

Inequitable Escheat?: Reflecting on Unclaimed Property Law and the Supreme Court’s Interstate Escheat Framework

T. CONRAD BOWER*

TABLE OF CONTENTS

I.	INTRODUCTION	516
II.	UNCLAIMED PROPERTY—ITS ORIGINS AND THE LAW GOVERNING ITS COLLECTION	519
	A. <i>Unclaimed Property’s Origins in the English Doctrines of Escheat and Bona Vacantia</i>	520
	B. <i>An Attempt at Uniformity: The Uniform Disposition of Unclaimed Property Act</i>	523
	C. <i>Recent Developments in State Enforcement of Unclaimed Property Statutes: A Vehicle for Aggressive Revenue Generation</i>	527
	1. <i>Reduced Statutory Dormancy Periods</i>	528
	2. <i>Expanding the Definition of Unclaimed Property</i>	530
	3. <i>Aggressive Multi-state Use of Contingent-Fee Auditors</i>	533
	a. <i>The Duty to Report</i>	533
	b. <i>Multi-State Audits, Contingent-Fee Auditors, and the Relentless Pursuit of Revenue</i>	534
	D. <i>Conclusion</i>	537
III.	THE SUPREME COURT’S DUAL-PRIORITY FRAMEWORK AND THE CONTROVERSIAL EMERGENCE OF THE “THIRD-PRIORITY” RULE	537
	A. <i>Texas v. New Jersey: The Birth of Interstate Escheat Priority Rules</i>	539
	B. <i>An Exception to the Dual-Priority Structure? The Emergence of the Third-Priority Rule</i>	543

*J.D. Candidate, The Ohio State University Moritz College of Law, expected 2013; B.A., Government, Skidmore College, 2006. I am grateful to the members of the *Ohio State Law Journal*, most especially Kailee Goold, for their encouragement and advice throughout the note-writing process. I would also like to thank Jamie Ryan, member, Bailey Cavalieri LLC, Columbus, Ohio, for his thoughtful feedback on an earlier draft. I dedicate this Note to my wife and best friend, Megan, who has selflessly supported me in all of my pursuits.

C.	<i>Critically Assessing the Constitutionality of the Third-Priority Rule</i>	544
1.	<i>The Third-Priority Rule Is Preempted by the Supreme Court's Holding in Texas</i>	545
2.	<i>The Third-Priority Rule Does Not Directly "Conflict with" Texas and Is Therefore Not Preempted</i>	547
D.	<i>Conclusion</i>	549
IV.	TOWARD A UNIFORM, REGULATORY FRAMEWORK ELEVATING THE LOCATION OF THE TRANSACTION ABOVE THE CORPORATE HOLDER'S STATE OF INCORPORATION	549
A.	<i>The Impetus for a Comprehensive Scheme to Regulate Interstate Escheat Disputes: The Limitations of Functioning as a Court of Original Jurisdiction</i>	550
B.	<i>Delaware: The Fortuitous Beneficiary Under the Current Dual-Priority Framework</i>	551
C.	<i>Fashioning a New Interstate Escheat Framework</i>	553
1.	<i>Proposed Interstate Escheat Framework</i>	553
2.	<i>Advantages to a Location-Based Rule Not Found in the Current Dual-Priority Structure</i>	554
V.	CONCLUSION	556

I. INTRODUCTION

With ever-widening state budget deficits and tax revenue steadily on the decline, the majority of states have been faced with the prospect of deepening spending cuts and increasing taxes in order to generate much-needed revenue.¹ Neither has been popular with the electorate.² Some state governments,

¹ See NICHOLAS JOHNSON ET AL., CTR. ON BUDGET & POLICY PRIORITIES, AN UPDATE ON STATE BUDGET CUTS: AT LEAST 46 STATES HAVE IMPOSED CUTS THAT HURT VULNERABLE RESIDENTS AND CAUSE JOB LOSS (2011), available at <http://www.cbpp.org/files/3-13-08sfp.pdf>. For a more current update on state budget deficits, see PHIL OLIFF ET AL., CTR. ON BUDGET & POLICY PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT (June 27, 2012), <http://www.cbpp.org/files/2-8-08sfp.pdf> ("As a new fiscal year begins, the latest state budget estimates continue to show that states' ability to fund services remains hobbled by slow economic growth. The budget gaps that states have had to close for fiscal year 2013 . . . total \$55 billion in 31 states.").

² See, e.g., THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, CHANGING VIEWS OF FEDERAL SPENDING: FEWER WANT SPENDING TO GROW, BUT MOST CUTS REMAIN UNPOPULAR 1 (Feb. 10, 2011), <http://www.people-press.org/2011/02/10/files/2011/02/702.pdf> ("The survey also shows that the public is reluctant to cut spending—or raise taxes—to balance state budgets.").

however, have tapped a far less controversial source of revenue to boost state coffers: unclaimed property.³

Traditionally, recovering unclaimed property was of low priority to states.⁴ More recently, however, states have recognized the potential revenue stream derived from collecting this property, as well as the fines and penalties that can be assessed on companies for noncompliance with reporting requirements.⁵ Accordingly, many states have stepped up enforcement of their unclaimed property statutes, resulting in the collection of billions of dollars annually through the seizure of property presumed to be abandoned.⁶ In fact, as of January 2013, states were in possession of 41.7 billion dollars in unclaimed property.⁷

Unclaimed property is generally defined as either tangible⁸ or intangible⁹ property over which a true owner has not exercised any powers of ownership for a predetermined period of time.¹⁰ Intangible property—which lacks a specific location or situs¹¹—generally refers to dormant accounts with companies that have had no contact with the true owner for a predetermined period of time.¹² The most common forms of unclaimed intangible property include bank deposits, savings accounts, stocks, bonds, dividends, utility deposits, refunds, travelers checks, unredeemed money orders, insurance drafts,

³ Throughout this Note, I use the terms “unclaimed” and “abandoned” property interchangeably.

⁴ *What Is Unclaimed Property*, NAT’L ASS’N UNCLAIMED PROP. ADMINS., <http://www.unclaimed.org/what/> (last visited Jan. 7, 2012) [hereinafter *Unclaimed Property*].

⁵ TRACEY L. REID, UNCLAIMED PROPERTY: A REPORTING PROCESS AND AUDIT SURVIVAL GUIDE 13 (2008) (“If the property is not turned over . . . , the holder can be subject to late reporting and nonreporting fines and penalties, which can double and even quadruple the amount of money that the holder should have reported initially.”).

⁶ Scott Thurm & Pui-Wing Tam, *States Scooping up Assets from Millions of Americans: ‘Unclaimed Property’ Fattens Public Coffers*, WALL ST. J., Feb. 4, 2008, at A1.

⁷ *Unclaimed Property*, *supra* note 4. According to one leading commentator, “Unclaimed property is the fastest growing source of state revenue—and it’s increasing 20% per year!” REID, *supra* note 5, at 3.

⁸ Some examples of tangible unclaimed property include: cash, coins, antiques, jewelry, new toys, collectibles, and musical instruments. See *Unclaimed Property: Frequently Asked Questions*, PA. DEP’T TREASURY, <http://www.patreasury.gov/unclaimedpropertyfaq.html#reporting> (last visited Mar. 9, 2012).

⁹ Intangible property is defined as “[p]roperty that lacks a physical existence. Examples include stock options and business goodwill.” BLACK’S LAW DICTIONARY 1336 (9th ed. 2009).

¹⁰ REID, *supra* note 5, at 8.

¹¹ Situs is a Latin word meaning “[t]he location or position (of something) for legal purposes, as in *lex situs*, the law of the place where the thing in issue is situated.” BLACK’S LAW DICTIONARY 1513 (9th ed. 2009).

¹² *Unclaimed Property*, *supra* note 4.

uncashed payroll checks, and the unredeemed portions of stored-value cards.¹³ All fifty states and the District of Columbia have unclaimed property laws—compliance with which is mandatory.¹⁴

The original purpose of unclaimed property law was to safeguard the interests of true owners until they could come forward and reclaim their right to control of the abandoned property.¹⁵ These laws require companies to turn over both tangible and intangible property to the state following a statutorily prescribed dormancy period.¹⁶ In this way, the value of the unclaimed property can benefit the public generally—instead of individual businesses—by generating revenue that can be used by the state for its citizens.¹⁷ While some states make a concerted effort to locate the property's true owner, on average only one-third of these owners are located and their abandoned property returned.¹⁸ At the other end of the spectrum is the state of Delaware, which reunites true owners with only 3.4% of the unclaimed property it collects.¹⁹ The benefits attendant to holding the unclaimed property obligations of owners who fail to surface and reclaim their property are almost too obvious to state.

Aggressive state enforcement of unclaimed property laws as a means of revenue generation raises intriguing issues concerning the fairness and equity of the practice²⁰—issues that cannot be swept aside completely and into which the beginning of this Note will delve. The focus of this Note, however, rests more narrowly on those situations when multiple states make concomitant claims to the same unclaimed intangible property. In these instances, the proper question is which state has the most legally cognizable right to the intangible property?

Because of the substantial and ever-increasing revenue to be derived from securing legal claim to unclaimed property, the current dual-priority structure—which looks first to the owner's last known address and, if unknown, then to the

¹³ See *id.*; see also Andrew W. McThenia, Jr. & David J. Epstein, *Issues of Sovereignty in Escheat and the Uniform Unclaimed Property Act*, 40 WASH. & LEE L. REV. 1429, 1431 (1983).

¹⁴ REID, *supra* note 5, at 1.

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 10.

¹⁷ See, e.g., *Smyth v. Carter*, 845 N.E.2d 219, 222 (Ind. Ct. App. 2006); see also REID, *supra* note 5, at 7 (“The theory is that if property is lost, the general public should benefit from the use of that property until the true owner can be found, rather than letting one individual business reap the benefit of a windfall that does not actually belong to them.”).

¹⁸ Thurm & Tam, *supra* note 6.

¹⁹ David Bogoslaw, *Cashing in on Unclaimed Property: State Controllers and the U.S. Treasury Hold Billions in Unclaimed Assets*, BLOOMBERG BUSINESSWEEK (May 27, 2009, 6:30 PM), http://www.msnbc.msn.com/id/30945297/ns/business-us_business/t/cashing-unclaimed-property/ (noting that since 1993, Delaware has returned only \$109 million out of a total of \$3.24 billion in unclaimed property).

²⁰ For an interesting discussion of the substantive due process implications of modern escheat statutes, see Teagan J. Gregory, Note, *Unclaimed Property and Due Process: Justifying “Revenue-Raising” Modern Escheat*, 110 MICH. L. REV. 319 (2011).

state of the debtor company's corporate domicile²¹—no longer provides an equitable and easily administrable framework from which to resolve interstate disputes. More accurately, the current framework too often and inequitably allows the state in which the debtor happened to incorporate to reap the financial benefit of intangible property obligations incurred all over the country.

This Note argues that Congress should accept the Supreme Court's repeated invitations and craft a uniform legislative framework governing the resolution of interstate disputes over the custody of unclaimed intangible property. This proposed framework would modify the dual-priority scheme articulated by the Supreme Court in *Texas v. New Jersey* and would afford the jurisdiction in which the transaction that gave rise to the intangible property occurred the benefit of custodial escheat in the event that the owner's last known address is not maintained.

Part II of this Note provides relevant background information on unclaimed property law, underscoring its recent migration away from a means of reuniting a true owner with her intangible property, and toward its use as a tool for aggressive revenue generation by states facing significant budget shortfalls. Part III presents the Supreme Court's current dual-priority, interstate escheat framework—as articulated in *Texas* and subsequently reaffirmed in *Pennsylvania v. New York*²² and *Delaware v. New York*²³—suggesting that this archaic judicial scheme is no longer workable as an effective and equitable vehicle for reuniting a true owner with her lost intangible property. This section also critically assesses the constitutionality of the so-called “third-priority rule”—the most prevalent attempt by states to carve out an exception to the Court's dual-priority framework—and concludes that state attempts to alter the Court's framework to prioritize the location of the transaction that gave rise to the intangible property are preempted by federal common law. Because federal preemption effectively forecloses a state-level solution and the Supreme Court is unlikely to reconsider *Texas* and its progeny, it is incumbent upon Congress to craft a legislative solution to correct the iniquities that plague the current framework. Part IV proposes a workable congressional framework that maintains the spirit of the Court's holding in *Texas* by preserving the opinion's twin principles of equity and ease of administration.

II. UNCLAIMED PROPERTY—ITS ORIGINS AND THE LAW GOVERNING ITS COLLECTION

This Note focuses on the more recent developments in unclaimed property law; however, any logical discussion of the recent trends in an area of the law must necessarily include its historical underpinnings. Therefore, this Note

²¹ *Texas v. New Jersey*, 379 U.S. 674, 682 (1965).

²² 407 U.S. 206, 214 (1972).

²³ 507 U.S. 490, 507 (1993).

begins with the origins of modern unclaimed property law. Section A briefly discusses the English common law origins of unclaimed property and the subsequent American adaptation of these ancient doctrines.²⁴ Section B presents the first major attempt at interstate uniformity within modern unclaimed property law: the National Conference of Commissioners on Uniform State Laws' (NCCUSL) 1954 Uniform Disposition of Unclaimed Property Act. Although gradually reducing the impediments to state escheat of unclaimed property—largely a response to this growing trend among states—the language and commentary of each version of the Act suggest a continued adherence to the central tenet of reuniting true owner and lost property. Finally, section C focuses on unclaimed property law's more recent use as an instrument of state revenue generation, arguing that the overwhelming trend among the states of leveraging their laws to raise tax-free revenue undercuts the law's purpose of efficient reunification of true owner and abandoned property.

A. Unclaimed Property's Origins in the English Doctrines of Escheat and Bona Vacantia

Modern unclaimed property laws are rooted in the English common law doctrines of escheat and *bona vacantia*.²⁵ Historically, under the doctrine of escheat,²⁶ when a tenant died without heirs, any unowned real property passed to the tenant's feudal lord.²⁷ In the event that the feudal lord could not be identified, or if the Crown was the original owner in fee, the property escheated to the sovereign.²⁸ With the abolition of subinfeudation in 1290,²⁹ the justification for escheat became one of royal prerogative—abandoning the more traditional justification of continuing necessary services to a tenant's lord.³⁰

²⁴ For a more comprehensive history of the derivation of modern unclaimed property laws, including their roots in English common law, see Note, *Origins and Development of Modern Escheat*, 61 COLUM. L. REV. 1319, 1319–20 (1961) [hereinafter *Origins of Modern Escheat*], as well as David C. Auten, Note, *Modern Rationales of Escheat*, 112 U. PA. L. REV. 95 (1963), and Susan T. Kelly, Note, *Unclaimed Billions: Federal Encroachment on States' Rights in Abandoned Property*, 33 B.C. L. REV. 1037 (1992).

²⁵ See McThenia & Epstein, *supra* note 13, at 1430–31; Kelly, *supra* note 24, at 1041.

²⁶ Escheat is defined as “[r]everision of property (esp. real property) to the state upon the death of an owner who has neither a will nor any legal heirs.” BLACK’S LAW DICTIONARY 623 (9th ed. 2009).

²⁷ *Origins of Modern Escheat*, *supra* note 24, at 1319–20.

²⁸ McThenia & Epstein, *supra* note 13, at 1430. Escheat was originally developed by the courts in order to ensure continued performance of services to the lord as consideration for the grant of land ownership from the lord to the tenant. 1 DAVID J. EPSTEIN ET AL., UNCLAIMED PROPERTY LAW AND REPORTING FORMS § 1.01 (1987). When a tenant died without an heir, no member of his line was capable of continuing performance of the required services. Therefore, the land reverted to the tenant's lord. *Id.*

²⁹ Statute of Quia Emptores, 1290, 18 Edw., cc. 1–3 (Eng.).

³⁰ EPSTEIN ET AL., *supra* note 28, § 1.01.

