburgh*, Justice John Paul Stevens concluded his dissent to the majority opinion upholding the letter-box monopoly law in 1981 by noting that "nobody has ever been convicted of violating this middle-aged nationwide statute."[301] Moreover, he said that "it must have been violated literally millions of times."[302] Because no one has ever been convicted of violating the letter-box monopoly statute, despite widespread violations, the federal government's inaction might constitute constructive notice that it will not enforce that statute. As a result of decades of nonenforcement, "the general public is at best only dimly aware of the law and that otherwise lawabiding citizens regularly violate it with impunity."[303] Therefore, enforcement of the statute might require additional notice within the analytical framework of the Court's 2012 opinion in *Fox Television Stations*.[304] Enforcement without such notice might violate due process even if the statute itself were not vague on its face. Any argument that the letter-box monopoly statute in itself provides notice of enforcement would be equivalent to the FCC's claim that an unenforced definition of indecent content from the 1960s constituted notice sufficient to satisfy the due process requirements of the Fifth Amendment when fining broadcasters in the early 2000s.[305] The Court rejected that claim because, as with the letter-box monopoly, subsequent failure to enforce that definition contradicted the notice.[306]

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301 *Greenburgh*, 453 U.S. at 155 (Stevens, J., dissenting).
302 *Id.*
303 *Id.*
304 132 S. Ct. 2307 (2012).
305 *See id.* at 2319.
306 *Id.*

In sum, the absence of any meaningful enforcement of the letter-box monopoly statute and the vagueness with which it outlines the bounds of the actions that it prohibits deprive the public of fair notice of prohibited conduct and invite arbitrary enforcement. The letter-box monopoly statute therefore violates due process under the void-for-vagueness doctrine.

IV. The Letter-Box Monopoly as a Taking of Private Property

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."[307] The Supreme Court has interpreted the Takings Clause to mean that a deprivation or physical occupation of private property by the government for a public purpose gives the property owner an absolute right to just compensation.[308] In other words, a physical occupation is classified as a categorical, or *per se*, taking. It is proper to characterize the letter-box monopoly as a physical occupation of private property and therefore a *per se* taking that entitles the letter-box owner to just compensation.

As I explain in more detail below, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court said that a permanent physical occupation of private property that the government authorizes is a *per se* taking because it effectively destroys all of an owner's fundamental property rights—namely, the rights to possess, use, and dispose of the property.[309] In 2015, the Court reiterated this reasoning in *Horne v. Department of Agriculture*.[310] Alternatively, if the government does not destroy or significantly burden the owner's property rights, but instead merely restricts the owner's property rights through regulation while leaving most of those rights intact, then the Court characterizes that conduct as a regulatory taking, which the Court has held deserves just compensation only if the government cannot justify the regulation.[311] In the following parts, I show that the letter-box monopoly is a *per se* taking and that the federal government is liable to pay the private owners of letter boxes just compensation under the Takings Clause.

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307 U.S. Const. amend. V.

308 *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982). For similar holdings by lower courts, see John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1356–57 (Fed. Cir. 2006); Boise Cascade Corp. v. United States, 296 F.3d 1339, 1353 (Fed. Cir. 2002); Blair v. Dep't of Conservation & Recreation, 457 Mass. 634, 639 (2010).

309 *Loretto*, 458 U.S. at 435.

310 135 S. Ct. 2419 (2015).

311 Yee v. City of Escondido, 503 U.S. 519, 522–23 (1992) ("[W]here the government merely regulates the use of property, compensation is required only if considerations . . . suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.") (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–25 (1978)); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("[W]hen [the diminution of value of the property] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.").

The Court has defined just compensation to be the amount that would put the property owner in as good a position as if his property had not been taken.[312] The Court has also interpreted the price that would satisfy that requirement to be the price that would result from a hypothetical, voluntary transaction between a willing buyer (in this case, the Postal Service) and a willing seller (the postal customer) at the moment immediately before the taking occurred.[313]

A. Is the Letter-Box Monopoly a Permanent Physical Occupation?

The letter-box monopoly gives the Postal Service the exclusive and permanent right to deliver items to the customer's letter box. The owner of the letter box may deposit in it only outgoing U.S. mail. The letter-box monopoly effects a physical occupation of private property that severely burdens the rights of the letter-box owner. The letter-box monopoly, like the permanent physical occupation in *Loretto*, destroys the fundamental property rights of the letter-box owner and is not a mere regulatory restriction on the use of private property.[314] Parallels between the physical appropriations that the Supreme Court found to be *per se* takings in *Loretto* and *Horne* show why the letter-box monopoly is a *per se* taking of the letter-box owner's personal property.

1. Loretto v. Teleprompter Manhattan CATV Corp.

In *Loretto*, the Court considered whether a "minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due."[315] The taking arose from a statute requiring a cable television company to install equipment on a landlord's property consisting of a cable, taps attached to the roof, boxes along the roof cables, and screws, nails, and bolts used to attach those items to the building.[316] The Court reasoned that the installation of those facilities was a *per se* taking because, "when the 'character of the governmental action' is a permanent physical occupation of property, [the Court's] cases uniformly have found a taking to the extent of the occupation."[317] Writing for the Court, Justice Thurgood Marshall said that "a physical occupation of another's property . . . is perhaps the most serious form of invasion of an owner's property

[312] United States v. Reynolds, 397 U.S. 14, 16 (1970); Kimball Laundry Co. v. United States, 338 U.S. 1, 6 (1949); Olson v. United States, 292 U.S. 246, 255 (1934).

[313] *See, e.g.*, Horne v. Dep't of Agric., 135 S. Ct. 2419, 2432 (2015); United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979); *Kimball Laundry*, 338 U.S. at 6.

[314] *See Loretto*, 458 U.S. at 434–35.

[315] *Id.* at 421.

[316] *Id.* at 422.

[317] *Id.* at 434–35 (citation omitted).

interests . . . . [T]he government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."[318]

Addressing the destruction of each of three fundamental property rights, Justice Marshall began with the loss of the right to possess and exclude:

> First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.[319]

The letter-box monopoly similarly deprives the letter-box owner of her right to possess and exclude. The Postal Service not only has direct physical control of some letter boxes through its control of letter-box keys, but it also has the exclusive right to place delivered mailable matter in any letter box. The letter-box owner cannot categorically exclude the Postal Service from the letter box. Although a mail recipient may refuse mail delivery, the Postal Service's regulations make such a refusal difficult in practice. The postal customer may "refuse to accept a mailpiece when it is offered for delivery"—that is, she may stand by the letter box in person and refuse the delivery of an individual item of mail—or she may request to stop deliveries addressed to a specific person for up to two years; but she may not categorically stop the Postal Service's mail delivery to the letter box.[320] The Supreme Court's reasoning in *Greenburgh* makes it clear that the Postal Service automatically delivers mail to any installed letter box: "Anyone is free to live in any part of the country without having letters or packages delivered or received by the Postal Service by simply failing to provide the receptacle for those letters and packages which the statutes and regulations require."[321] The letter-box monopoly therefore deprives the letter-box owner of the essential property right to exclude some mail without excluding all mail.

As I explain in Part II.E, the loss of that right is particularly relevant given that a majority of mail volume is advertising. The letter-box owner cannot exclude unwanted advertising from her letter box without also excluding First-Class mail and letter-box-sized parcels. The letter-box monopoly entirely deprives the letter-box owner's right to control access to her property: she may not exclude the advertising mail that she does not wish to receive, and she may not grant access to some of the parcels and extremely urgent mail that she would like to receive.

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318 *Id.* at 435 (citing Andrus v. Allard, 444 U.S. 51, 65–66 (1979)).
319 *Id.* (citing Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979)).
320 DMM § 508.1.1.2, 1.1.4.
321 453 U.S. at 125–26 (emphasis in original).

In *Loretto*, Justice Marshall next found that a physical occupation permanently destroyed the owner's right to use the property:

> Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant.[322]

The letter-box monopoly similarly denies the letter-box owner the "power to control the use of [that] property" and "the right to use and obtain a profit from [that] property." The Postal Service prohibits any private citizen—including the letter-box owner—from placing any mailable material in the letter box that does not bear sufficient postage. Section 508.3.1.3 of the *Domestic Mail Manual* states that "[authorized mail] receptacles . . . may be used only for matter bearing postage."[323] As I explained in Part I, the letter-box monopoly prohibits the letter-box owner from receiving private deliveries in the letter box (unless the deliveries bear canceled postage). The letter-box monopoly thereby deprives the letter-box owner of the power to control the use of her property and denies her the benefits of increased security, increased timeliness, and lower prices for private delivery services. In addition, a strict interpretation of section 508.3.1.3 would exclude the letter-box owner from using her letter box for any purpose other than to deposit outbound, stamped mailable matter. In other words, even the owner's depositing of *nonmailable* matter (or any other use that is not "for matter bearing postage") would be illegal. For example, under that interpretation, the regulation would prohibit a letter-box owner from placing a spare key for a neighbor to collect in the letter box if the key did not bear postage.

The Postal Service's control of the letter box also prevents the letter-box owner from using and obtaining a profit from the letter box by prohibiting "any advertising on a mailbox or its support."[324] In the absence of the Postal Service's regulation, the letter-box owner could potentially earn income from allowing companies to advertise on her letter box. Unlike the advertising mail that the letter-box owner is forced to receive in her letter box, the letter-box owner—not the Postal Service—would control and profit from advertising on the exterior of the letter box. The letter-box monopoly severely burdens the letter-box owner's right to possess and use the letter box. The letter-box owner cannot use her letter box to receive private deliveries or even unpaid flyers to locate a neighbor's lost dog. The Postal Service

322 *Id.* at 436 (citing *Andrus*, 444 U.S. at 66).
323 DMM § 508.3.1.3.
324 *Id.* § 508.3.2.5.

excludes the letter-box owner from using her property for any purpose that does not produce revenue for the Postal Service.

In *Loretto*, Justice Marshall cited the destruction of the value of the right to dispose of the property as a third frequent consequence of a physical occupation:

> Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.[325]

The Postal Service's permanent occupation of the letter box prevents the letter-box owner from transferring full ownership of the letter box to a third party. Because the purchaser of a letter box will be unable to exercise the fundamental property rights of possession, use, and exclusion, the letter-box monopoly empties much of the value of the right to dispose of the letter box.