Because escheat only applied to real property, the complementary doctrine of *bona vacantia*³¹ emerged to apply to personal property.³² This doctrine was premised on the belief that the sovereign had a more equitable right to unclaimed personal property than a stranger and that by taking possession of the property, the sovereign would minimize disputes between private parties over the right of possession.³³ *Bona vacantia* is distinguishable from escheat because the sovereign's claim to the personalty was based on the absence of any other owner, rather than simply its status as ultimate owner.³⁴ Furthermore, collecting unclaimed personalty under the doctrine of *bona vacantia* was, at least initially, custodial, whereas traditional escheat vested immediate ownership in the sovereign.³⁵

Following the Revolutionary War, the doctrines of escheat and *bona vacantia* were assimilated into American law, and these sovereign rights were reserved with the states.³⁶ The American doctrine that emerged was a unified version of both escheat and *bona vacantia*³⁷ and did not closely resemble the

³¹ *Bona vacantia* is defined as “[p]roperty not disposed of by a decedent’s will and to which no relative is entitled under intestacy laws.” BLACK’S LAW DICTIONARY 199 (9th ed. 2009). *Bona vacantia* most frequently resulted when the owner of personal property died without an heir to claim the property. Consequently, it either belonged to the finder of the personalty or escheated to the sovereign. *Id.*

³² *Origins of Modern Escheat*, *supra* note 24, at 1326.

³³ *Id.* at 1326–27. *Bona vacantia* should also be distinguished from treasure trove, which consists of “coin or money concealed in the earth or other private place,” where the true owner of the property is unknown. EPSTEIN ET AL., *supra* note 28, § 1.03. Under traditional property law, most lost property could be claimed by the finder against all but the true owner. By contrast, possession of lost property deemed treasure trove, once discovered, vested in the sovereign by royal prerogative. *Id.*

³⁴ EPSTEIN ET AL., *supra* note 28, § 1.02.

³⁵ Cary B. Hall, Note, *Escheat? Gesundheit. But for States, It’s Nothing to Sneeze at: Delaware v. New York*, 113 S. Ct. 1550 (1993), 5 U. MIAMI BUS. L.J. 79, 80–81 (1993).

³⁶ Kelly, *supra* note 24, at 1041. The Supreme Court first upheld the constitutionality of a state law regulating the escheat of an intestate decedent’s real property in 1896. See EPSTEIN ET AL., *supra* note 28, § 1.04[3] (citing *Hamilton v. Brown*, 161 U.S. 256, 263 (1896)) (“[I]n this country, when the title to land fails for want of heirs and devisees[,] it escheats to the State as part of its common ownership, either by mere operation of law, or upon an inquest of office, according to the law of the particular State.”); see also *Christianson v. King Cnty.*, 239 U.S. 356, 365 (1915) (“The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the territorial legislature to deal with as it saw fit, in the absence of an inhibition by Congress.”).

³⁷ Kelly, *supra* note 24, at 1042. The authority to enact escheat legislation was derived from the states “as the successors to the prerogative of royal sovereignty.” EPSTEIN ET AL., *supra* note 28, § 1.04[1]. Because *bona vacantia* was not derived from royal prerogative, but rather because of the absence of the true owner to claim possession of the property, the states’ assumption of this doctrine was justified under their inherent police power. *Id.*

archaic doctrines from which it was derived.³⁸ By the nineteenth century, many states had passed escheat statutes to deal with the distribution of real property to the state,³⁹ and toward the end of the century, state statutory provisions governing the distribution of personal property began to emerge.⁴⁰ Perhaps unsurprisingly, the early twentieth century was fraught with competition between the states acting pursuant to their unclaimed property statutes.⁴¹

Escheat in the United States has taken on a form distinct from its English common law roots. American escheat applies to both real and personal property, it presumes abandonment after a dormancy period has elapsed, and it is custodial in nature.⁴² It is this final difference—that escheat is custodial in nature—that validates American escheat’s roots in reuniting a true owner with her abandoned property.⁴³ The remainder of this Part presents the NCCUSL’s

³⁸ See Kelly, *supra* note 24, at 1043; see also Auten, *supra* note 24, at 114 (“Modern escheat law bears only superficial resemblance to its hoary ancestors; some of the rules are the same, but the underlying reasons have necessarily changed.”). The early American adaptation of escheat differed from its traditional English counterpart predominantly in two respects. First, with the American version of escheat, “it [was] not necessary for escheated property to have been passed intestate. Modern statutes contain[ed] a presumption of abandonment . . .” Kelly, *supra* note 24, at 1043; see also *In re People of N.Y.*, 138 F. Supp. 661, 666 (S.D.N.Y. 1956) (“It is a basic property rule that title must rest somewhere, and it is a logical presumption that property unclaimed over a large number of years has been abandoned by its owners; indeed, it is on the logic of this presumption that state escheat laws are based . . .”). Second, American escheat is custodial, meaning that when “unclaimed property is remitted to the state by the holder of the property, title to the property does not pass to the state. Instead, title remains with the owner of the abandoned property, and the owner may reclaim the property from the state at any time.” Ethan D. Millar & John L. Coalson, Jr., *The Pot of Gold at the End of the Class Action Lawsuit: Can States Claim It as Unclaimed Property?*, 70 U. PITT. L. REV. 511, 516 (2009); see also *In re Linnquist’s Estate*, 154 P.2d 879, 887 (Cal. 1944) (“[T]itle to property distributed to the state . . . does not vest absolutely and unconditionally in the state . . . [T]he title held by the state is conditional and subject to divestment by the appearance of legitimate claimants.”).

³⁹ EPSTEIN ET AL., *supra* note 28, § 1.04[3].

⁴⁰ *Id.* In 1911, the U.S. Supreme Court first considered the constitutionality of an abandoned property statute that permitted the Massachusetts Attorney General to apply to the probate court for the value of savings deposits that had been dormant for a period of thirty years. See R. Perry Sentell, Jr., *Escheat, Unclaimed Property, and the Supreme Court*, 17 CASE W. RES. L. REV. 50, 59 (1965) (citing *Provident Inst. for Sav. v. Malone*, 221 U.S. 660 (1911)). The Court rejected the bank’s argument that to presume the funds in a dormant savings account had been abandoned, and then to subsequently confiscate these unclaimed funds, offended due process of law. *Provident Institution*, 221 U.S. at 665.

⁴¹ Kelly, *supra* note 24, at 1053 (noting that a combination of “diverse state statutes as well as . . . multiple states claiming the same intangible property” characterized the period leading up to the promulgation of the 1954 Disposition of Unclaimed Property Act).

⁴² See *infra supra* note 38.

⁴³ Millar & Coalson, *supra* note 38, at 516 (“Instead, title remains with the owner of the abandoned property, and the owner may reclaim the property from the state at any time. The state thus acts as a mere custodian or conservator for the owner.”).

attempts at legislative uniformity and concludes with unclaimed property law's recent shift toward the less noble and more pragmatic purpose of padding state coffers.

B. *An Attempt at Uniformity: The Uniform Disposition of Unclaimed Property Act*

The NCCUSL has promulgated four different model acts⁴⁴ that regulate the distribution of unclaimed property,⁴⁵ of which forty-four states and the District of Columbia have adopted at least one version.⁴⁶ The evolution of these acts has traced the developments in Supreme Court case law governing interstate escheat rules.⁴⁷ The section that follows provides background on three distinct attempts at uniformity, underscoring the NCCUSL's efforts to both accommodate developing trends in state statutory law and to preserve unclaimed property law's paramount purpose of reuniting an owner with her abandoned property.

In the face of widely divergent state abandoned property statutes and inconsistent Supreme Court case law,⁴⁸ the NCCUSL made its first attempt at

⁴⁴ It should be noted that the NCCUSL drafts and proposes model acts, but they do not become law until an individual state adopts them in part or in their entirety. *See About the ULC*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Mar. 10, 2012).

⁴⁵ Millar & Coalson, *supra* note 38, at 515.

⁴⁶ REID, *supra* note 5, at 6 ("There are still a handful of states, including Delaware, Kentucky, Massachusetts, New York, Ohio, and Texas, which have not adopted ANY form of these Uniform Acts."). According to two commentators, "Few states still follow either the 1954 or 1966 model acts. Most states currently base their unclaimed property laws on the Uniform Unclaimed Property Act of 1981 . . . but at least ten states have also adopted . . . the Uniform Unclaimed Property Act of 1995 . . ." Millar & Coalson, *supra* note 38, at 515–16.

⁴⁷ *See* UNIF. UNCLAIMED PROP. ACT (1995), Prefatory Note, 8C U.L.A. 87 (2003) ("The 1954 Act was drafted during a period of conflicting legislation among the various States and several Supreme Court decisions In 1965, these conflicts were resolved by the decision in *Texas v. New Jersey*, which established a set of priorities for claimant States [that] . . . were then adopted in the 1981 Act." (citation omitted)).

⁴⁸ *See* McThenia & Epstein, *supra* note 13, at 1440. *Compare* Conn. Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 551 (1948) (recognizing that the rights of other parties not represented in the case may be affected, but nevertheless concluding that "the ties thereby established between the companies and the State were without more sufficient to validate the jurisdiction here asserted by the Legislature"), *with* Standard Oil Co. v. New Jersey, 341 U.S. 428, 442 (1951) ("We think that stock certificates and undelivered dividends thereon may also be abandoned property subject to the disposition of the domiciliary state of the corporation when the whereabouts of the owners are unknown for such lengths of time, and under such circumstances, as permit the declaration of abandonment."). The Supreme Court in *Standard Oil* also held that more than one state escheating the same abandoned property could not comport with due process. This revelation led to what has been termed a "race of diligence" among the states. UNIF. UNCLAIMED PROP. ACT (1981), Prefatory Note, 8C U.L.A. 151 (2003).

uniformity with the 1954 Uniform Disposition of Unclaimed Property Act.⁴⁹ Fundamentally grounded in the derivative rights doctrine,⁵⁰ the Act's predominant purpose was to protect a true owner's interest in her missing property.⁵¹ Additionally, the commissioners—realizing the unlikelihood of an owner actually reclaiming her property after it had been presumed abandoned—were determined to craft a framework that was administratively simple,⁵² that relieved holders of abandoned property of the liability and responsibility incident to maintaining possession,⁵³ and that precluded these holders from reaping the financial benefits derived from the continued use of the property.⁵⁴

⁴⁹UNIF. DISPOSITION OF UNCLAIMED PROPERTY ACT, 8A U.L.A. 267 (1968). One commentator has provided the following description of the 1954 version of the Act:

[I]t is custodial in nature, making the states the custodians of unclaimed property on behalf of the true owners; . . . it is comprehensive, in that it attempted to encompass all forms of intangible property; it was intended to be a consumer protection law; and it created revenue enhancement for the states

REID, *supra* note 5, at 5–6.

⁵⁰See *S. Pac. Transp. Co. v. State*, 380 S.W.2d 123, 126 (Tex. Civ. App. 1964) (“[T]he State in escheating such claims did not acquire any better or greater right to enforce the claims than was possessed by the former owners.”); see also Millar & Coalson, *supra* note 38, at 516 (“Th[e] [derivative rights] doctrine provides that the right of a state to take custody of unclaimed property is derived from the rights of the owner of the property. Accordingly, the state ‘stands in the shoes’ of the missing owner and acts on the owner’s behalf.”).

⁵¹1954 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SIXTY-THIRD YEAR 137 (1954) [hereinafter 1954 HANDBOOK] (“The Uniform Disposition of Unclaimed Property Act, if adopted by the states, will serve to protect the interests of owners”); see also Ray H. Garrison, *Escheats, Abandoned Property Acts, and Their Revenue Aspects*, 35 KY. L.J. 302, 306 (1947) (“The objective sought in laws giving the state possession of property presumed abandoned is primarily to conserve property for owners who have become disassociated with possession and to protect it from risks attendant with long neglect.”). It should also be noted that in addition to the traditional justification behind escheat law, the Act also sought to “end[] jurisdictional conflict” between claimants of intangible property. See Kelly, *supra* note 24, at 1054–55; see also Clarold L. Britton, Comment, *Escheat—Abandoned Property—Full Faith and Credit as a Bar to Multiple Escheat of Intangibles*, 59 MICH. L. REV. 756, 779 (1961) (noting that the Act had two purposes in mind, one of which was “the prevention of multiple escheat”).

⁵²1954 HANDBOOK, *supra* note 51, at 137 (observing that the Act would serve to not only protect a true owner’s interest in the property, but also “make[] possible a substantial simplification of procedure,” and would “preclude multiple liability”).

⁵³*Id.* (observing that the Act would serve “to relieve the holders from annoyance, expense and liability”).

⁵⁴R. PERRY SENTELL, JR., *A STUDY OF ESCHEAT AND UNCLAIMED PROPERTY STATUTES* 74 (1962) (quoting 1954 HANDBOOK, *supra* note 51, at 137) (indicating that the Act will “give the adopting state the use of some considerable sums of money that otherwise would, in effect, become a windfall to the holders thereof”). The fact that the original Act affords the state the financial benefit of escheat of unclaimed property, however, cannot be viewed

Specifically, the 1954 act attempted to harmonize the existing law by establishing a uniform dormancy period of seven years for most types of intangible property.⁵⁵ The Act also codified the Supreme Court's decision in *Connecticut Mutual Life Insurance Co. v. Moore*,⁵⁶ which based the ability to make a claim for abandoned property upon whether or not the court had personal jurisdiction over the debtor.⁵⁷ Therefore, a state could make a claim for abandoned property under one of two scenarios: if the holder's domicile was within the state or if the holder's last known address was within the state and the holder conducted its business there.⁵⁸ By adopting the jurisdictional rule from *Connecticut Mutual Life Insurance*, the Act attempted to "protect a holder of intangible property from the dangers of multiple escheat."⁵⁹

The impetus for two subsequent revisions to the 1954 Act was the need to keep pace with developing Supreme Court case law.⁶⁰ In an attempt to codify the Court's decision in *Texas v. New Jersey*⁶¹ and to address the shortcomings of the 1954 and 1966 versions of the Act, the NCCUSL drafted a major revision in 1981.⁶² Prior to its enactment, more and more states were realizing the revenue potential of their unclaimed property statutes; consequently, many attempted to step up enforcement.⁶³ Their efforts were frustrated by a general lack of compliance by holders of abandoned property.⁶⁴ This trend was attributable, in part, to confusion over the new dual-priority structure articulated

as a euphemism for revenue generation. See 1954 HANDBOOK, *supra* note 51, at 137. Indeed, the closest that the commissioners came to acknowledging revenue generation as a legitimate purpose of the legislation was in their general commentary on recent developments in state unclaimed property law. See UNIF. UNCLAIMED PROP. ACT (1981), Prefatory Note, 8C U.L.A. 153 (2003) (noting that states have increasingly been "using the 'windfall' unreturned funds as general fund receipts for the benefit of citizens of the state" and consequently, have "sought to enforce their unclaimed property laws with enhanced vigor").

⁵⁵ 1954 HANDBOOK, *supra* note 51, at 140 ("This period is used throughout the Uniform Act and is applied to all types of property subject to the Act.").

⁵⁶ 333 U.S. 541 (1948).

⁵⁷ McThenia & Epstein, *supra* note 13, at 1440.

⁵⁸ *Id.*

⁵⁹ Britton, *supra* note 51, at 784.

⁶⁰ See *Delaware v. New York*, 507 U.S. 490 (1993); *Pennsylvania v. New York*, 407 U.S. 206 (1972); *Texas v. New Jersey*, 379 U.S. 674 (1965). Part III.A of this Note will delve more deeply into the Supreme Court's dual-priority, interstate escheat framework as articulated in *Texas v. New Jersey*, and subsequently reaffirmed in *Pennsylvania v. New York* and *Delaware v. New York*. The purpose of introducing these cases within this section is limited to contextualizing the NCCUSL's substantive revisions to its model unclaimed property acts.

⁶¹ 379 U.S. 674 (1965). See *infra* Part III.A for a more detailed examination of the Court's dual-priority, interstate escheat framework.

⁶² UNIF. UNCLAIMED PROP. ACT (1981), Prefatory Note, 8C U.L.A. 153 (2003).

⁶³ *Id.*

⁶⁴ *Id.*

by the Court in *Texas*, as well as ineffective enforcement provisions within the 1954 and 1966 versions of the Act.⁶⁵

In addition to codifying the Supreme Court's decision in *Texas*, the revision made several other notable changes to the Act. Perhaps the most controversial change was the Act's introduction of a third-priority rule,⁶⁶ which provided that if either of the first two priority rules failed,⁶⁷ the state where the transaction that gave rise to the intangible property occurred was entitled to escheat the property.⁶⁸ Other notable changes within the 1981 Act included: encouraging cooperation between states in the sharing of information, expanding the definition of intangible property to include stock certificates, requiring holders in possession of an owner's last known address to maintain this record for a minimum of ten years, and reducing the dormancy period from seven to five years before property could escheat to the state.⁶⁹

The 1995 revisions to the Unclaimed Property Act, while predominantly motivated by the Supreme Court's decision in *Delaware v. New York*,

⁶⁵ *Id.* at 153–54.

⁶⁶ See UNIF. UNCLAIMED PROP. ACT § 3 (1981), 8C U.L.A. 189 (2003).

⁶⁷ See *infra* Part III.A for an extended discussion of the Supreme Court's dual-priority escheat framework.

⁶⁸ UNIF. UNCLAIMED PROP. ACT § 3 (1981), 8C U.L.A. 189 (2003). The relevant language of the third-priority rule is as follows:

[I]ntangible property is subject to the custody of this State as unclaimed property if the conditions raising a presumption of abandonment under Sections 2 and 5 through 16 are satisfied and:

.....

- (6) the transaction out of which the property arose occurred in this State, and
 - (i)(A) the last known address of the apparent owner or other person entitled to the property is unknown, or
 - (B) the last known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property, and
 - (ii) the holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property.

Id.

⁶⁹ UNIF. UNCLAIMED PROP. ACT (1981), Prefatory Note, 8C U.L.A. 156–57 (2003). The commissioners cited three main justifications for their decision to reduce dormancy periods from seven to five years for most types of intangible property: an increase in mobility of the population during the time between 1966 and 1981. *Id.* at 186. Second, the commissioners explicated that an examination of those states with shorter dormancy periods demonstrated that they were able to return a higher percentage of unclaimed property. *Id.* Finally, the high inflation rates at the time, according to the commissioners, “exact[] a severe penalty from one who holds money or its equivalent for extended periods; an inference of loss or abandonment may be drawn more quickly than in 1966 when the value of money was more stable.” *Id.* at 157.

introduced several important, albeit incremental, changes to the unclaimed property landscape.⁷⁰ The Court's decision in *Delaware* reaffirmed the dual-priority framework established by the Court in *Texas* and codified in the 1981 version of the Act, but it also clarified that the Court's priority rules could not be superseded by state statutory law⁷¹—a holding with substantial implications for the emerging third-priority rule.⁷² In addition to ensuring the continuing validity of *Texas*, the commentary to section two of the Act introduced a number of exceptions to the 1981 Act's general five-year presumption of abandonment.⁷³ Some exceptions continued the developing trend of shortening dormancy periods,⁷⁴ whereas others called upon the commissioners' experience in justifying the continuation of longer dormancy periods.⁷⁵

In the pursuit of increased uniformity among the several states, the model unclaimed property acts promulgated by the NCCUSL have attempted to accommodate the gradual liberalization in state escheat laws, while preserving unclaimed property law's central purpose of reuniting an owner with her abandoned property. Unclaimed property law has become increasingly "fiscally significant"⁷⁶ in the last several decades; however, neither the language nor commentary from the original 1954 Act suggests that revenue generation was within the contemplation of the NCCUSL. The section that follows presents the most recent developments in unclaimed property law, arguing that the aggressive techniques implemented by the majority of states during times of budgetary crisis constitute a perversion of the historic purpose of and traditional justification for unclaimed property law.

C. Recent Developments in State Enforcement of Unclaimed Property Statutes: A Vehicle for Aggressive Revenue Generation

As the previous sections have foreshadowed, the recent focus of state unclaimed property statutes has gravitated away from the efficient reunification

⁷⁰ See UNIF. UNCLAIMED PROP. ACT (1995), Prefatory Note, 8C U.L.A. 87, 88 (2003).

⁷¹ *Id.*

⁷² See *infra* Part III.B.

⁷³ UNIF. UNCLAIMED PROP. ACT § 2, Comment (1995), 8C U.L.A. 88, 104 (2003).

⁷⁴ *Id.* at 105 (referencing, for example, the one-year dormancy period for unclaimed wages due to the unlikelihood of finding the owner of a payroll check beyond a year, as well as the reduction in dormancy periods from five years to three for unpaid distributions from retirement accounts).

⁷⁵ *Id.* ("For instance, statistical evidence indicates that a period of 15 years continues to be appropriate in the case of travelers checks, and seven years in the case of personal money orders and money orders issued by express companies."). The Act also provided some additional measures to protect the true owners of unclaimed property, including revising the definition of a "holder" in order to prioritize the obligation of paying the owner regardless of whether or not that individual was the original debtor. REID, *supra* note 5, at 6. Additionally, the Act called for civil penalties on noncompliant holders. *Id.*

⁷⁶ Kelly, *supra* note 24, at 1048.

of an owner with her abandoned property, and toward the generation of non-controversial, tax-free revenue for the state. This section begins with two methods states have implemented to enhance the revenue-making potential of their unclaimed property statutes: reducing dormancy periods and expanding the definition of what constitutes intangible property. This section concludes with perhaps the most controversial development in state enforcement of unclaimed property law: the aggressive use of contingent fee auditors to investigate companies suspected of violating reporting requirements.

1. *Reduced Statutory Dormancy Periods*

One popular method that states have employed to enhance the revenue potential of their unclaimed property statutes is shortening the length of statutory dormancy periods.⁷⁷ Generally defined as the period of time after which a state takes custody of property presumed to be abandoned by its true owner,⁷⁸ dormancy periods—which at one time were as long as thirty years for some types of property⁷⁹—have undergone a drastic shortening in duration over the last decade.⁸⁰ Perhaps unsurprisingly, these reductions have become

⁷⁷ According to one well-reputed unclaimed property consulting firm, the number of jurisdictions reporting a five-year dormancy period for unclaimed property within the banking industry has decreased from thirty-six to thirty since 2003. Keane Unclaimed Property Team, *Dormancy Periods for Unclaimed Property Continue to Trend Downward*, KEANE INSIGHTS: UNCLAIMED PROP. ISSUES & NEWS (Feb. 1, 2012), <http://unclaimed-property.keaneco.com/dormancy-periods-for-unclaimed-property-continue-to-trend-downward>. By contrast, the number of jurisdictions reporting a three-year dormancy period has increased from twelve to twenty-two during the same period. *Id.* For unclaimed intangible property within the securities industry, the trend was even more pronounced. Since 2001, the jurisdictions operating under a five-year dormancy period decreased from thirty-six to twenty, whereas the number of jurisdictions reporting a three-year dormancy period increased from nine to twenty. *Id.*

⁷⁸ Hollis L. Hyans & Amy F. Nogid, *Honey, I Shrunk the Dormancy Periods!*, ST. TAX TODAY, Feb. 21, 2011, at 559, <http://www.mofo.com/files/Uploads/Images/110222-Dormancy-Periods.pdf>.

⁷⁹ See, e.g., *Provident Inst. for Sav. v. Malone*, 221 U.S. 660, 661 (1911) (“In 1907 the General Court of the Commonwealth of Massachusetts passed an act providing that deposits in savings banks which had remained inactive and unclaimed for thirty years . . . should be paid to the treasurer and receiver general.”).

⁸⁰ See, e.g., Stephen G. Harris & Phyllis J. Shambaugh, *Abbreviated Unclaimed Property Dormancy Periods*, 31 J. PAYMENT SYS. L. 52, 52 (2007), available at <http://www.jonesday.com/files/Publication/b50f787d-8cba-4b04-a291-da45d8d998f5/Presentation/PublicationAttachment/82a3ec45-0f65-48ed-b15d-e53666f8c302/~7159882.pdf> (“One method states use to speed up the unclaimed property windfall is to reduce dormancy periods.”); *id.* at 54 (“The trend among states is to shorten dormancy periods.”).

increasingly common since 2008,⁸¹ as most states that teetered on the brink of financial ruin became increasingly desperate for novel sources of revenue.⁸²

Although of growing popularity, this practice is not without controversy. When a state reduces the dormancy period for any type of unclaimed property, it receives a one-time, tax-free windfall of unclaimed property obligations.⁸³ The most obvious and oft-cited concern stemming from this practice is that the property in question, which has been presumed abandoned by the legislature, may not actually be abandoned by its true owner. This raises a host of constitutional issues, not the least of which is due process.⁸⁴ Furthermore, the

⁸¹Some states that have recently reduced their dormancy periods include New York, S.B. 2811, 234th Leg., Reg. Sess. (N.Y. 2011) (lowering dormancy periods from five years to three years for money and securities held in escrow, amounts due on deposits held by banks, and interest or other increments held by a banking institution in a bond or mortgage transferred by it); Michigan, H.B. 6421, 95th Leg., Reg. Sess. (Mich. 2010) (reducing general dormancy period from five years to three years, money orders from seven years to three years, gift cards from five years to three years, and funds held or owing under any life or endowment insurance policy or annuity contract that has matured or terminated from five years to three years, among others); Indiana, H.B. 1083, 116th Gen. Assem., 2d Reg. Sess. (Ind. 2010) (reducing dormancy periods from five years to three years for various property types including, for example, a demand, savings, or matured time deposit); New Jersey, N.J. Assem. B. 3002, 214th Leg., 1st Ann. Sess. (N.J. 2010) (reducing dormancy periods for travelers checks from fifteen to three years, for money orders from seven to three years, and creating a two-year presumption of abandonment for stored value cards); and Arizona, S.B. 1003, 49th Leg., 4th Spec. Sess. (Ariz. 2009) (reducing dormancy periods from fifteen to three years for travelers checks, from seven to three years for money orders, from three to two years for stock or equity interests, and from five to three years for demand, savings, or time deposits).

⁸²See, e.g., Nicholas Johnson et al., *Tax Measures Help Balance State Budgets: A Common and Reasonable Response to Shortfalls*, CTR. ON BUDGET & POLICY PRIORITIES, <http://www.cbpp.org/files/5-13-09sfp.pdf> (last updated July 9, 2009) (“Were states to rely on spending cuts alone to close their gaps, it would require unprecedented reductions in such essential public services as health care, education, and assistance for the elderly and disabled.”).

⁸³EPSTEIN ET AL., *supra* note 28, § 1.06[3][c].

⁸⁴For an insightful commentary on the recent reductions in unclaimed property dormancy periods, see Hyans & Nogid, *supra* note 78, at 561 (“[W]ith the short periods in vogue . . . there is scant basis to conclude that the property actually has been abandoned, and escheat statutes may run afoul of constitutional protections to property owners and holders.”). These commentators have also argued that because “the fundamental underlying purpose of the unclaimed property act is to reunite owners with their property, a legislature’s revenue-raising goal is inherently suspect and *should* be subject to heightened scrutiny.” *Id.* at 563.

While repeatedly holding that custodial escheat statutes are constitutional, the Supreme Court has at least impliedly suggested that there is an interrelationship between the length of the dormancy period and the constitutionality of this legislative presumption. *See Andersen Nat’l Bank v. Lockett*, 321 U.S. 233, 241 (1944) (“[I]t is within the constitutional power of the state to protect the interests of depositors from the risks which attend long neglected accounts, by taking them into custody when they have been inactive so long as to be

practice prioritizes a state's need for revenue above the general property interests of its constituents. To the extent states persist in shrinking their dormancy periods, they continue to subvert the doctrine's intended purpose of protecting a true owner's property interests.

2. *Expanding the Definition of Unclaimed Property*

In addition to shortening dormancy periods, states have pursued greater revenue by expanding their unclaimed property statutes to include new types of intangible property. Recently, state unclaimed property laws have subsumed such intangible property as unidentified remittances, unapplied cash, security deposits, refunds, credit memos, leases, royalty payments, write-offs to miscellaneous income, unredeemed gift certificates, and the unredeemed portions of stored-value cards.⁸⁵ This section concentrates on two of the more recent and controversial types of intangible property that states have targeted: uninvoiced receivables and promotional incentives.⁸⁶

Uninvoiced receivables constitute “account balances [] generated when a company received goods but either the company does not receive a corresponding invoice that can be associated with those goods or the company receives an invoice but the amount of goods actually received exceeds the amount stated on the invoice.”⁸⁷ These types of balances are controversial because they do not represent fixed liabilities or “property” owed to the holder's

presumptively abandoned”); *see also* *Provident Inst. for Sav. in Bos. v. Malone*, 221 U.S. 660, 664 (1911) (“[I]f the statute had provided that the money should be paid over to the receiver-general if the owner, *after a short absence*, could not be found, or if the account remained inactive for a brief period, a very different question would be presented” (emphasis added)); *Cunnius v. Reading Sch. Dist.*, 198 U.S. 458, 476–77 (1905) (“[T]he creation by a state law of an arbitrary and unreasonable presumption of death resulting from absence *for a brief period*, would be a want of due process of law” (emphasis added)).

At least one district court has boldly held that a statute reducing the dormancy period from fifteen years to seven years for travelers checks violates the Due Process Clause. *See Am. Express Travel Related Servs. Co. v. Hollenbach*, 630 F. Supp. 2d 757, 764 (E.D. Ky. 2009), *vacated sub nom. Am. Express Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011) (“Because it is clear that the state's objective was to raise revenue rather than to reunite citizens with lost property, [the statute] does not satisfy rational basis review. Shortening the presumptive abandonment period from fifteen to seven years is not ‘rationally related’ to raising revenue for the state”).

⁸⁵ Robert Peters, *Treasury Alliance Group Webinar Series—Unclaimed Property: The Changing Landscape*, DUFF & PHELPS (Mar. 12, 2010), <http://www.duffandphelps.com/expertise/webcasts/pages/webcastDetail.aspx?itemid=42&list=Webcasts>.

⁸⁶ Ethan D. Millar & Kendall L. Houghton, *Unclaimed Property: The Solution to State Budget Woes?*, ST. TAX NOTES 723, 727 (2011), *available at* <http://www.alston.com/files/Publication/c2122782-42d6-474b-a752-284758d0d39b/Presentation/PublicationAttachment/6a809fd2-699c-44ff-906a-290da2da82d2/UP%20Trends%20STN%20Article.pdf>.

⁸⁷ *Id.*

vendors,⁸⁸ and they have become so commonplace in commercial transactions that requiring a business to escheat these obligations invariably increases the costs of doing business.⁸⁹ Put simply, uninvoiced receivables are not the type of obligations in need of protection by the state. As of 2009, only thirteen states exempted business-to-business transactions⁹⁰ from their unclaimed property statutes.⁹¹

Promotional incentives are a second type of intangible property that state unclaimed property statutes have subsumed. The most common type of promotional incentive is uncashed rebate checks—commonly referred to as “slippage”—the outstanding value of which has been estimated in the hundreds of millions of dollars nationwide.⁹² Because of the continuing popularity of these incentives, there is incredible revenue to be realized by targeting companies that issue these incentives.⁹³

⁸⁸ *Id.*

⁸⁹ See JANA S. LESLIE, COUNCIL ON STATE TAXATION, THE BEST AND WORST OF STATE UNCLAIMED PROPERTY LAWS: SCORECARD ON STATE UNCLAIMED PROPERTY STATUTES: THE HOLDER’S PERSPECTIVE 4 (Jan. 2009), www.cost.org/WorkArea/DownloadAsset.aspx?id=71960.

⁹⁰ Uninvoiced receivables, it should be noted, are a subset of the common business-to-business exemption, which frequently encompasses accounts payable, accounts receivable, or other types of inter-company credits. The general principle underlying the business-to-business exemption is that the volume of business transactions between companies frequently leads to accounting over- and under-payment—transactions that appear to produce intangible property obligations, but in reality are merely inter-company credits and debits that will be worked out in the future. See REID, *supra* note 5, at 74. Therefore, it should not be within the realm of unclaimed property statutes to “clean up the financial dealings of corporations and their business associates.” *Id.*

⁹¹ *Id.* at 75. Notably, in July 2010, Delaware Governor Jack Markell was applauded for signing Senate Bill 272 into law, which exempted uninvoiced payables from the state’s definition of unclaimed property. See, e.g., Michelle Andre, *Delaware: Unclaimed Property Legislation Is Enacted*, KPMG TAX NEWS FLASH—UNITED STATES (Aug. 2, 2010), <http://www.us.kpmg.com/microsite/taxnewsflash/2010/Aug/10351.pdf>. Although this change represented a significant update to Delaware’s unclaimed property statute, it certainly bucked the current trend of expanding the definition of unclaimed property to include uninvoiced receivables. See, e.g., Millar & Houghton, *supra* note 86, at 727 (“Although uninvoiced payables are no longer an issue in Delaware, other states have now begun to assert that uninvoiced payables must be reported as unclaimed property.”).

⁹² Brian Grow, *The Great Rebate Runaround*, BLOOMBERG BUSINESSWEEK (Nov. 22, 2005), <http://www.businessweek.com/stories/2005-11-22/the-great-rebate-runaround>; Millar & Houghton, *supra* note 86, at 727.