In addition, that the letter-box owner does not lose *all* economically valuable use of the letter box does not disqualify the letter-box monopoly from being a *per se* taking. The Supreme Court has held that whether the government has appropriated all economically valuable uses of a property is relevant to a takings case only for regulatory takings.[326] In contrast, to establish that a *per se* taking has occurred and to receive just compensation, a property owner needs to show only that the government physically occupied the property.

In comparing a physical occupation to a regulatory taking, Justice Marshall said that a physical occupation "is qualitatively more severe than a regulation of the *use* of property . . . since the owner may have no control over the timing, extent, or nature of the invasion."[327] Subsequent decisions by lower courts have similarly stated that what distinguishes a permanent physical occupation from a temporary physical invasion of property is the permanent dispossession of property rights. For example, in *Boise Cascade Corp. v. United States*, the Federal Circuit in 2002 said that "[t]he permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude . . . . The rationale is evident: [temporary limitations] do not absolutely dispossess the owner of his rights to use, and exclude others from, his property."[328]

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325 *Loretto*, 458 U.S. at 436.

326 Brown v. Legal Found. of Wash., 538 U.S. 216, 224, 235 (2003); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–25 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

327 *Loretto*, 458 U.S. at 436 (internal citations omitted) (emphasis in original).

328 296 F.3d 1339, 1353 (Fed. Cir. 2002); *see also* John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1356–57 (Fed. Cir. 2006) ("When the government permanently and physically occupies property, it effectively destroys the owner's right to exclude, as well as the owner's right to make non-possessory use of the property.") (citing *Loretto*, 458 U.S. at 435–36).

The letter-box monopoly destroys the customer's plenary right to use the letter box by stripping the customer of her rights (1) to exclude the Postal Service from using the letter box, (2) to limit the scope of the Postal Service's use of the letter box, (3) to give access to the letter box to competitors of the Postal Service for the delivery of nonreserved products, and (4) to use the letter box for any purpose other than as a depository for stamped mailable matter delivered by the Postal Service. Those actions are not mere restrictions on how the owner of the property may use that property. The Postal Service does not incidentally limit the amount of competitive mail products that the customer may receive in her letter box by, for example, limiting the portion of the volume of the letter box that competitors' deliveries may consume. Instead, the letter-box monopoly prevents the customer entirely from using the letter box as the customer wishes, even when that desired use would not constrain or conflict with the Postal Service's use.

Consider the cable television analogy that I developed in Part II. Suppose that the government has a monopoly over cable television and prohibits the consumer from using the consumer's own television to play Netflix, Blu-rays, video games, and the like (unless the consumer pays the government a prohibitive access charge). Suppose that the government can access the consumer's television at any time to provide maintenance services, without obtaining permission, but that the consumer himself cannot access the television at any time except to connect, watch, or troubleshoot cable television service. Nor may the consumer allow any other company to access the television (to install a Roku box or connect a Blu-ray player, for example). Few would disagree that regulation as invasive as this would constitute a *per se* taking of the consumer's television set.

The fact that a letter box occupies a small space is not relevant to whether the letter-box monopoly is a *per se* taking. In *Loretto*, Justice Marshall stated that "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied."[329] He said that "[t]he displaced volume . . . [is] not critical: whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox."[330] Further, the Court found that it is irrelevant whether the permanent physical occupation interferes with the landowner's use of the rest of his land. The Court said that "permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land."[331]

[329] 458 U.S. at 436.
[330] *Id.* at 438 n.16.
[331] *Id.* at 430 (internal citations omitted).

In sum, the Postal Service's letter-box monopoly has, since 1934, permanently encumbered and in its practical effect has destroyed the property rights of the letter-box owner. The letter-box monopoly therefore constitutes a *per se* taking in the form of a permanent physical occupation of private property for which just compensation is due.

2. Horne v. Department of Agriculture

In *Horne v. Department of Agriculture*,[332] the Supreme Court in 2015 considered whether the government's appropriation of a portion of the Horne family's raisin crop was a *per se* taking under the Fifth Amendment. The Agricultural Marketing Act of 1937 permits the Secretary of Agriculture to issue "marketing orders," ostensibly to maintain stable markets for certain agricultural products, including raisins.[333] The raisin marketing order requires all raisin growers to surrender a percentage of their crop to the government free of charge.[334] The Raisin Administrative Committee, a government entity whose members the Secretary of Agriculture appoints, determines the required percentage each year and acquires title to the appropriated raisins.[335]

The Raisin Committee disposes of the raisins at its discretion: it sells the raisins "in noncompetitive markets, for example to exporters, federal agencies, or foreign governments; donates them to charitable causes; releases them to growers who agree to reduce their raisin production; or disposes of them by 'any other means' consistent with the purposes of the raisin program."[336] The raisin growers retain an interest in the net proceeds from the sale of the appropriated raisins.[337] However, the Raisin Committee uses the majority of the proceeds to subsidize handlers that sell raisins for export.[338] The Raisin Committee returns to the growers the proceeds from the sale of the raisins after deducting those subsidies and the Committee's administrative expenses.[339] In the two years at issue in *Horne*, 2002 to 2003 and 2003 to 2004, the net proceeds that the Raisin Committee returned to the growers were less than the cost of producing the appropriated raisins in the first year and zero in the next.[340]