⁹³ For example, in June 2012, Staples, Inc. agreed to pay \$8.9 million to settle a dispute with the state of Delaware stemming from a 2005 unclaimed property audit. Randall Chase, *Staples Pays \$8.9M to Settle Dispute with Delaware*, YAHOO! FIN. (Sept. 14, 2012), <http://finance.yahoo.com/news/staples-pays-8-9m-settle-192209466.html>. The settlement decision was driven, at least in part, by the Delaware Chancery Court’s rejection of Staples’ contention that uncashed rebates are not unclaimed property under the Delaware statute. See *Staples, Inc. v. Cook*, 35 A.3d 421, 426 (Del. Ch. 2012) (holding that a rebate check was

In the uncashed rebate check arena, the state of Iowa has become a battleground between states that seek remittance of these promotional incentive obligations and the companies that initially issue the rebate checks. Ongoing litigation, originally filed in 2006, carries substantial future implications for companies that issue promotional incentives.⁹⁴ The Treasurer of the State of Iowa, following an audit conducted by a third-party company,⁹⁵ initiated suit against Young America Corporation—one of the largest rebate fulfillment companies—and several of its high-profile clients, including Walgreens, T-Mobile, and Sprint.⁹⁶ The suit was joined by forty-five other states which collectively sought over \$120 million in damages⁹⁷ from Young America and its clients for failing to report and remit the proceeds of uncashed rebate checks, in contravention of state unclaimed property laws.⁹⁸ Defendants Walgreens, T-Mobile, and Sprint sought dismissal of the suit on the grounds that because they were not in possession of the unclaimed rebates, they could not be considered “holders” under their states’ unclaimed property statutes.⁹⁹ The Iowa district court denied the motion, concluding that the “holder” of unclaimed property is the company that bears the initial obligation, not the rebate fulfillment company or other third party, even when this third party retains the unclaimed funds in question.¹⁰⁰ Therefore, the failure of Young America Corporation or any other rebate fulfillment company to report and remit the unclaimed property of which

unclaimed property subject to escheat because it is “a quintessential example of a bill of exchange and thus a specifically enumerated item under the Escheat Statute”).

⁹⁴ See Lee A. Zoeller et al., *Two Recent Court Decisions Add Burdens and Create Uncertainties Regarding Compliance with Unclaimed Property Laws*, REED SMITH (Jan. 12, 2009), http://www.reedsmith.com/files/Publication/cf1449fb-d757-4888-be93-3f20ff9252ad/Presentation/PublicationAttachment/218584b8-d6ba-4322-80d7-915b7af11c29/Two_Recent_Court_Decisions_Add_Burdens_and_Create_Uncertainties.pdf (citing Order, Fitzgerald v. Young Am. Corp., No. CV 6030 (Iowa Dist. Ct. for Polk Cnty., Jan. 5, 2009)). The issues within the case were: “[W]hether uncashed rebate checks are reportable under Iowa’s unclaimed property laws and, if so, who is the proper party to report them to the State Treasurer.” Press Release, Iowa Dep’t of Justice, Office of the Att’y Gen., State Treasurer and Attorney General Settle with Sprint over Iowans’ Uncashed Rebate Checks (Feb. 12, 2010), http://www.state.ia.us/government/ag/latest_news/releases/feb_2010/Sprint_rebate_checks.html.

⁹⁵ For a more detailed discussion of third-party, contingent-fee audits, see *infra* Part II.C.3.

⁹⁶ Robert Peters, *Client Alert: Uncashed Rebate Checks Are Latest Controversy Between the States and Corporate America*, DUFF & PHELPS, <http://www.duffandphelps.com/expertise/publications/pages/ArticleDetail.aspx?itemid=25&list=Articles> (last visited Mar. 10, 2012).

⁹⁷ *Id.*

⁹⁸ *Id.* Judith Welcom, *Unclaimed Property: A Panacea for State Budget Woes?*, SIDLEY AUSTIN: UNCLAIMED PROP. UPDATE (Apr. 26, 2010), http://www.sidley.com/unclaimed_property_update_042610/.

⁹⁹ Peters, *supra* note 96.

¹⁰⁰ Zoeller, *supra* note 94.

it is in possession does not absolve the company issuing the initial obligation from liability.¹⁰¹

Although the *Young America* case involves a specific interpretation of Iowa law, it carries national implications as Iowa's unclaimed property statute is similar or identical to most other states and the District of Columbia.¹⁰² Furthermore, the case evidences the willingness of state regulators to collectively pressure holders of unclaimed property to report and remit new categories of intangible property that have not been of interest in the past.¹⁰³

3. *Aggressive Multi-state Use of Contingent-Fee Auditors*

The final and perhaps most significant development in unclaimed property law is the rise of multi-state audits and the use of contingent-fee auditors in the collection of unreported intangible property obligations. These heavily revenue-focused tactics simply cannot be reconciled with unclaimed property law's original purpose of reuniting owner and abandoned intangible property. This section begins with an overview of a company's duty to report and then presents two controversial methods that contingent-fee auditors utilize to maximize revenue for the state employing them: lengthy "look-back" periods and estimation of liability that antedates a holder's business records.

a. *The duty to report*

Unclaimed property reporting is mandatory in all fifty states and the District of Columbia.¹⁰⁴ Prior to submitting an unclaimed property report, a company must first complete its due diligence by attempting to locate the property's true owner.¹⁰⁵ If these attempts are unsuccessful and the statutory dormancy period has lapsed for the type of property in question, the company holder must initiate the reporting process and turn over the property to the proper jurisdiction.¹⁰⁶ There are a number of steps a company must take in order to ensure compliance with a state's reporting requirements, beginning with the basic questions of what does it owe and to whom does it need to be paid?¹⁰⁷ In answering these questions, a company must typically identify the type of intangible property that it is holding, determine in which jurisdiction it has an obligation to report,

¹⁰¹ *Id.*

¹⁰² Peters, *supra* note 96.

¹⁰³ Welcom, *supra* note 98. As of February 2010, Sprint agreed to a \$22 million settlement with Iowa and thirty-six additional states. See Press Release, Iowa Dep't of Justice, *supra* note 94.

¹⁰⁴ REID, *supra* note 5, at 15.

¹⁰⁵ *Id.* at 12.

¹⁰⁶ *Id.* ("If a holder cannot find the true owner, the states require that holder to remit the property to the state for safekeeping.")

¹⁰⁷ *Id.* at 23.

confirm if the respective state's statute provides an exemption for any of the types of intangible property the company is holding, prepare and file the unclaimed property report, and remit the funds to the appropriate reporting agency.¹⁰⁸

Notwithstanding the informational and practical resources available to companies, as well as a more general awareness of the heightened enforcement of reporting requirements, only about ten to twenty percent of companies in the United States fully comply with state unclaimed property requirements.¹⁰⁹ Consequently, many major companies each year find themselves the subject of a multi-state audit, the implications of which are discussed in greater detail below.

b. Multi-State Audits, Contingent-Fee Auditors, and the Relentless Pursuit of Revenue

The rise of contingent-fee auditing represents perhaps the most significant threat to holders of unclaimed property obligations and has been the conduit through which states have brought these companies into compliance with the law. As of 2009, more than forty states have employed third-party, contingent-fee auditors to investigate companies believed to be noncompliant with state reporting requirements.¹¹⁰ A contingent-fee auditor is typically a company on retainer by an individual state that is compensated on a contingent-fee basis—usually a percentage of the unclaimed property obligations that it uncovers through its audit.¹¹¹ The average percentage rate of compensation for these auditors is twelve percent of the unclaimed property obligations discovered.¹¹² The contingent-fee nature of this arrangement provides auditors with a direct incentive to resolve reporting disputes in favor of the states that employ them¹¹³ and to push the envelope in discovering “liabilities that go well beyond traditional legal interpretations.”¹¹⁴

¹⁰⁸ *Id.* at 16–22, 34.

¹⁰⁹ *Id.* at 3 (as of 2008).

¹¹⁰ Robert S. Peters & Matthew J. Beintum, *Going Fishing: State Budget Deficits Drive an Expanding Net of Unclaimed Property Collections*, J. MULTISTATE TAX’N & INCENTIVES, July 2009, at 26, 29.

¹¹¹ Scott D. Smith, *Loyalty Reward Programs Raise a Host of Questions Under State Unclaimed Property Laws*, HOSPITALITAS NEWSL. (July 1, 2011), <http://www.bakerdonelson.com/loyalty-reward-programs-raise-a-host-of-questions-under-state-unclaimed-property-laws-06-30-2011/>.

¹¹² REID, *supra* note 5, at 46.

¹¹³ Millar & Houghton, *supra* note 86, at 723; *see also* REID, *supra* note 5, at 47 (“Holders and consultants . . . who have made a commitment to represent *only* holders feel that there is an inherent conflict of interest in hiring a company that has a financial stake in the outcome of an audit . . .”).

¹¹⁴ Peters & Beintum, *supra* note 110, at 29. Peters and Beintum reference the critics of contingent-fee auditing who “contend that states have overextended the definition of what

These audits typically begin with a single company's records within a single state. With larger corporations, however, they can quickly expand to an audit of a single company on behalf of as many as thirty to forty states simultaneously.¹¹⁵ Multi-state audits create enormous financial incentives for the auditors, who receive their fee for unclaimed property obligations discovered on behalf of *each* state involved in the audit,¹¹⁶ and present substantial difficulties for companies in appealing the adverse determinations of these auditors due to the complexities of such a massive audit.¹¹⁷ Furthermore, in addition to seizing the property discovered during an audit, state unclaimed property statutes frequently levy substantial penalties and interests against a company found to be harboring unreported unclaimed property—amounts that can far exceed the actual value of the property recovered.¹¹⁸

One of the most significant issues that arises in any single- or multi-state audit is that a corporate holder typically does not maintain records of its intangible property obligations as far back as an individual state's "look-back" period. Most states have a look-back period of ten years, which does not include the applicable dormancy period—usually ranging from three to five years.¹¹⁹ This effectively ensures an audit period of thirteen to fifteen years¹²⁰—a time

constitutes 'unclaimed property' and have placed an undue burden on business to meet compliance requirements." *Id.* at 29–30.

¹¹⁵ Millar & Houghton, *supra* note 86, at 723.

¹¹⁶ Marc Musyl et al., *Unclaimed Property Audits: No Laughing Matter*, CORP. & SEC. CLIENT ADVISORY 2 (Aug. 1, 2011), http://www.gtlaw.com/portalresource/lookup/wosid/contentpilot-core-401-18819/pdfCopy.name=/GTca_Unclaimed%20Property%20Audits_Aug2011.pdf?view=attachment.

¹¹⁷ Millar & Houghton, *supra* note 86, at 723.

¹¹⁸ Musyl et al., *supra* note 116, at 1.

¹¹⁹ Smith, *supra* note 111, at 2.

¹²⁰ *Id.*; see also Millar & Houghton, *supra* note 86, at 724. Delaware, by contrast, has historically looked back as far as 1981 when it initiates an unclaimed property audit. *Id.* Although legislation has been introduced to shorten the period that the state can look back during an unclaimed property audit from 1981 to 1995, perhaps unsurprisingly, House Bill 229 has yet to emerge from Delaware's House Judiciary Committee. See *Delaware Unclaimed Property Proposed Legislative Amendments*, MOODY, FAMIGLIETTI & ANDRONICO ALERTS & INSIGHTS (Aug. 2011), <http://www.mfa-cpa.com/alerts-and-insights/alerts/2011/delaware-unclaimed-property-proposed-legislative-amendments>.

On July 11, 2012, Senate Bill 258 was signed into law, establishing a new voluntary disclosure program to be administered by the Delaware Secretary of State. See Keane Unclaimed Property Team, *Delaware Passes SB 258: Establishes Voluntary Disclosure Program*, KEANE'S UNCLAIMED PROP. BLOG (July 23, 2012), <http://unclaimed-property.keaneco.com/delaware-voluntary-disclosure-program>. Under this disclosure program, companies indicating their intent to come forward and enter into a Voluntary Disclosure Agreement (VDA) with the state of Delaware before June 30, 2014 will only be required to report all outstanding unclaimed property obligations back to either 1996 or 1993, depending on how quickly the company manifests its intent to comply with the program. *Id.* Prior to Senate Bill 258, the state of Delaware offered reduced exposure to

period that substantially exceeds the average seven-year period that a company maintains its records.¹²¹ The effect of these extensive look-back periods is an added financial burden upon companies to keep their business records for nearly double the length of time they would otherwise choose to maintain this information. Furthermore, the lengthy period almost certainly ensures that an auditor will be authorized to perform an estimation for the years that antedate a company's records.¹²² It is a controversial practice and a subject to which this section now turns.

Suppose that a state's look-back period is ten years. Suppose further that a company within that state's jurisdiction is the unfortunate subject of an unclaimed property audit. Upon investigating the company's records—which, pursuant to company policy, are only maintained for a period of five years—the state's auditors discover substantial intangible property obligations, which (1) became abandoned after a dormancy period of three years, and (2) were never reported or remitted to the state. The operative question, and source of the underlying controversy, is how would these auditors determine the intangible property obligations from year six (the first year after the expiration of the company's business records) through year thirteen (the ten-year look-back period plus three-year dormancy period)?

The answer to the question posed above is that the liabilities for years six through thirteen would be determined using estimation and extrapolation.¹²³ Typically, the state will calculate the corporate holder's actual unclaimed property liability for the years for which it has accurate records, take the amount of the liability and divide it by the holder's total revenue over the same period, and then apply this "error rate" to the years for which the holder no longer maintained adequate business records.¹²⁴ This process has been met with substantial criticism for two predominant reasons: first, because the period used to estimate a holder's obligation represents a small and potentially misleading sample of a company's actual unclaimed property obligations, extrapolating across a greater time period may not accurately reflect a corporate holder's actual financial obligation.¹²⁵ Second, and more relevant to this Note, is that

companies that agreed to voluntarily disclose their outstanding unclaimed property liability by restricting the look-back period to 1991—as opposed to 1981 for companies that did not avail themselves of the program. *Id.* While a step in the right direction, Delaware's reforms are indeed a very small step. A company selected for an audit by the state of Delaware—as opposed to one that voluntarily complies with Delaware's new disclosure program—is still required to report unclaimed property obligations back to 1981 under the state's traditional rules. *See id.* Furthermore, a company that avails itself of Delaware's disclosure program is still subject to liability for a bare minimum of sixteen years—substantially longer than the more common ten-year period in most other states. Smith, *supra* note 111, at 2.

¹²¹ Millar & Houghton, *supra* note 86, at 724.

¹²² *Id.*

¹²³ Peters & Beintum, *supra* note 110, at 33.

¹²⁴ Millar & Houghton, *supra* note 86, at 723–24.

¹²⁵ Peters & Beintum, *supra* note 110, at 33.

this “estimated” unclaimed property is de facto revenue for the state to which it escheats, as there are no actual owners who could conceivably step forward in the future to claim the abandoned property.¹²⁶ Furthermore, because the revenue is derived from estimation rather than from business records containing actual owners with discernible last known addresses, the state of the holder’s corporate domicile will take the entirety of these estimated unclaimed property obligations under the Supreme Court’s secondary priority rule.¹²⁷ In the case of most major American corporate entities, the state of corporate domicile receiving the majority of this financial windfall is Delaware.

D. Conclusion

Unclaimed property law, originally conceived as a means of facilitating the reunification of a true owner and her abandoned property, has become an incredibly efficient vehicle for generating tax-free revenue during a time of budgetary crises. More recent developments—including shortening dormancy periods, expanding definitions of unclaimed property, and aggressively utilizing contingent-fee auditors—have led to revenue generation that was never contemplated by the NCCUSL when it promulgated the original Uniform Disposition of Unclaimed Property Act in 1954. Yet, for all of the fiscal benefits conferred on the states, these advances have also subverted unclaimed property law’s purpose of ensuring that citizens have a central repository where their misplaced property would be safely held until reclaimed.

The previous section focused on developments in state law governing unclaimed property indisputably within its jurisdiction. The section that follows turns to the Supreme Court’s current interstate escheat framework, which governs the situation where multiple states make concomitant claims to the same intangible property. The current framework, when combined with the multitude of revenue-based developments at the state level, has led the state of Delaware—as the state in which most American companies incorporate—to inequitably reap exorbitant financial benefits.