In the two years at issue, the Hornes—who are both raisin growers and handlers—refused to surrender any of the raisins that they had grown or had

332 135 S. Ct. 2419 (2015).
333 *Id.* at 2424.
334 *Id.*
335 *Id.*
336 *Id.*
337 *Id.*.
338 *Id.*
339 *Id.*
340 *Id.*

purchased from other growers in those years.[341] The government fined the Hornes the market value of the raisins ($480,000) and an additional civil penalty of just over $200,000 for refusing to comply with the order to relinquish the raisins.[342] The Hornes then brought suit in federal court, alleging that the reserve requirement was a taking under the Fifth Amendment.[343] The U.S. Court of Appeals for the Ninth Circuit considered whether the government's appropriation of the Hornes' raisins was a *per se* taking or a regulatory taking. The court reasoned that the appropriation was not a *per se* taking because "'the Takings Clause affords less protection to personal than to real property' and because the Hornes 'are not completely divested of their property rights'" given that they retain an interest in the proceeds from the sale of the raisins.[344] The Ninth Circuit therefore classified the appropriation as a restriction on the use of the raisins, "similar to a government condition on the grant of a land use permit."[345]

The Ninth Circuit characterized the reserve requirement as a voluntary exchange in which the government "imposed a condition (the reserve requirement) in exchange for a Government benefit (an orderly raisin market)."[346] The Hornes could avoid the reserve requirement, the court reasoned, by "planting different crops," just as a landowner could avoid the conditions for a land use permit by forgoing the permit.[347] Having determined that the raisin reserve requirement was not a *per se* taking, the Ninth Circuit found that the government's interest in ensuring an orderly raisin market justified the reserve requirement and that the requirement was therefore not a regulatory taking under the Fifth Amendment.[348]

On appeal, the Supreme Court considered three questions. The first was straightforward: the petition for certiorari asked "[w]hether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property' applies only to real property and not to personal property."[349] The Court held that "the Fifth Amendment applies to personal property as well as real property."[350] The Court reasoned that "[n]othing in the text or history of the Takings Clause, or our precedents, suggests that the rule [that a physical appropriation is a *per se* taking] is any different when it comes to appropriation

341 *Id.*
342 *Id.* at 2425.
343 *Id.*
344 *Id.* (quoting Horne v. Dep't of Agric., 750 F.3d 1128, 1139 (9th Cir. 2014)).
345 *Id.*
346 *Id.*
347 *Id.* (quoting *Horne*, 750 F.3d at 1143).
348 *Id.*
349 *Id.* (quoting Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012)).
350 *Id.* at 2422.

of personal property."[351] The Postal Service's physical occupation of the letter-box owner's personal property is no less a *per se* taking of the letter box.

The Court in *Horne* then considered "[w]hether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion."[352] The government argued that raisins are a fungible good whose only value lies in the revenue from their sale.[353] Because the government returns the net proceeds from the sale of the appropriated raisins to the growers, the government argued, the growers retain the "most important property interest in the reserve raisins," such that no taking had occurred.[354] The Supreme Court disagreed. It said that "the fact that the growers retain a contingent interest of indeterminate value does not mean there has been no physical taking, particularly since the value of the interest depends on the discretion of the taker."[355] The Court noted that the fact that the raisin growers retain some economically valuable use of the raisins—the potential net proceeds from their sale—is irrelevant for purposes of determining whether a *per se* taking has occurred.[356] The Court contrasted its *per se* takings analysis with its regulatory takings analysis, holding that "[o]nce there is a taking, as in the case of a physical appropriation, any payment from the Government in connection with that action goes, at most, to the question of just compensation."[357]

Similarly, that the letter-box owner retains some economically valuable use of the letter box is not relevant to determining whether the letter-box monopoly is a *per se* taking. The letter-box owner may still derive some economically valuable use from receiving deliveries from the Postal Service in his letter box, or from placing there an outgoing letter. However, that use—like the raisin growers' interest in the proceeds from their appropriated raisins—does not diminish the Postal Service's physical occupation of the letter-box. In addition, the Postal Service determines—at least in part—the value of the letter-box owner's receipt of mail in the letter box. The Postal Service controls the products that the letter-box owner may receive in her letter box, the prices of those products, and the amount of advertising mail that the letter-box owner must accept as a condition of receiving those products. Therefore, that the letter-box owner may receive Postal

351 *Id.* at 2426.
352 *Id.* at 2428.
353 *Id.*
354 *Id.* at 2429.
355 *Id.*
356 *Id.*
357 *Id.*

Service deliveries in her letter box is irrelevant to the question of whether the letter-box monopoly is a *per se* taking.