III. THE SUPREME COURT’S DUAL-PRIORITY FRAMEWORK AND THE CONTROVERSIAL EMERGENCE OF THE “THIRD-PRIORITY” RULE

Part II of this Note—in the interest of introducing the concept of custodial escheat in its simplest form—presupposes that the state to which unclaimed

¹²⁶ See *id.* at 29, 33; Millar & Houghton, *supra* note 86, at 724.

¹²⁷ Peters & Beintum, *supra* note 110, at 29; Millar & Houghton, *supra* note 86, at 724 (“As the state of domicile of the largest percentage of incorporated and unincorporated business entities, Delaware is the state that most often benefits from these estimations.”). For a more detailed discussion of the Supreme Court’s interstate escheat rules, see *infra* Part III.A.

intangible property has escheated is the sole potential recipient of the benefit of this property. Because intangible property is not physical property that can be pinpointed to a specific location,¹²⁸ often a single state cannot claim the sole right to escheat the property in question.¹²⁹ This unique characteristic—when combined with the Supreme Court’s holding in *Standard Oil Co. v. New Jersey* that more than one state cannot escheat the same abandoned property¹³⁰—has led to competition among multiple states to gain the right to escheat the same intangible property.

In 1965, the Supreme Court—acting as a court of original jurisdiction¹³¹—attempted to create a uniform and easily administrable solution¹³² to these conflicts by crafting a dual-priority, interstate escheat framework that governed which state could take custody of abandoned intangible property when multiple states made legally cognizable claims.¹³³ This framework has remained binding precedent for forty-eight years; however, in the last quarter century, notwithstanding the Supreme Court’s admonitions in *Texas v. New Jersey* and subsequently in *Delaware v. New York*,¹³⁴ a majority of states have carved out an exception to the dual priority framework¹³⁵: a so-called “third-priority” rule, which empowers the state where the transaction that gave rise to the intangible property occurred to take custody if both the primary or secondary priority rules fail.¹³⁶ These statutes—especially deemed owner address provisions¹³⁷—are of

¹²⁸ See *supra* notes 9–11 and accompanying text.

¹²⁹ See *Delaware v. New York*, 507 U.S. 490, 497–98 (1993) (“No serious controversy can arise between States seeking to escheat ‘tangible property, real or personal’ On the other hand, intangible property ‘is not physical matter which can be located on a map,’ and frequently no single State can claim an uncontested right to escheat such property.” (internal citations omitted)).

¹³⁰ See *supra* note 48 and accompanying text.

¹³¹ U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction.”).

¹³² See *Texas v. New Jersey*, 379 U.S. 674, 683 (1965) (“[T]he issue here is not controlled by statutory or constitutional provisions or by past decisions, nor is it entirely one of logic. It is fundamentally a question of ease of administration and of equity.”).

¹³³ *Id.* at 677.

¹³⁴ *Delaware*, 507 U.S. at 500 (“[A]nd no State may supersede [these priority rules] by purporting to prescribe a different priority under state law.”).

¹³⁵ Ethan D. Millar & John L. Coalson, Jr., *Some States Escheating Unredeemed Gift Cards Ignore Federal Laws*, 56 ST. TAX NOTES 381, 381 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612205.

¹³⁶ *Id.* at 381 n.2.

¹³⁷ *Id.* at 381 (“That provision . . . generally states that if the holder of an unredeemed gift card does not have a record of the card owner’s last known address and the card was sold in that state, that address is *presumed* to be the address of the state treasurer or other state official.”). For a thoughtful argument that stored value cards should be exempted from state escheat laws, see generally Sean M. Diamond, Note, *Unwrapping Escheat: Unclaimed Property Laws and Gift Cards*, 60 EMORY L.J. 971 (2011).

considerable utility to states facing budget crises and represent a more equitable method of appropriating unclaimed property receipts; yet, they raise difficult questions about their constitutional validity.

Section A begins by introducing and contextualizing the current dual-priority escheat framework articulated in *Texas v. New Jersey*. Section B provides a brief introduction of the third-priority rule and its precipitous emergence within the abandoned property landscape. Finally, section C takes a critical look at the arguments for and against the constitutionality of this rule, ultimately concluding that the third-priority rule, in its traditional form, is preempted by Supreme Court case law. Consequently, because the states are unable to circumvent the Court's framework, any attempts to rework the current dual-priority structure must come from Congress.

A. *Texas v. New Jersey: The Birth of Interstate Escheat Priority Rules*

This section introduces the current dual-priority escheat framework as articulated by the Supreme Court in its 1965 opinion in *Texas v. New Jersey*.¹³⁸ Although the 1954 Uniform Disposition of Unclaimed Property Act endeavored to end conflicts between states asserting concomitant claims to the same intangible property,¹³⁹ by 1961 the Act had only been adopted in twelve states¹⁴⁰ and was largely ineffectual at ending the rash of interstate litigation over the rights to unclaimed intangible property.¹⁴¹ Four years later, the Supreme Court concluded that the time had come for a bright-line set of priority rules¹⁴² in order to bring stability to an unsettled area of the law.

In *Texas v. New Jersey*, the Supreme Court considered an action for an injunction and a declaration of rights brought by the state of Texas against New Jersey, Pennsylvania, and the Sun Oil Company.¹⁴³ The action was brought for the purpose of settling a controversy over which of these three states was legally entitled to take custody of various small debts totaling \$26,461.65 that Sun Oil Company owed to 1,730 creditors who had not come forward to claim their

¹³⁸ 379 U.S. 674 (1965).

¹³⁹ See *supra* Part II.B.

¹⁴⁰ See 1954 HANDBOOK, *supra* note 51 (noting that by 1961, the 1954 Act had been adopted in Arizona, California, Florida, Idaho, Illinois, Montana, New Mexico, Oregon, Utah, Virginia, Washington, and West Virginia); see also Kelly, *supra* note 24, at 1055.

¹⁴¹ Kelly, *supra* note 24, at 1054–55.

¹⁴² See *Texas*, 379 U.S. at 677 (“Since the States separately are without constitutional power to provide a rule to settle this interstate controversy and since there is no applicable federal statute, it becomes our responsibility . . . to adopt a rule which will settle the question of which State will be allowed to escheat this intangible property.”); see also Kelly, *supra* note 24, at 1056.

¹⁴³ *Texas*, 379 U.S. at 675. The state of Florida was also permitted to intervene because it claimed the right to escheat the portion of the proceeds that was attributable to parties whose last known address was within Florida. *Id.* at 677.

property for periods of time ranging from seven to forty years.¹⁴⁴ Texas asserted its right to the proceeds because the debts were either found on the books of Sun Oil's two Texas offices or concerned individuals whose last known addresses were in the state of Texas.¹⁴⁵ New Jersey claimed the right to escheat because Sun Oil was incorporated therein.¹⁴⁶ Pennsylvania argued that because Sun Oil's principal place of business was located within its borders, it should receive the benefit of custodial escheat.¹⁴⁷ Sun Oil, although not making any claims to the proceeds in question, was a party to the lawsuit in order to ensure that it would not be subject to multiple liability.¹⁴⁸ From each of these differing perspectives emerged four proposed rules¹⁴⁹ regarding which state should be given exclusive jurisdiction of intangible property in an interstate escheat dispute: the state with the most significant contacts,¹⁵⁰ the state of the corporate holder's domicile or incorporation,¹⁵¹ the state where the corporate holder's

¹⁴⁴ *Id.* at 675.

¹⁴⁵ *Id.* at 675-76.

¹⁴⁶ *Id.* at 676.

¹⁴⁷ *Id.*

¹⁴⁸ *Texas*, 379 U.S. at 676.

¹⁴⁹ Of the four proposed rules above, the Supreme Court dismissed the first three. *Id.* at 678-79. In rejecting Texas' argument that the minimum contacts test should determine the state to which the intangible property escheats, the Court was concerned that structuring a framework around such a nebulous test would result in "difficult, often quite subjective, decisions as to which State's claim to those pennies or dollars seems stronger than another's." *Id.* at 679. Next, the Court faulted New Jersey's proposed rule that the state of corporate domicile should control because "it would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself." *Id.* at 679-80. Finally, the Court found Pennsylvania's proposal that the principal place of business should control appealing, but ultimately concluded that each case "would raise . . . the sometimes difficult question of where a company's 'main office' or 'principal place of business' or whatever it might be designated is located." *Id.* at 680. Similar to its concerns with Texas' proposed rule, the Court feared that Pennsylvania's rule would lead to a propensity to engage in a case-by-case analysis of the particular facts of a dispute, as opposed to encouraging the uniform enforcement of a bright-line rule. *Id.*

¹⁵⁰ *Id.* at 678. For the Supreme Court's articulation of its minimum contacts standard, see *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that . . . the suit does not offend 'traditional notions of fair play and substantial justice.'").

¹⁵¹ *Texas*, 379 U.S. at 679.

principal place of business is located,¹⁵² or the state of the creditor's last known address as shown by the corporate holder's books and records.¹⁵³

Rejecting the Texas, New Jersey, and Pennsylvania proposals, the Supreme Court held "that each item of property in question in this case is subject to escheat only by the State of the last known address of the creditor, as shown by the debtor's books and records."¹⁵⁴ Underlying the Court's decision was the principle that the property ultimately belonged to the creditor, and therefore it should be subject to escheat by the state of the creditor's residence.¹⁵⁵

This first priority rule, however, did not address which state had the right to escheat the intangible property when an owner's last address was not found within a holder's books and records or when an owner's last known address was within a state that did not provide for escheat of the type of intangible property in question.¹⁵⁶ In either situation, the Court held that the intangible property would escheat to the state of the corporate debtor's domicile.¹⁵⁷ The state of the debtor's incorporation, however, could be divested of the property if another state came forward with "proof that the last known address of the creditor was within its borders."¹⁵⁸ Similarly, where the state of the owner's last known address did not provide for escheat of the property in question, escheat to the state of the corporate domicile was "subject to the right of the State of the last known address to recover it if and when its law made provision for escheat of such property."¹⁵⁹

To help illustrate the interplay between these priority rules, consider the following example.¹⁶⁰ Company *Y*, which is incorporated in the state of Delaware, has a retail center in Trenton, New Jersey. Employee *Z*, who works in this retail center, resides fourteen miles away in Newtown, Pennsylvania. Assume further that Employee *Z* has recently quit Company *Y* and has requested that his final paycheck be forwarded to his home address. In the meantime, Employee *Z*, without notifying Company *Y* of his new address, moves from Newtown; thereafter, the post office returns his final paycheck to Company *Y*. If Employee *Z* is not successfully notified or does not come

¹⁵² *Id.* at 680. For the Supreme Court's articulation of its current principal place of business standard, see *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010) ("We conclude that 'principal place of business' is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's 'nerve center.'").

¹⁵³ *Texas*, 379 U.S. at 680–81.

¹⁵⁴ *Id.* at 681–82.

¹⁵⁵ *McThenia & Epstein*, *supra* note 13, at 1443.

¹⁵⁶ *Texas*, 379 U.S. at 682.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ This illustrative example is adapted from a similar one found within REID, *supra* note 5, at 18.

forward before the lapse of the statutory dormancy period, Company *Y* must report this obligation. But to which jurisdiction is Company *Y* obligated to report?

Company *Y*, under the Supreme Court's escheat rules, must report the unclaimed property to Pennsylvania, the state of Employee *Z*'s last known address. Assume, however, that during the time between Employee *Z* leaving the company and Company *Y* reporting his unclaimed payroll check (a period of several years), Company *Y* has converted its aging payroll systems and the last known address of Employee *Z*—who has now been an ex-employee for several years—has been lost. Under this scenario, the state of Delaware, in which Company *Y* is incorporated, would receive the funds from Employee *Z*'s final payroll check. New Jersey—where the working relationship between Company *Y* and Employee *Z* was formed and where Employee *Z* worked for years—would be deprived of any benefit of this intangible property.

Fundamentally underpinning the Court's decision in *Texas*—which one commentator has described as “beguiling in its simplicity and definitiveness”¹⁶¹—are the principles of ease of administration¹⁶² and of equity.¹⁶³ As the majority announces toward the end of its opinion, it is not the specifics of the Court's rules that drive its holding,¹⁶⁴ but rather its desire to settle the turbulent case law through an administratively simple and fundamentally fair framework. Before turning to Part IV, which argues that it is ultimately these principles to which a new regime must aspire, it is important to introduce and examine the most common, and perhaps audacious, attempt by states to sidestep the Court's decision in *Texas*: the third-priority rule.

¹⁶¹ EPSTEIN ET AL., *supra* note 28, § 2.04[2]; McThenia & Epstein, *supra* note 13, at 1444.

¹⁶² The Court makes repeated references to adopting a rule that is administratively simple, avoids case-by-case analysis of unique fact patterns, and settles the state of the law. *Texas*, 379 U.S. at 681 (“Adoption of such a rule involves a factual issue simple and easy to resolve, and leaves no legal issue to be decided. . . . And by using a standard of last known address, rather than technical legal concepts of residence and domicile, administration and application of escheat laws should be simplified.”).

¹⁶³ The decision prioritized fairness and equity by denying a financial windfall to both the corporate holder, *see* McThenia & Epstein, *supra* note 13, at 1444, and the state of corporate domicile, *Texas*, 379 U.S. at 680 (“[I]t seems to us that in deciding a question which should be determined primarily on principles of fairness, it would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself.”).

¹⁶⁴ *Texas*, 379 U.S. at 683 (“We realize that this case could have been resolved otherwise, for the issue here is not controlled by statutory or constitutional provisions or by past decisions, nor is it entirely one of logic.”).

B. An Exception to the Dual-Priority Structure? The Emergence of the Third-Priority Rule

In the last several decades, a majority of U.S. jurisdictions have carved out exceptions to the U.S. Supreme Court's bright-line, dual-priority structure.¹⁶⁵ The most common of these attempts is the location-based "third-priority rule,"¹⁶⁶ which has been adopted by thirty-seven states and the District of Columbia.¹⁶⁷ This rule specifies that if the primary and secondary priority rules fail, "[T]he state in which the transaction giving rise to the unclaimed property occurred has the right to claim the property."¹⁶⁸ Although never successfully challenged at the Supreme Court level, the third-priority rule's constitutionality has been questioned since its adoption because of its apparent conflict with the Court's well-established dual-priority scheme.¹⁶⁹ Nevertheless, the jurisdictions that have adopted this rule have done so under the assumption that the Court's decision in *Texas* does not limit their power to escheat unclaimed intangible property in the event that the primary or secondary priority rules are inapplicable.¹⁷⁰

¹⁶⁵ Millar & Coalson, *supra* note 135, at 381.

¹⁶⁶ *See id.* at 381 n.2.

¹⁶⁷ *See* Marshall T. Kline & Kellie A. Lanford, *Unclaimed Property: Getting Your Priorities Straight*, SALT TO TASTE: ST. & LOCAL TAX ITEMS OF INTEREST (Jan. 24, 2012), http://www.stratatamic.com/uploads/dlptax/news_events/UnclaimedPropertyGettingYourPrioritiesStraight.pdf; *see also*, e.g., N.J. STAT. ANN. § 46:30B-10 (West 2003) ("The transaction out of which the property arose occurred in this State, and (1) [t]he last known address of the apparent owner or other person entitled to the property is unknown, or (2) [t]he last known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property, and (3) [t]he holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property.").

¹⁶⁸ Millar & Coalson, *supra* note 135, at 381 n.2; *see also* UNIF. UNCLAIMED PROP. ACT § 3 (1981), 8C U.L.A. 189 (2003).

¹⁶⁹ *See*, e.g., Kline & Lanford, *supra* note 167. For a more detailed discussion of the constitutionality of the third-priority rule, *see infra* Part III.C.

¹⁷⁰ *See* Noel E. Hall, Jr., Matthew B. Chenoweth, & Garth V. Jensen, *Exemptions in Unclaimed Property: Fact or Fiction?*, TAX ADVISER (July 2001), at 466. Another possible explanation is that because the 1981 and 1995 Uniform Acts introduced this location-based rule, any state that has adopted these model statutes in their entirety has also effectively adopted the third-priority rule, whether or not that state intended to carve out such an exception to the *Texas* framework. *Id.* Still, others have impliedly suggested that some states enforce their third-priority rule as a weapon against unsuspecting holders who are either "ignorant to the Supreme Court's priority rules or who do not have the financial wherewithal to challenge the state's claim." Jamie Ryan & Jameel Turner, *Gift Certificate/Gift Card Legislation Update*, CLIENT ALERT 2 (Sept. 2010), http://www.baileycavalieri.com/97-Client_Alert.pdf.