In addition, under the Court's reasoning in *Horne*, any benefits that the government purports to give the letter-box owner in exchange for the letter-box monopoly are relevant only to the question of the sufficiency of just compensation—not the anterior question of whether the letter-box monopoly is a *per se* taking. If, for example, the Postal Service were to provide increased security for the letter box in exchange for the letter-box monopoly, that benefit would not eliminate the Postal Service's *per se* taking of the letter box. The benefit would, at most, reduce the quantum of just compensation due the letter-box owner. As I explain in Part IV.C, the Postal Service does not provide benefits sufficient to compensate the letter-box owner for its *per se* taking of the letter box. Consequently, regardless of the value of those benefits, the letter-box monopoly is still a *per se* taking of the letter-box owner's personal property.

The third question that the Court considered in *Horne* was "[w]hether a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking."[358] The Court held that, at least in the case of the Hornes' raisin crop, the government mandate was a *per se* taking.[359] The Court cited its opinion in *Loretto*, in which it held that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."[360] The Court rejected the government's reasoning that the Hornes voluntarily chose to participate in the raisin market and could have avoided the raisin reserve requirement by "plant[ing] different crops" or by "sell[ing] their raisin-variety grapes as table grapes or for use in juice or wine."[361] The Court cited its reasoning in *Loretto* that the argument that the government may condition permission to engage in commerce on uncompensated government appropriation of property "proves too much":

> For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices.[362]

358 *Id.* at 2430.
359 *Id.*
360 *Id.*
361 *Id.*
362 *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 n.17 (1982)).

The Court in *Horne* contrasted the appropriation of the Hornes' raisins with the disclosure conditions for dangerous chemical permits in *Ruckelshaus v. Monsanto Co.*,[363] which the Court found not to be a taking. In *Ruckelshaus*, the Environmental Protection Agency had required companies manufacturing pesticides, fungicides, and rodenticides to disclose health, safety, and environmental information, including trade secrets, as a condition of receiving a permit to sell those products.[364] The Court in *Ruckelshaus* found that the manufacturers were not subjected to a *per se* taking because they had engaged in a voluntary exchange for a "valuable government benefit"—namely, the chemical permits.[365] The Court in *Horne* noted that the Court had "already rejected the idea that *Monsanto* may be extended by regarding basic and familiar uses of property as a 'Government benefit' on the same order as a permit to sell hazardous chemicals."[366] The Court reasoned that "[s]elling produce in interstate commerce, although certainly subject to reasonable government regulation, is similarly not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection."[367]

Similarly, the letter-box owner's right to use the letter-box as a receptacle for mail matter—its intended use—is an ordinary activity that cannot reasonably be characterized as a government benefit. Under the regulations that implement the letter-box monopoly, a letter box becomes subject to the letter-box monopoly as soon as the letter-box owner uses or intends to use the letter box "for the receipt or delivery of mail."[368] The letter-box owner could avoid the letter-box monopoly by using the letter box as a decoration or a birdhouse—just as the Hornes could have sold wine or table grapes. The letter-box owner's decision to use the letter box for its intended purpose, knowing that the letter box is subject to the monopoly, is not a voluntary exchange for a government benefit. The Postal Service's physical occupation of the letter box, like the government's appropriation of the Hornes' raisins, is a *per se* taking.

B. Does the Letter-Box Monopoly Constitute Government Action?

To be entitled to just compensation under the Takings Clause, one must show, among other things, that the taking of private property resulted from state action rather than private action. Certainly, section 1725 of the Criminal Code is the result of a public law enacted by Congress. But what of the

363 467 U.S. 986 (1984).
364 *Id.* at 990.
365 *Id.* at 1007.
366 *Horne*, 135 S. Ct. at 2430.
367 *Id.* at 2430–31
368 DMM § 508.3.1.1.

regulations that the Postal Service has promulgated to interpret (and expand) the scope of section 1725? Is the Postal Service a state actor for purposes of the Takings Clause?

Whether one can impute a public enterprise's actions to the U.S. government depends on the unique characteristics of the public enterprise. In *Flamingo Industries*, the Supreme Court found that the Postal Service is part of the U.S. government for purposes of antitrust liability.[369] If the Postal Service is part of the U.S. government, it necessarily follows that its interpretation of the scope of the letter-box monopoly qualifies as government action and is therefore subject to the Takings Clause.

As I explained in Part III.A, the Supreme Court in its 2015 decision in *Amtrak* considered whether the PRIIA's provisions granting Amtrak the power to issue railway standards and metrics were an unconstitutional delegation of rulemaking authority to a private entity.[370] In addition to the due process challenge that I analyzed in Part III.A, the AAR argued in *Amtrak* that section 207 of the PRIIA "violates the nondelegation doctrine . . . by placing legislative and rulemaking authority in the hands of a private entity [Amtrak] that participates in the very industry it is supposed to regulate."[371] In its 2013 decision in *Amtrak*, the D.C. Circuit agreed with the AAR and found that Amtrak was a private entity whose authority to issue metrics and standards for rail service violated of the nondelegation principle.[372]