Recently, a handful of states have taken a more unorthodox approach to the traditional third-priority rule.¹⁷¹ These so-called “deemed owner address provisions” or “place-of-purchase” presumptions, which have been applied almost exclusively to stored-valued cards, generally provide that—in the event that the original holder’s last known address is not maintained by the corporate debtor—the address of the holder shall be presumed to be the Treasurer’s office of the state in which the transaction took place.¹⁷² In this way, the statute functionally replaces the secondary priority rule—which would provide for escheat to the state of the corporate debtor’s domicile in the event that the last known address of the true owner was not maintained—with a rule prioritizing the location of the transaction that gave rise to the creditor-debtor relationship.¹⁷³ It is the constitutionality of the third-priority rule to which this Note turns in the section that follows.

C. Critically Assessing the Constitutionality of the Third-Priority Rule

This section identifies and weighs the arguments for and against the constitutionality of the traditional third-priority rule—a question that, until very

¹⁷¹ States that have experimented with deemed owner address provisions include Maine, ME. REV. STAT. tit. 33, § 1958(2)(B-1) (Supp. 2011) (“The address of the owner of the gift obligation or stored value card is . . . presumed to be that of the address of the Treasurer of State unless the person who sells or issues the gift obligation or stored-value card obtains and maintains the address of the owner.”); Nevada, NEV. REV. STAT. § 120A.520(2) (2011) (“If a gift certificate is issued or sold in this State and the seller or issuer does not obtain and maintain in his records the name and address of the owner of the gift certificate, the address of the owner of the gift certificate shall be deemed to be the address of the Office of the State Treasurer in Carson City.”); New Jersey, N.J. STAT. ANN. § 46:30B-42.1 (West Supp. 2012), *repealed by* L.2012, ch. 14, § 1 eff. June 29, 2012 (“If the issuer of a stored value card does not have the name and address of the purchaser or owner of the stored value card . . . the address of the place where the stored value card was purchased . . . shall be reported to New Jersey . . . if the . . . card was sold or issued . . . in New Jersey.”); Texas, TEX. PROP. CODE ANN. § 72.1016(c) (West 2011) (“If the person who sells or issues a stored value card in this state does not . . . maintain a record of the owner’s name and address and the identification number of the card, the address of the apparent owner is considered to be the Austin, Texas, address of the comptroller.”). Following the Third Circuit’s decision in *New Jersey Retail Merchants Ass’n v. Sidamon-Eristoff*, 669 F.3d 374, 400 (3d Cir. 2012), § 46:30B-42.1 of New Jersey’s annotated statutes was amended to redact the state’s place-of-purchase presumption. *See infra* note 174.

¹⁷² *See* Millar & Coalson, *supra* note 135, at 381–82.

¹⁷³ Of the handful of states that have adopted these provisions, Maine has perhaps the most aggressive statute, which ostensibly does not distinguish between stored-value cards purchased within its borders and those purchased elsewhere: under either scenario, the state’s presumption is that they were purchased in Maine and are therefore subject to escheat therein. *See* Klein & Lanford, *supra* note 167. By contrast, Texas’s statute specifies that the stored value card must actually be purchased within the state if the address is to be presumed to be that of the State Comptroller. *Compare* 33 ME. REV. STAT. tit. 33, § 1958(2)(B-1), with TEX. PROP. CODE § 72.1016(c).

recently, was rarely considered and only at the state and federal district court level.¹⁷⁴ This section concludes by arguing that the traditional third-priority rule is preempted by the Court's decision in *Texas*. The implications of the rule's unconstitutionality are significant: any attempts by states to alter the current interstate escheat framework to more equitably distribute unclaimed property proceeds are effectively foreclosed by Supreme Court case law. Therefore, any hope of bringing an antiquated and inequitable system back in line with the core principles of the *Texas* decision rests with Congress.

1. *The Third-Priority Rule Is Preempted by the Supreme Court's Holding in Texas*

Challenges to the constitutionality of the third-priority rule have centered on the doctrine of preemption. Pursuant to the Supremacy Clause of the U.S. Constitution, federal law is the supreme law of the land and therefore, cannot be superseded by state statutory law.¹⁷⁵ Although the federal law underlying the current escheat framework is judge made and therefore, does not emanate from Congress under its constitutionally delegated powers, this distinction is largely irrelevant: "Federal common law is federal law as much as if it had been enacted by Congress."¹⁷⁶ Thus, when state statutory law comes into conflict with "federal common law set out in a decision based upon the Supreme Court's

¹⁷⁴ See, e.g., *Am. Express Travel Related Svcs. Co. v. Hollenbach*, 630 F. Supp. 2d 757 (E.D. Ky. 2009); *Am. Petrofina Co. v. Nance*, 697 F. Supp. 1183 (W.D. Okla. 1986), *aff'd*, 859 F.2d 840 (10th Cir. 1988); *State v. Chubb*, 570 A.2d 1313 (N.J. Super. Ct. Ch. Div. 1989); *TXO Prod. Corp. v. Okla. Corp. Comm'n*, 829 P.2d 964 (Okla. 1992). For a very recent decision analyzing the constitutionality of the third-priority rule's cousin, the deemed owner address provision, see *New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012). In *Sidamon-Eristoff*, the Third Circuit affirmed the District Court for the District of New Jersey's conclusion that "Chapter 25[s] creation of a place-of-purchase presumption when the last known address or zip code of a stored value card purchaser/owner is unknown is preempted by the federal common law set forth in the *Texas* line of cases," *Am. Express Travel Related Svcs. Co. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 609 (D.N.J. 2010), providing the most thorough analysis of the constitutionality of the third-priority rule and deemed owner address provisions to date. *Sidamon-Eristoff*, 669 F.3d at 396.

¹⁷⁵ U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

¹⁷⁶ *Am. Petrofina*, 697 F. Supp. at 1187; see also *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("[W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law."); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 314 (1955) ("[S]ince in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress.").

original jurisdiction and rendered for the purpose of national uniformity,”¹⁷⁷ the state law is thereby preempted.

The Supreme Court in *Texas*, acting as a court of original jurisdiction, fashioned the dual-priority scheme governing interstate escheat of unclaimed property absent a guiding federal statute or relevant constitutional provision.¹⁷⁸ That decision—intended to settle the turbulent case law that had enveloped conflicting interstate claims to the same intangible property—very clearly established both a primary and secondary priority rule.¹⁷⁹ In no part of the opinion did the Court address a scenario where both the primary and secondary rules failed,¹⁸⁰ nor did it reference a location-based, third-priority rule.¹⁸¹ To the extent that a state statute creates a third-priority rule absent a decisional holding from the Supreme Court, it has contravened the Court’s mandate in *Texas*,¹⁸² and the law is therefore preempted.

Further support for the argument that state attempts to circumvent the Court’s dual-priority framework are preempted can be found in the *Texas* Court’s consideration and rejection of two proposals similar in nature to the third-priority rule.¹⁸³ The first was the state of Texas’s proposal that the state with the most significant contacts should be permitted the right to escheat the property.¹⁸⁴ Although relying upon numerous decisions by the Court, Texas’s proposal was summarily rejected because a “‘contacts’ test as applied in this field is not really any workable test at all.”¹⁸⁵ Although not identical, a location-based, third-priority rule has many overlapping characteristics with the

¹⁷⁷ *Am. Petrofina*, 697 F. Supp. at 1187.

¹⁷⁸ See *Texas v. New Jersey*, 379 U.S. 674, 683 (1965) (“We realize that this case could have been resolved otherwise, for the issue here is not controlled by statutory or constitutional provisions or by past decisions, nor is it entirely one of logic.”).

¹⁷⁹ See *supra* notes 154–59 and accompanying text.

¹⁸⁰ See *Am. Express Travel Related Svcs. Co. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 604–05 (D.N.J. 2010) (“*Texas* does not explicitly address what happens when the debtor’s State of incorporation does not escheat the particular intangible property at issue. *Texas* merely held that the debtor’s State of incorporation had ‘the right to escheat.’”).

¹⁸¹ See *Sidamon-Eristoff*, 755 F. Supp. 2d at 606–07 (“[I]n fashioning the *Texas* rules, the Supreme Court expressly stated that the secondary rule applied when the law of the primary rule state ‘do[es] not provide for escheat.’ That it made no similar concession in connection with the secondary rule further suggests that no third priority was envisioned . . .”).

¹⁸² *Texas*, 379 U.S. at 677 (“[I]t becomes our responsibility in the exercise of our original jurisdiction to adopt a rule which will settle the question of which State will be allowed to escheat this intangible property.”).

¹⁸³ *Am. Petrofina Co. v. Nance*, 697 F. Supp. 1183, 1187 (W.D. Okla. 1986), *aff’d*, 859 F.2d 840 (10th Cir. 1988) (noting that the 1981 Act conflicts with the *Texas* scheme because “[it] utilizes a scheme, for custodial taking of unclaimed property, that was considered and rejected by the Supreme Court.”).

¹⁸⁴ *Texas*, 379 U.S. at 679; see also *supra* notes 149–50 and accompanying text.

¹⁸⁵ *Texas*, 379 U.S. at 679.

contacts-based test rejected by the Court in *Texas*.¹⁸⁶ The second proposal was from the state of Pennsylvania and would have rendered a corporate holder's principal place of business as the primary priority rule because "[s]imilar uncertainties would result if we were to attempt in each case to determine the State in which the debt was created and allow it to escheat."¹⁸⁷ Both proposals closely approximate the third-priority rule, and the fact that both were summarily rejected by the *Texas* Court adds further weight to the argument that the Court did not envision a location-based, third-priority rule.

Finally, seven years after *Texas* was decided, the Supreme Court rejected another attempt by the state of Pennsylvania to elevate the priority of the location of the transaction that gave rise to the unclaimed property in question in *Pennsylvania v. New York*.¹⁸⁸ In that case, the Court considered the constitutionality of a Pennsylvania escheat statute that permitted the state to escheat unclaimed money orders that were purchased from Western Union's Pennsylvania offices.¹⁸⁹ Pennsylvania encouraged the Court to discard its secondary priority rule and adopt a presumption that the owners of the unredeemed money orders were located in the state where the instrument was purchased.¹⁹⁰ The Court, in refusing to supplant the current framework, reaffirmed its holding in *Texas* and echoed its desire to avoid "decid[ing] each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts."¹⁹¹ Therefore, because the Court rejected a location-based priority rule that closely resembled the current third-priority rule, expanding the Court's holding in *Texas* to accommodate a third-priority rule would run afoul of the Court's intention in *Pennsylvania*.

2. *The Third-Priority Rule Does Not Directly "Conflict with" Texas and Is Therefore Not Preempted*

Although the vast majority of commentators would most likely conclude that the traditional third-priority rule is, at best, of questionable validity and, at worst, patently unconstitutional, there is an argument to be made that the third-priority rule does not directly contravene federal common law. That argument has two components.

On the one hand, a proponent of the constitutionality of the third-priority rule would first distinguish between state statutory law that *conflicts with*

¹⁸⁶ See Hall et al., *supra* note 170 ("[J]urisdictions that have a third priority rule have effectively adopted a contacts test in contravention of *Texas v. New Jersey*. Ascertaining the location of a transaction that produced a given item of intangible property will, in many instances, involve factual vagaries similar to those produced by the contacts test . . .").

¹⁸⁷ *Texas*, 379 U.S. at 680.

¹⁸⁸ 407 U.S. 206 (1972).

¹⁸⁹ *Id.* at 209.

¹⁹⁰ *Id.* at 212.

¹⁹¹ *Id.* at 215 (quoting *Texas*, 379 U.S. at 679).

Supreme Court case law and state law that might *expand upon* a void in existing Court precedent.¹⁹² Because the traditional third-priority rule does not directly contravene either the primary or secondary priority rules—addressing only a scenario where both priority rules fail—it does not run afoul of the Court’s decision in *Texas*.¹⁹³

The second, and perhaps better, justification highlights the fundamental difference between *Texas* and a situation where a state acts as custodian of unclaimed property escheated through its third-priority rule. More specifically, in *Texas* there were other states—namely Texas, Pennsylvania, New Jersey, and Florida—asserting concomitant and conflicting claims to the same property.¹⁹⁴ This situation is distinguishable from one in which a third-priority state asserts the sole claim to an intangible property obligation: “*Texas* does not explicitly address what happens when the debtor’s state of incorporation does not escheat the particular intangible property at issue [It] merely held that the debtor’s State of incorporation had ‘the *right* to escheat.’”¹⁹⁵ Therefore, in a situation where no state steps forward to claim the right to escheat an unclaimed property obligation under either the primary or secondary priority rule,¹⁹⁶ the third-priority rule would empower the state where the transaction originally occurred to “temporarily hold[] the property until the creditor’s address becomes apparent and the creditor’s state asserts its superior right to escheat.”¹⁹⁷ In other words, absent conflicting claims by more than one state, a third-priority rule might coexist constitutionally with the Court’s *Texas* decision.

¹⁹² See *Am. Petrofina Co. v. Nance*, 697 F. Supp. 1183, 1187 (W.D. Okla. 1986), *aff’d*, 859 F.2d 840 (10th Cir. 1988) (“The Supreme Court’s decision in *Texas v. New Jersey*, may be relied upon to prevent state officials from enforcing a state law *in conflict* with the *Texas* . . . scheme” (emphasis added)).

¹⁹³ *But see Delaware v. New York*, 507 U.S. 490, 500 (1993) (“These rules arise from our ‘authority and duty to determine for [ourselves] all questions that pertain’ to a controversy between States and no State may supersede them by purporting to prescribe a different priority under state law.” (citations omitted)).

¹⁹⁴ See *Kline & Lanford*, *supra* note 167, at 2, 4 n.4.

¹⁹⁵ *Am. Express Travel Related Svcs. Co. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 604–05 (D.N.J. 2010).

¹⁹⁶ See *id.* at 605 (“Indeed, state courts have held that *Texas* applies only when two states affirmatively seek to escheat the same property.”); see also *TXO Prod. Corp. v. Okla. Corp. Comm’n*, 829 P.2d 964, 971 (Okla. 1992) (“Nothing in *Texas* prohibits a state from claiming temporary custody of unclaimed property until some other state comes forward with proof that it has a superior right to it.”); *O’Connor v. Sperry & Hutchinson Co.*, 379 A.2d 1378, 1381 (Pa. Commw. Ct. 1977) (“[T]he [*Texas*] Court meant its rule to be binding only where there were multiple claims to the same property . . . because it believed either one of those states would be willing and able to escheat.”).

¹⁹⁷ *Sidamon-Eristoff*, 755 F. Supp. 2d at 604.

D. Conclusion

Attempts by the majority of states to carve out a third-priority rule from the Supreme Court's escheat framework in *Texas* cannot be reconciled with established Supreme Court case law. This argument is even more compelling given the Court's rejection of similar proposals in *Texas* and its rejection of Pennsylvania's attempt to elevate the location of the transaction above the Court's traditional secondary priority rule. Although this section argues that states are effectively precluded from circumventing the Supreme Court's dual-priority framework, there is no constitutional barrier precluding Congress—pursuant to its constitutionally delegated power to regulate interstate commerce¹⁹⁸—from fashioning a framework that would more equitably distribute unclaimed property receipts when an owner's last known address is not maintained.

IV. TOWARD A UNIFORM, REGULATORY FRAMEWORK ELEVATING THE LOCATION OF THE TRANSACTION ABOVE THE CORPORATE HOLDER'S STATE OF INCORPORATION

This Note proposes a congressional framework that would adopt the location of the transaction that gave rise to the intangible property in question—instead of the state of the corporate debtor's incorporation—as the default rule when an owner's last known address is unknown or the state does not provide for escheat of the intangible property in question. This scheme would more closely approximate the core principles underlying the *Texas v. New Jersey* decision and would present a more equitable means of resolving interstate escheat disputes. Although the current dual-priority structure has existed for nearly fifty years, this Note suggests that the current shift toward aggressive enforcement of unclaimed property laws has increasingly pitted states against one another for the right to claim abandoned intangible property. Further straining the existing framework is society's increasing mobility and the attendant difficulties associated with keeping up-to-date records of a holder's last known address. These changes could not have been foreseen by the Supreme Court when it decided *Texas* in 1965 and have substantial implications for the frequency with which intangible property escheats to the debtor's state of incorporation under the secondary priority rule.

Section A begins with the foundation for this comprehensive change, highlighting the limitations of the Supreme Court as policymaker when functioning as a court of original jurisdiction. Section B puts the state of Delaware under the microscope, demonstrating that the reality that over sixty

¹⁹⁸ See *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 (1981) (“We have always recognized that federal common law is ‘subject to the paramount authority of Congress.’” (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931))).

percent of corporations are incorporated therein has led to tremendous financial windfalls for the state never contemplated by the Court in *Texas*. Finally, section C outlines the particulars of this proposed framework and identifies how a retooling of the interstate priority rules would more equitably distribute unclaimed property among the states while preserving the *Texas* decision's core principles of equity and ease of administration.

A. The Impetus for a Comprehensive Scheme to Regulate Interstate Escheat Disputes: The Limitations of Functioning as a Court of Original Jurisdiction

The Supreme Court has long recognized the inherent limitations of functioning as a court of original jurisdiction¹⁹⁹—an understanding that has led the Court to do so highly infrequently.²⁰⁰ Language within the Court's opinion in *Texas* implicitly suggests that it was acting outside of its traditional function and under the necessity of resolving a growing controversy that the states were without the constitutional power to settle. The Court conceded that it was called upon to craft a rule of law within an arena in which it is not particularly well versed: “[w]e realize that this case could have been resolved otherwise, for the issue here is not controlled by statutory or constitutional provisions or by past decisions, nor is it entirely one of logic.”²⁰¹ Instead, the Court adopted a rule that it believed was “fair[], . . . easy to apply, and in the long run will be the most generally acceptable to all the States.”²⁰² Although the rule in *Texas* has stood for nearly fifty years, a decision based upon “an individual Justice's views as to what he might consider ‘fair’ or ‘equitable’ or ‘expeditious’”²⁰³ cannot be insulated from reevaluation given the significant developments in unclaimed property law since *Texas* was decided.

In the Supreme Court's most recent consideration of its interstate escheat framework, the Court, in decidedly stronger language, again suggested that it was not the most appropriate institution to resolve these types of disputes. Justice Thomas—writing for the majority in *Delaware v. New York*—grounded his opinion in *stare decisis* and declared his unwillingness to unseat *Texas*'s

¹⁹⁹ See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 761 (1981) (“The Court has wisely insisted that original jurisdiction be sparingly invoked because it is not suited to functioning as a *nisi prius* tribunal.”); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971) (“This Court is . . . structured to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original [jurisdiction] cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence.”).

²⁰⁰ See, e.g., *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) (“It has long been this Court's philosophy that ‘our original jurisdiction should be invoked sparingly.’” (quoting *Utah v. United States*, 394 U.S. 89, 95 (1969))).

²⁰¹ *Texas v. New Jersey*, 379 U.S. 674, 683 (1965).

²⁰² *Id.*

²⁰³ *Pennsylvania v. New York*, 407 U.S. 206, 216 (1972) (Powell, J., dissenting).

framework.²⁰⁴ Toward the end of the opinion, and after rejecting the Special Master's recommendation that the secondary priority rule should be displaced by a "principal executive offices" presumption, the Court announced that "[i]f the States are dissatisfied with the outcome of a particular case, they may air their grievances before Congress. That body may reallocate abandoned property among the States without regard to this Court's interstate escheat rules."²⁰⁵ Effectively handcuffed by stare decisis, this Note argues—consistent with Justice Thomas's admonition in *Delaware*—that Congress and not the courts is the appropriate forum for modernizing the current interstate escheat framework.

B. *Delaware: The Fortuitous Beneficiary Under the Current Dual-Priority Framework*

The state of Delaware derives substantial revenue from unclaimed property obligations generated under both its state laws and the Supreme Court's interstate escheat framework.²⁰⁶ A state that was already well positioned during the recent economic crisis,²⁰⁷ Delaware's financial outlook is bright thanks—in no small part—to the revenue it derives from the collection of abandoned property.²⁰⁸ Currently, abandoned property receipts are the state's third-largest source of revenue behind income taxes and corporate franchise taxes.²⁰⁹ In

²⁰⁴ *Delaware v. New York*, 507 U.S. 490, 497–98, 510 (1993).

²⁰⁵ *Id.* at 510.

²⁰⁶ See Peters & Beintum, *supra* note 110, at 29 (“In 1996, escheat of unclaimed property boosted the state’s general revenue fund by \$76 million. In 2001, that number more than doubled, to \$163 million. By 2006, Delaware’s unclaimed property added more than \$325 million to the state’s coffers and grew to more than \$375 million in 2008.”).

²⁰⁷ See, e.g., Oliff et al., *supra* note 1. Tables three through five within the report contain state budget deficit information for the years 2009 through 2011. *Id.* at 5, 7. In each of the three years, Delaware’s total shortfall as a percentage of its general fund was well below the national average. *Id.*

²⁰⁸ See DEFAC *General Fund Revenue Worksheet*, DEL. ECON. & FIN. ADVISORY COUNCIL (Jan. 22, 2013, 9:41 AM), <http://finance.delaware.gov/defac/dec12/revenues.pdf>. At its December 17, 2012 meeting, the Delaware Economic and Financial Advisory Council (DEFAC) projected abandoned property revenue of \$566.5 million for fiscal year 2013 and \$514 million for fiscal year 2014. *Id.*; see also *Governor's Financial Overview, FISCAL YEAR 2014 OPERATING & CAP. BUDGET INFO.* (Feb. 1, 2013), http://budget.delaware.gov/fy2014/operating/vol1/financial_overview.pdf. These projections represent marked increases over the \$427.9 million and \$319.5 million in unclaimed property revenue actually collected by the state in fiscal years 2011 and 2012. See *Delaware Fiscal Notebook 2012 Edition*, ST. DEL. DEP'T FIN., 29 (Nov. 28, 2012), http://finance.delaware.gov/publications/fiscal_notebook_12/fiscal_notebook_12.pdf [hereinafter, *Delaware 2012 Fiscal Notebook*].

²⁰⁹ Randall Chase, *Delaware Among States Eyeing Unclaimed Property*, BLOOMBERG BUSINESSWEEK (Nov. 24, 2010), <http://www.businessweek.com/ap/financialnews/D9JMOU000.htm>. This was not always the case, however. As recently as 1993, unclaimed property revenue comprised only 2.4% of Delaware's yearly revenue, behind hospital board

recent years, the state has come to rely heavily upon this source of income when balancing its ledger.²¹⁰

As was alluded to in previous sections, Delaware benefits heavily from intangible debt obligations incurred all over the country by virtue of being the state in which the majority of American businesses have historically incorporated, and continue to do so today.²¹¹ Under the *Texas* framework, in the event that an owner's last known address is not reflected in the corporate debtor's books and records, the debtor's state of incorporation—most often the state of Delaware—is entitled to escheat.²¹² Further enriching Delaware's financial position are the aggressive estimation techniques wielded by state-employed contingent-fee auditors.²¹³ When a corporate debtor subject to audit has not maintained its records long enough to satisfy a state's look-back period the debtor's actual liability for this period is indeterminable and can then be derived from statistical estimation.²¹⁴ The absence of discernible owners

and treatment fees and inheritance taxes. Leslie, *supra* note 89, at 2 (referencing *Delaware Fiscal Notebook 2007 Edition*, ST. DEL. DEP'T FIN., 21 (Oct. 31, 2007), http://www.finance.delaware.gov/publications/fiscal_notebook_07/Section02/sec2page21.pdf). By 2004, Delaware's unclaimed property monies had overtaken the revenue derived from the state lottery, bank franchise taxes, and business gross receipts taxes. *Id.* More recently, unclaimed property revenue comprised 12.1% of Delaware's revenue in fiscal year 2011, and it is forecasted to increase to 16% by fiscal year 2013. *See Delaware 2012 Fiscal Notebook, supra* note 208, at 29.

²¹⁰ *See* Chase, *supra* note 209 (“Delaware officials are fighting to defend a key source of revenue: abandoned property.”) (“Abandoned property has become a pillar of the state's budget.”) (“As a state, we're very fortunate to have this revenue source; it keeps taxes down for our citizens,” said Delaware Finance Secretary Tom Cook.”). Forty-two states and the District of Columbia either closed or worked toward closing \$103 billion in deficits for fiscal year 2012. *See* Oliff et al., *supra* note 1. Conspicuously absent from this group was Delaware, which did not face a budget shortfall in 2012. *Id.*

²¹¹ *See, e.g.*, Del. Div. of Corps., DEP'T ST., <http://corp.delaware.gov/> (last visited Feb. 16, 2012) (“[M]ore than 900,000 business entities have their legal home in Delaware including more than 50% of all U.S. publicly-traded companies and 63% of the Fortune 500.”).

²¹² *See supra* notes 157–59; *see also* Dale Dallabrida, *Delaware Lands Millions in Unclaimed Property*, NEWS J. (May 31, 1998), *available at* <http://daledallabrida.com/articles/unclaimed.htm> (quoting state revenue director Bill Remington saying, “It's not like every state gets this kind of money. Virtually all of it goes to Delaware.”) (“But Delaware's unique status as a corporate capital, which is largely behind the state's unclaimed-property windfall, makes comparisons tough.”); Bogoslaw, *supra* note 19 (“One reason the payouts [to the rightful owners] have been so few is that Delaware is deluged with unknown owner property since 60% to 65% of the Fortune 1000 companies in the U.S. are incorporated in Delaware.”).

²¹³ *See supra* Part II.C.3.

²¹⁴ Michael Houghton & Brenda Mayrack, *Delaware's Unclaimed Property Enforcement Continues to Evolve: Estimation and Equity*, KEANOTES NEWSL. (Jan. 27, 2012), <http://www.keanunclaimedproperty.com/keanotes/winter-2012/delaware-unclaimed-property-enforcement> (“[A] significant portion of the unclaimed property revenue paid to

effectively means that the unclaimed property obligations estimated during an audit will never pass under the first priority rule—which requires knowledge of an owner’s last known address—becoming de facto revenue for the state of incorporation.²¹⁵ For this reason, as states commence unclaimed property audits with growing frequency, they increasingly funnel substantial sums of estimated unclaimed property liability directly to the state of Delaware.

C. Fashioning a New Interstate Escheat Framework

This section endeavors to outline how a regulatory framework that elevates the location of the transaction giving rise to the intangible property above the state of corporate domicile might look, as well as to identify and substantiate the advantages of this new regime. Although not bound by the Court’s decision in *Texas*, if Congress is to effectively supplant the current dual-priority structure, its regulatory solution should be sensitive to the core principles that underpinned the current escheat framework: equity and ease of administration.

1. Proposed Interstate Escheat Framework

This Note proposes a federal regulatory framework that would modify the order of priority of the existing interstate rules originally articulated by the Supreme Court in *Texas*, as well as incorporate the traditional third-priority rule, in order to more equitably distribute unclaimed property obligations incurred throughout the country. Under this framework, the first priority rule under *Texas*—that the intangible property in question “is subject to escheat only by the State of the last known address of the creditor, as shown by the debtor’s books and records”²¹⁶—would remain unchanged. Therefore, in the event that a corporate holder of unclaimed property is in possession of the owner’s last known address, the state that encompasses this address should continue to receive the benefit of the unclaimed property above all others.²¹⁷

Second, the current secondary priority rule—which provides that the intangible property in question is subject to escheat by the state of the holder’s incorporation²¹⁸—would be supplanted by a rule that looks to the location where the relationship between creditor and debtor was formed. In other words,

Delaware has no identified owner. . . . Delaware derives the vast majority of its unclaimed property revenue from estimations of holder liability, monies which the state can then spend as part of its annual budget because no owner will ever come forward to claim them.”).

²¹⁵ See *supra* notes 126–27 and accompanying text.

²¹⁶ *Texas v. New Jersey*, 379 U.S. 674, 682 (1965).

²¹⁷ In this way, the rule maintains the equitable spirit of the *Texas* decision by continuing to “recognize[] that the debt was an asset of the creditor,” and therefore, the rule would continue to “distribute escheats among the States in the proportion of the commercial activities of their residents.” *Id.* at 681.

²¹⁸ See *supra* notes 157–59.

this framework would elevate the traditional third-priority rule above the current secondary rule, affording the benefit of escheat to the state encompassing the location of the transaction that gave rise to the unclaimed property at issue.

Finally, in an attempt to avoid a significant shortcoming of the *Texas* framework—that it did not address a scenario in which both the primary and secondary priority rules failed—the state of the holder’s incorporation would continue to exist as the tertiary priority rule under this proposed framework. By permitting the state of incorporation to escheat intangible property in the highly unlikely situation that the last known address and the location of the transaction were not reflected within a corporate holder’s books and records—or, in a scenario where the unclaimed property statutes of either state entitled to escheat under the primary and secondary rules do not provide for escheat of the intangible property in question—this framework would eliminate any lingering ambiguity, ensuring that the property escheats to a single state.

2. *Advantages to a Location-Based Rule Not Found in the Current Dual-Priority Structure*

While respecting the principles that underpinned the Supreme Court’s decision in *Texas*—namely equity and ease of administration—this Note argues that the framework tasked with achieving these ends should be refashioned to account for the significant developments in unclaimed property law since 1965. Firstly, a congressional framework that elevates the location of the original debtor-creditor relationship above the state of incorporation when the primary priority rule is inapplicable better “preserves the equitable foundation of the *Texas v. New Jersey* rule.”²¹⁹ By denying the state of the debtor’s incorporation the right to custodial escheat in the event that the last known address of the creditor is unknown, this scheme would deny a windfall to a state simply because of the unrelated coincidence that the holder happened to incorporate therein.²²⁰ Indeed, it was the fear of such a windfall that led the Court in *Texas* to reject the state of New Jersey’s domicile-of-the-debtor primary rule proposal notwithstanding its “obvious virtues of clarity and ease of application.”²²¹ Instead, the Court was more comfortable making the state of incorporation the secondary rule because it was “conducive to needed certainty” and, more importantly, because the Court foresaw it “aris[ing] with comparative infrequency.”²²² Because it has become a common occurrence for property to escheat to a holder’s state of incorporation²²³—either because a corporate

²¹⁹ *Pennsylvania v. New York*, 407 U.S. 206, 220 (1972) (Powell, J., dissenting).

²²⁰ *See Texas*, 379 U.S. at 680.

²²¹ *Id.*

²²² *Id.* at 682.

²²³ *See supra* notes 212–15.

debtor has not maintained the owner's last known address or because of the increase in statistical estimation as an auditing technique—one of the most significant assumptions upon which the *Texas* framework was predicated is no longer applicable.

Additionally, elevating the location of the transaction above the state of corporate domicile would further the *Texas* Court's equitable objective by proportionally dividing the revenue derived from the escheat of unclaimed intangible property based on an approximation of the number of transactions occurring within each state.²²⁴ In this way, the proposed framework would maintain "the integrity of the notion that these amounts represent assets of the individual purchasers or recipients of [the intangible property]."²²⁵ Perhaps the most fundamental problem with the current structure is its propensity to reward a state with no relationship to the creditor, the property, or the underlying transaction with a substantial financial benefit because of the unrelated coincidence that the holder happened to incorporate therein. A framework that places greater emphasis on the location of the original debtor-creditor relationship would mitigate this inequity by permitting a state with far greater ties to the underlying transaction to take custody of the property ahead of the state of corporate domicile.²²⁶

Finally, a secondary but important consideration is the administrability of this proposed framework. The Court in both *Texas* and *Pennsylvania* feared that any room for case-by-case analysis would undermine the efficiency of the rule and opted, instead, for a solution that was uniformly administrable.²²⁷ A

²²⁴ See *Pennsylvania*, 407 U.S. at 218 (Powell, J., dissenting) ("Also, in distributing the property among the creditors' States, the rule had the advantage of dividing the property in a manner roughly proportionate to the commercial activities of each State's residents."); *id.* at 219 ("Yet the decision today . . . disregards the Court's clearly expressed intent that the escheatable property be distributed in proportions roughly comparable to the volume of transactions conducted in each state.").

²²⁵ *Id.* at 220; *Texas*, 379 U.S. at 680.

²²⁶ Of course, in a world where debtor-creditor relationships are more frequently formed in cyberspace than in a physical location readily confined to a single state's borders, determining the location of the underlying transaction is more complicated. A congressional framework emphasizing the location of the underlying transaction would require a set of bright-line rules for determining the physical location upon which escheat would be predicated. For example, Congress could determine that, within the retail context, the appropriate "location" of the underlying transaction is the place where the payment was processed, affording both retailers and the states with a clear-cut method of determining which jurisdiction was entitled to take custody of the abandoned intangible property. Although this solution would inevitably require some line-drawing, Congress—with its ability to conduct hearings and solicit testimony from experts across numerous industries—is the governmental body properly equipped to make these top-down determinations. I would like to thank Jamie Ryan for a conversation that we had on this subject.