However, the Supreme Court reversed the D.C. Circuit's decision and concluded instead that Amtrak is part of the government.[373] (As I explained in Part III.A, the Court remanded the case to the D.C. Circuit for consideration of the remaining questions, consistent with Amtrak's designation as a government entity).[374] In its finding that Amtrak was a private entity, the D.C. Circuit had relied on the fact that, by statute, Amtrak is managed as a for-profit corporation.[375] However, the Supreme Court noted that three unique characteristics of Amtrak indicate that it has significant ties to the government. First, Amtrak is required by statute to pursue broad public objectives, such as to "provide efficient and effective intercity passenger rail mobility, minimize Government subsidies, provide reduced fares to the disabled and elderly, and ensure mobility in times of national disaster."[376] Second, Congress mandates certain aspects of Amtrak's day-to-day operations, such as which routes to maintain and which considerations to apply

[369] 540 U.S. 736, 737 (2004).
[370] *Amtrak III*, 135 S. Ct. 1225, 1226 (2015).
[371] *Id.* at 1230.
[372] Ass'n of Am. R.Rs. v. U.S. Dep't of Transp. (*Amtrak II*), 721 F.3d 666, 668 (D.C. Cir. 2013).
[373] *Amtrak III*, 135 S. Ct. at 1226.
[374] *Amtrak II*, 721 F.3d at 667.
[375] *Id.* at 677 ("[B]y designing Amtrak to operate as a private corporation—to seek profit on behalf of private interests—Congress has elected to deny itself the power to delegate it regulatory authority.").
[376] *Amtrak III*, 135 S. Ct. at 1232 (citing 49 U.S.C. §§ 24101(b), 24101(d), 24307(a), 24101(c)(9)).

when making improvements.[377] Third, Amtrak has depended on federal financial support for most of its existence: "[i]n its first 43 years of operation, Amtrak has received more than $41 billion in federal subsidies. In recent years these subsidies have exceeded $1 billion annually."[378] The Court found:

> Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise. Among other important considerations, its priorities, operations, and decisions are extensively supervised and substantially funded by the political branches. A majority of its Board is appointed by the President and confirmed by the Senate and is understood by the Executive to be removable by the President at will. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions.[379]

The Postal Service has features similar to those that the Court cited in *Amtrak*, which indicates that the Postal Service also acts as a government entity.

First, section 101 of Title 39 of the U.S. Code clearly specifies that Congress established the Postal Service in pursuit of the government's broad objectives. Section 101 provides that "[t]he United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States."[380]

Second, the Board of Governors of the Postal Service has eleven members, nine of whom the President appoints, with the approval of Congress. In addition to exercising control over the Board of Governors, the political branches also control aspects of the Postal Service's day-to-day operations. For example, sections 603 through 606 of Title 39 dictate the procedure that postal employees must follow when searching for, seizing, and disposing of letters that third parties carry contrary to law.[381] Section 1006 of Title 39 dictates the Postal Service's employment policies—such as the requirement that officers and employees of the Postal Service be "eligible for promotion or transfer to any other position in the Postal Service or the executive branch of the Government of the United States for which they are qualified."[382]

Third, the Postal Service benefits from financial support from the federal government. In a 2015 survey of the extent of the Postal Service's subsidies,

377 *Id.* (citing 49 U.S.C. §§ 24101(c)(6), 24902(b), 24305(f)).
378 *Id.*
379 *Id.* at 1232–33.
380 39 U.S.C. § 101(a).
381 *Id.* § 603–06.
382 *Id.* § 1006.

economist Robert Shapiro estimated that, in total, the Postal Service's "monopolies and related special treatment produce effective subsidies worth nearly $18 billion per-year."[383] For example, the Postal Service receives loans from the Federal Financing Bank of the National Treasury at below-market interest rates.[384] As of the third quarter of 2014, the Postal Service had reached its borrowing limit of $15 billion and serviced that debt at an interest rate of only 1.2 percent.[385] Based on an analysis of the Postal Service's financial statements, Shapiro estimated that that privilege produces an annual subsidy of between $415 million and $490 million.[386] In addition, state and local governments cannot collect property, income, or sales taxes from the Postal Service, because the Postal Service is a part of the U.S. government for tax purposes.[387] Shapiro estimated that the Postal Service's exemption from state and local property and real estate taxes created a benefit of $1.53 billion in 2012.[388] The federal government's annual effective subsidies to the Postal Service therefore greatly exceed those to Amtrak.

These three features resemble those that the Supreme Court found to be determinative in *Amtrak*. It is thus clear as a matter of law that the Postal Service is part of the federal government, such that the restrictions on governmental action contained in the Fifth Amendment apply to the Postal Service's actions. The letter-box monopoly therefore constitutes government action for purposes of the Takings Clause.

In addition, as I explained in Part I.D, in *Flamingo Industries* the Supreme Court found that the Postal Service was part of the government for purposes of antitrust liability before Congress enacted the PAEA.[389] The Court said that "[t]he Postal Service has many powers more characteristic of Government than of private enterprise, including its state-conferred monopoly on mail delivery, and the powers of eminent domain and to conclude international postal agreements."[390] Although the PAEA partially overruled *Flamingo Industries*, nothing in the PAEA contradicts the Court's ruling with respect to the Postal Service's status as part of the federal government. The Postal Service still retains its monopoly over mail delivery, its power of eminent domain, and its power to conclude international postal agreements.[391] The Postal Service therefore remains part of the federal government according

383 Shapiro, *supra* note 137, at 3.
384 39 U.S.C. § 2006; Daniel J. Richardson, Congressional Research Service, The U.S. Postal Service's Financial Condition: A Primer (2014), https://www.fas.org/sgp/crs/misc/R43162.pdf.
385 Richardson, *supra* note 384; Shapiro, *supra* note 137, at 4.
386 Shapiro, *supra* note 137, at 4.
387 Federal Trade Commission, Accounting for Laws That Apply Differently to the U.S. Postal Service and Its Competitors 25 (2007) [hereinafter FTC, Accounting for Laws].
388 Shapiro, *supra* note 137, at 4.
389 540 U.S. 736, 737 (2004).
390 *Id.* at 747.
391 39 U.S.C. §§ 601, 401, 403.

to the Court's ruling in *Flamingo Industries*. The Postal Service's letter-box monopoly is therefore government action for purposes of the Takings Clause.

C. Does the Postal Service Already Compensate Letter-Box Owners?

As the Court recognized in *Flamingo Industries*, the Postal Service has the power of eminent domain.[392] The Postal Service is therefore entitled to appropriate private property for public use, provided that it pays the property owner just compensation in compliance with the Takings Clause. Critics of the takings critique of the letter-box monopoly might argue that the Postal Service already compensates letter-box owners implicitly for its *per se* taking—in other words, that it provides other benefits to the customer that offset the taking.[393] However, for that *quid pro quo* to absolve the Postal Service of liability, the Postal Service would need to compensate the letter-box owner fully for the takings.

In general, when American courts evaluate damages in contexts involving involuntary exchanges, they consider the amount that would be paid in a hypothetical, voluntary transaction that would have occurred in a counterfactual state of the world.[394] Justice Felix Frankfurter established that principle in *Kimball Laundry Co. v. United States*, a case that addressed the right to compensation for a temporary taking of a private laundry by the military during World War II.[395] In that case, Justice Frankfurter said:

> [Since] a transfer brought about by eminent domain is not a voluntary exchange, this amount can be determined only by a guess, as well informed as possible, as to what equivalent would probably have been had a voluntary exchange taken place. If exchanges of similar property have been frequent, the inference is strong that the equivalent arrived at by the haggling of the market would probably have been offered and accepted, and it is thus that the "market price" becomes so important a standard of reference.[396]

The Court has also adopted the fair market value standard for just compensation in other takings cases.[397] That value is not always ascertainable, particularly in markets that are thinly traded, in which case the court must rely upon evidence of the price that would have eventuated in a voluntary exchange

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392 540 U.S. at 737.

393 Sidak & Spulber, Deregulatory Takings and the Regulatory Contract, *supra* note 26, at 278.

394 *See generally* J. Gregory Sidak, Inaugural Address at Tilburg University: Is Harm Ever Irreparable? (2011); J. Gregory Sidak, *Bargaining Power and Patent Damages*, 19 Stan. Tech. Rev. 1 (2015).

395 338 U.S. 1 (1949).

396 *Id.* at 6.

397 *See, e.g.*, Horne v. Dep't of Agric., 135 S. Ct. 2419, 2421 (2015); United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 77 (1913).

in the counterfactual state of the world.[398] In the absence of market distortions, the market value of an asset is the asset's opportunity cost.[399] In other words, the benefits that the letter-box monopoly offers must equal or exceed the benefits of the consumer's best alternative. To compensate the letter-box owner for the *per se* taking, the Postal Service would need to provide the letter-box owner benefits equal to the entire forgone surplus from activities that the letter-box monopoly precludes, such as receiving private deliveries in the letter box.

There is no evidence that the Postal Service fully, or even partially, compensates the letter-box owner for its physical occupation of her property. In Part I.B, I explained why the Supreme Court's reasoning regarding the Postal Service's exchange of postal services for its occupation of the customer's letter box in *Greenburgh* was unpersuasive. The argument does not consider the opportunity costs of the letter-box monopoly, or that some consumers might be willing to pay a higher price for the Postal Service's products if it were to relax the letter-box monopoly. A consumer might also be willing to pay a higher price for the letter box itself if the consumer were permitted to receive other mail in the letter box. Instead, the letter-box monopoly gives consumers only one option: a letter box that is closed to competition and subject to postal regulation.

Further, the Postal Service does not compensate letter-box owners (as recipients of mail) through a reduction in fees, because there are no fees to reduce under the "sending party pays" model of the Postal Service. With the limited exception of "business reply mail," recipients of mail do not pay to receive their mail. Instead, the sender pays postage fees. Consequently, recipients of mail cannot benefit from a reduction in postage fees that the Postal Service would notionally offer as the *quid pro quo* for regulating the mail recipient's letter box.

The only benefit that a letter-box owner might receive from the Postal Service that could conceivably compensate the owner for the *per se* taking of her letter box is increased security from the Postal Inspection Service's investigation of mail-theft crimes. The Postal Service has argued that the letter-box monopoly is necessary to protect the security of the mail. For example, the Postal Service has asserted that the letter-box monopoly facilitates the detection of mail theft. The Postal Service argues that, because only the letter-box owner and the Postal Service can legally access the letter box, the Postal Inspection Service (PIS) can identify any other party observed

[398] *See, e.g.*, Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. Envtl. L.J. 110, 116–17 (2002).

[399] *See, e.g.*, Sidak & Spulber, Deregulatory Takings and the Regulatory Contract, *supra* note 26, at 275 (citing Richard A. Brealey & Stewart C. Myers, Principles of Corporate Finance 98 (McGraw-Hill, Inc. 4th ed. 1991)).

accessing the letter box as a suspect.[400] The Postal Service claims that the PIS's ability to identify suspects with ease has a deterrent effect on theft from the letter box. However, that argument is exaggerated and unpersuasive. It fails to acknowledge that the letter-box monopoly does not strictly prohibit other parties from accessing the letter box: anyone may place a letter in the letter box if the letter contains canceled postage. If exclusive access to the letter box were vital to securing the letter box—and not only to limiting competition—then one would expect an outright prohibition of access by all persons save the Postal Service and the letter-box owner. One would also expect to observe more locked letter boxes and tighter security measures to protect the mail. Yet, to the contrary, letter boxes in the United States typically remain unsecured.[401]

The letter-box monopoly is clearly ineffective as a deterrent against mail theft. In 2013, there were 3,266 cases of mail theft reported in the United States.[402] In its 2013 annual report, the PIS highlighted a mail-theft case in which the perpetrators—undeterred by the purported security functions of the letter-box monopoly—tampered with letter boxes in seven states and stole a total of $400,000.[403]

However, even if one were to accept the premise that the letter-box monopoly substantially deters theft from the letter box, that deterrent effect would not justify maintaining the letter-box monopoly. To determine whether additional deterrence of mail theft compensates the letter-box owner for the letter-box monopoly, one must consider the counterfactual: the level of security that the letter-box owner would enjoy in the absence of the letter-box monopoly. Ending the letter-box monopoly (and the Postal Inspection Service's supposed protection of the letter box) would likely effect a net *increase* in letter-box security.

As I explained in Part II, opening the letter box to competition will likely result in significant security innovations to the letter box. In the only (though now dated) significant, multiple-country study about the letter-box monopoly, the Government Accountability Office found that the most important factor in determining the level of mail theft in the eight countries surveyed was the percentage of locked letter boxes, mail slots, and other receptacles

400 FTC, Accounting for Laws, *supra* note 387, at 88.

401 Anderson, *supra* note 152.

402 In fiscal year 2013, the Postal Inspection Service initiated 1,752 investigations of mail theft that did not involve Postal Service employees and 1,514 investigations of mail theft involving Postal Service employees, for a total of 3,266 cases of mail theft. Postal Inspection Service, 2013 Annual Report 10 (2014), https://postalinspectors.uspis.gov/radDocs/pubs/USPIS_AnnualReport_FY13.pdf; Internal Mail Theft, U.S. Postal Service Office of the Inspector General, https://www.uspsoig.gov/investigations/internal-mail-theft.

403 Postal Inspection Service, *supra* note 407, at 11.

that postal customers used to receive mail.[404] That analysis suggests that new letter boxes with tracking scanners, digital access codes, or similar security innovations will substantially increase mail security after the letter-box monopoly's repeal. The development of such security systems will make the mail stream more—not less—secure after the repeal of the letter-box monopoly. The Postal Service therefore fails to compensate the letter-box owner for its *per se* taking through its provision of putatively greater mail security.

In addition, the Postal Service's general enforcement of mail-theft laws—even if it did increase security for letter-box owners—would not constitute just compensation for the Postal Service's *per se* taking of the letter box. Consider the following analogy: the government appropriates a building for its use but allows the property owner some limited access to the building. The government could not then claim that the extension of laws that protect government property to the building was just compensation to the property owner for the taking. In that example, in *Horne*, and in the case of the letter-box monopoly, just compensation is no more and no less than the full market value of the appropriated property. The Postal Service fails to provide any part of that value to letter-box owners, and therefore it does not implicitly compensate them for its *per se* taking.

Conclusion

The letter-box monopoly increases the cost of delivery of letter-box-sized parcels and extremely urgent mail. Consumers bear the increased costs of delivery, including the explicit costs of higher delivery prices and the implicit increase in cost from reduced entry and innovation. The Postal Service's regulatory authority over its competitors' letter-box access violates due process, as does the vagueness of the criminal statute that defines the letter-box monopoly. The monopoly is both an antitrust violation and a *per se* taking of private property. The Postal Service delivered the mail without the letter-box monopoly before 1934, and no other country in the world gives its national postal operator a statutory monopoly over the customer's letter box.[405] There is no reason to continue the harm to consumers that the letter-box monopoly causes. Sound public policy counsels Congress to repeal the letter-box monopoly.

[404] U.S. Government Accountability Office, GAO-GGD-97-85, Restrictions on Mailbox Access 30 (1997).
[405] FTC, Accounting for Laws, *supra* note 387, at 17.