²²⁷ *Pennsylvania*, 407 U.S. at 221 (Powell, J., dissenting) ("The majority adheres to the existing rule because of some apprehension that flexibility in this case will deprive the Court

location-based secondary priority rule would prove no more difficult to administer, nor would it impose any greater burden on the states or corporate debtors than the Court's current framework. In *Texas*, the Court was not overly concerned by its rule that required looking to a corporate holder's books and records to determine an owner's last known address.²²⁸ A framework requiring an examination of the same records to determine the location of the underlying transaction would present an equally minimal burden upon the corporate debtor or upon a regulatory scheme tasked with deriving the information from the debtor. In the event that a debtor's books and records did not contain the last known address of the owner of an escheatable obligation, there is a strong probability that they would still reflect such fundamental recordkeeping information as the location where the relationship between creditor and debtor was formed.

V. CONCLUSION

For too long, states where companies most frequently incorporate have reaped the financial windfall of escheatable obligations incurred all over the country. The Supreme Court in *Texas v. New Jersey* felt comfortable sacrificing the potential for these financial windfalls in the interest of ease of administration because of its understanding of the relative rarity in which the primary rule might fail. Since states have become more fiscally constrained, the potential financial benefits derived from unclaimed property have been fully realized, and the population has become increasingly mobile, these windfalls are no longer an unlikely theoretical shortcoming of the Court's dual-priority framework, but an unfortunate practical reality. As the assumptions underlying interstate escheat of unclaimed property have evolved, any framework under which it operates must also adapt.

Congress should accept the Supreme Court's repeated invitations and craft a uniform, regulatory framework that supplants the current secondary priority rule—that when a corporate debtor's books and records do not reflect an owner's last known address, the state of incorporation is entitled to escheat the intangible property—with a rule that prioritizes the location of the transaction that gave rise to the intangible property in question. While the Court is bound by *stare decisis* and therefore unlikely to reconsider the dual-priority framework that it has upheld on two occasions subsequent to *Texas*, there are no impediments to an interstate escheat framework pursuant to Congress's constitutionally delegated power to regulate interstate commerce. This proposed

of a satisfactory test for the resolution of future cases. The opinion anticipates that departure from *Texas* . . . will leave other cases to be decided on an ad hoc basis . . .”).

²²⁸ *Texas*, 379 U.S. at 681 (“Such a solution would be in line with one group of cases dealing with intangible property for other purposes in other areas of the law. Adoption of such a rule involves a factual issue simple and easy to resolve . . .”).

framework, although ostensibly eschewing the dual-priority scheme articulated by the Court in *Texas*, would no longer “exalt[] the rule but derogate[] the reasons supporting it,”²²⁹ and would remain true to the core fundamental principles underpinning the Court’s decision: equity and ease of administration.

²²⁹ *Pennsylvania*, 407 U.S. at 216.

OHIO STATE LAW JOURNAL

Volume 74
Number 4
2013

ARTICLES

The Supremacy Clause, Original Meaning, and
Modern Law

Michael D. Ramsey

The Corporate Preference for Trade Secret

Andrew A. Schwartz

NOTE

Beyond the Fourth Amendment: Limiting Drone
Surveillance Through the Constitutional Right
to Informational Privacy

Jonathan Olivito



Cite as 74 OHIO ST. L.J. ____ (2013)

Copyright © 2013 by The Ohio State University

The *Ohio State Law Journal* (ISSN 0048-1572) is published six times a year in Columbus, Ohio. The *Journal* Editorial and General Offices are located at 55 West 12th Avenue, Columbus, Ohio 43210-1391.

Subscriptions: Domestic, \$45.00 per volume; \$9.00 per regular issue; \$10.00 per symposium issue. Foreign, \$55.00 per volume; \$10.00 per regular issue; \$11.00 per symposium issue. Please enclose check with order. For further information, see <http://moritzlaw.osu.edu/students/groups/oslj/>. Back stock, reprint, and microform editions of the *Journal* are available through William S. Hein & Co., Inc., 1285 Main St., Buffalo, N.Y. 14209-1987. Back issues of the *Journal* may also be obtained through HeinOnline at <http://www.heinonline.org>.

The *Journal* assumes that each subscriber desires to renew its subscription unless the subscriber notifies the *Journal* otherwise before the subscription expires. Change of address notice should be received at least thirty days prior to the date of the issue with which that change is to take effect.

The *Journal* welcomes the submission of unsolicited manuscripts for possible publication in print or online. The text and footnotes of all manuscripts should be double spaced, with the text and footnotes on the same page. The *Journal* prefers submissions through ExpressO but accepts submissions by email attachment. You may submit manuscripts and correspond with the *Journal* at lawjml@osu.edu. For further information, see <http://moritzlaw.osu.edu/students/groups/oslj/>.

Postmaster: Please send address changes to the *Ohio State Law Journal*, 55 West 12th Avenue, Columbus, Ohio 43210-1391.

OHIO STATE LAW JOURNAL

2013–2014

EDITOR IN CHIEF

David J. Twombly

EXECUTIVE EDITOR

Cheyenne N. Chambers

CHIEF ARTICLES EDITOR

Jim Saywell

NOTE EDITOR

Matthew L. Strayer

SYMPOSIUM EDITOR

Adam Philipp

CHIEF MANAGING EDITOR

Elizabeth B. Howard

ARTICLES EDITORS

Matthew Brady
Elizabeth R. Gorman
Lisa M. Herman
Colin J. Kalvas
Mariam Keramati
Chris Matgouranis
Scott Mayland
Jonathan Olivito
Syane Roy
Brendan J. Schlauch
Kyle Shelton
Catherine Sturik
Megan E. Walker

FURTHERMORE EDITOR

Alexis Cole

TECHNOLOGY EDITOR

David N. Sutton

MANAGING EDITORS

Matt Borden
Whitney Braunlin
Jourdan Day
Amanda Gillen
Joshua Grossman
Jocelyn M. Harrington
Andrew Hartman
Natalie Holzaepfel
Alyson Letsky
Kelsey Mehaffie
Andrew Peiffer
Kyle Schrodi
Jana Willsey

BUSINESS EDITOR

Kristine Missall

EVENTS EDITOR

Meaghan FitzGerald

ASSOCIATE EDITORS

Abbigail Brothers
Casey Cross
Michael Dallaire

Ryan Duerring

Meghan Mannion

Christopher Pendleton

Joshua Snowden

STAFF

Jonathan D. Allan
Ina Avalon
Megan Bracher
Amable Njodzeka Bunry
Xiaole Chen
Arryn K. Cole
Kory G. Decker
Adam Doane
Robert K. Dodson
Deborah A. Enck
Collin R. Flake

Jackson Froliklong
Matthew J. Gherlein
Russell L. Gray
James M. Hafner, Jr.
M. Ryan Harmanis
Jared P. Hasson
Thomas R. Irwin
Brian F. Jordan
Lindsey M. Jump
Calland M. Kluchar
Christopher LaRocco

Tara E. Maine
Katherine M. Maskell
Michael G. Matthews
William S. McCoy
Mikaela R. Mitchell
Matthew P. Navarre
Justin P. Nelson
Christina M. Otero
Channing M. Pepper
Joseph D. Perruzzi
Dilynn Roettker

Emily C. Rotella
Liane H. Rousseau
Melissa A. Schaub
Avery Schumacher
Tom Shafirstein
Sam Skubak
Heather L. Spangler
Janet R. Stewart
Jordan E. Watrous
W. Hunter West
Laura W. Willis
Christopher D. Woeste

FACULTY ADVISORS

Garry W. Jenkins
Deborah Jones Merritt

ADMINISTRATIVE ASSISTANT

Dawn Parker

Published Six Times a Year by Students of The Ohio State University Moritz College of Law

THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW

OFFICERS OF ADMINISTRATION

Joseph A. Alutto, B.A., M.A., Ph.D., *Interim President of the University*
Joseph E. Steinmetz, B.A., M.A., Ph.D., *Executive Vice President and Provost of the University*
Alan C. Michaels, A.B., J.D., *Dean of the College and Edwin M. Cooperman Prof. of Law*
Garry W. Jenkins, B.A., M.P.P., J.D., *Assoc. Dean for Academic Affairs and Prof. of Law*
Christopher M. Fairman, B.A., J.D., *Assoc. Dean for Faculty and Alumni Society Designated Prof. of Law*
Bruce S. Johnson, B.A., J.D., M.L.S., *Assoc. Dean for Information Services and Thomas J. and Mary E. Heck and Leo H. Faust Memorial Designated Prof. of Law*
Kathy S. Northern, B.A., J.D., *Assoc. Dean for Admissions and Assoc. Prof. of Law*
Laura Fernandez, B.S., J.D., *Assist. Dean for International and Graduate Affairs and Adjunct Prof.*
Monte Smith, B.A., J.D., *Assist. Dean for Academic Affairs and Adjunct Prof.*
Robert L. Solomon, II, B.A., J.D., *Assist. Dean for Admissions & Financial Aid, Director of Minority Affairs and Adjunct Prof.*

FACULTY EMERITI

Francis X. Beytagh, B.A., J.D.
Michael Braunstein, B.A., J.D.
Albert L. Clovis, B.A., M.A., LL.B.
Howard P. Fink, B.A., LL.B.
David A. Goldberger, B.A., J.D.
Sheldon W. Halpern, B.A., LL.B.
Lawrence R. Herman, A.B., LL.B.
Louis A. Jacobs, A.B., J.D., LL.M.
Michael Kindred, B.A., J.D., M.C.L., D.E.S.
Joan M. Krauskopf, A.B., J.D.
Stanley K. Laughlin, Jr., B.A., J.D.

James E. Meeks, A.B., J.D.
John B. Quigley, A.B., M.A., LL.B.
Rhonda R. Rivera, B.A., M.P.A., J.D.
Nancy H. Rogers, B.A., J.D.
Michael D. Rose, B.A., J.D., LL.M.
Allan J. Samansky, B.A., M.A., J.D.
Philip C. Sorensen, B.S., J.D.
Gregory M. Travaglio, B.A., J.D., LL.M.
Vincene F. Verdun, B.A., J.D.
Douglas J. Whaley, B.A., J.D.
Charles E. Wilson, B.S., J.D.

FACULTY

Amna Akbar, B.A., J.D., *Visiting Assist. Prof. of Law*
Michelle Alexander, B.A., J.D., *Assoc. Prof. of Law*
Erin Archerd, B.A., J.D., *Langdon Fellow in Dispute Resolution*
Mary Beth Beazley, B.A., J.D., *Assoc. Prof. of Law and Director of Legal Writing*
Douglas A. Berman, A.B., J.D., *Robert J. Watkins/Procter & Gamble Prof. of Law*
Micah Berman, B.A., J.D., *Assist. Prof. of Public Health and Assist. Prof. of Law*
Gregory A. Caldeira, B.A., A.M., Ph.D., *Distinguished Univ. Prof. and Prof. of Law*
Cinnamon Carlame, B.A., B.C.L., M.S., J.D., *Assoc. Prof. of Law*
Sanford N. Caust-Ellenbogen, B.A., M.C.R.P., J.D., *Assoc. Prof. of Law*
Martha Chamallas, B.A., J.D., *Robert D. Lynn Chair in Law*
Daniel C.K. Chow, B.A., J.D., *Joseph S. Platt-Porter Wright Morris & Arthur Prof. of Law*
Amy J. Cohen, B.A., J.D., *Prof. of Law*
Sarah Rudolph Cole, B.A., J.D., *John W. Bricker Prof. of Law and Director of Prog. on Dispute Resolution*
Ruth Colker, A.B., J.D., *Distinguished Univ. Prof. and Grace Fern Heck Faust Chair in Constitutional Law*
Elizabeth Ilgen Cooke, B.A., J.D., *Clinical Prof. of Law*
Richard C. Daley, B.A., J.D., *Senior Lecturer in Law*
Steven M. Davidoff, B.A., M.S., J.D., *Prof. of Law*
Sharon L. Davies, B.A., J.D., *Gregory H. Williams Chair in Civil Rights and Civil Liberties and Executive Director of the William E. Kirwan Institute for the Study of Race and Ethnicity*
Ellen E. Deason, B.A., J.D., *Joanne W. Murphy/Classes of 1965 and 1972 Prof. of Law*
Joshua Dressler, B.A., J.D., *Frank R. Strong Chair in Law*
Terri L. Enns, B.A., J.D., *Clinical Prof. of Law*
Katherine Hunt Federle, B.A., J.D., LL.M., *Prof. of Law and Director of the Center for Interdisciplinary Law and Policy Studies*
Edward B. Foley, B.A., J.D., *Chief Justice Thomas J. Moyer Prof. for the Administration of Justice and the Rule of Law*
Larry T. Garvin, B.A., B.S., M.S., J.D., *Lawrence D. Stanley Prof. of Law*

E. Gordon Gee, B.A., J.D., Ed.D., *Prof. of Law and President Emeritus*
Arthur F. Greenbaum, B.A., J.D., *James W. Shocknessy Prof. of Law*
L. Camille Hébert, B.A., J.D., *Carter C. Kissell Prof. of Law*
Stephanie R. Hoffer, B.S., J.D., LL.M., *Assoc. Prof. of Law*
Steven F. Huefner, A.B., J.D., *Prof. of Law and Director of Clinical Prof.*
Creola Johnson, B.S., J.D., *Prof. of Law*
Kimberly Jordan, B.S., J.D., *Assist. Clinical Prof. of Law*
Katherine S. Kelly, B.A., M.A., J.D., *Assist. Clinical Prof. of Law*
Robert M. Krivoshey, B.A., M.A., Ph.D., J.D., *Clinical Prof. of Law*
Katrina J. Lee, B.A., J.D., *Assist. Clinical Prof. of Law*
Deborah Jones Merritt, A.B., J.D., *John Deaver Drinko-Baker and Hostetter Chair in Law*
Dale A. Oesterle, B.A., M.P.P., J.D., *J. Gilbert Reese Chair in Contract Law*
Efthimos Parasidis, B.A., M.BE, J.D., *Assist. Prof. of Law and Assist. Prof. of Public Health*
Anne Ralph, B.A., J.D., *Assist. Clinical Prof. of Law*
Paul Rose, B.A., J.D., *Assoc. Prof. of Law*
Guy A. Rub, LL.B., M.A., LL.M., *Assist. Prof. of Law*
Dakota Rudesill, B.A., J.D., *Assist. Prof. of Law*
Peter M. Shane, A.B., J.D., *Jacob E. Davis & Jacob E. Davis II Chair in Law*
Ric Simmons, B.A., M.A., J.D., *Prof. of Law*
Marc S. Spindelmann, B.A., J.D., *Isadore and Ida Topper Prof. of Law*
Todd A. Starker, B.A., M.B.A., J.D., *Assist. Clinical Prof. of Law*
David Stebenne, B.A., J.D., Ph.D., *Prof. of History and Prof. of Law*
Joseph B. Stulberg, B.A., J.D., M.A., Ph.D., *Michael E. Moritz Chair in Alternative Dispute Resolution*
C. Lee Thomason, B.A., J.D., *Assist. Clinical Prof. of Law*
Donald B. Tobin, B.A., J.D., *Frank E. & Virginia H. Bazler Designated Prof. in Business Law*
Daniel P. Tokaji, A.B., J.D., *Robert M. Duncan/Jones Day Designated Prof. of Law*
Christopher J. Walker, B.A., M.P.P., J.D., *Assist. Prof. of Law*

ADJUNCT FACULTY

Sandra J. Anderson
Elizabeth L. Anstaett
Susan Azyndar
David Ball
David S. Bloomfield
Joseph M. Caliguri
Hon. William B. Chandler
Hon. R. Guy Cole
Matt Cooper
Jonathan E. Coughlan
James E. Davidson
April Opper Davis
Hon. Gregory Frost
Gates Garrity-Rokous

Todd G. Guttman
David W. Hardyman
Gail Block Harris
Patricia Hatler
Kimberly Weber Herlihy
Hon. John E. Hoffman Jr.
Barton Hubbard
Junxia Tang Jemjevic
James Johnson
Shawn Judge
Hon. Terrence P. Kemp
Hon. Norah McCann King
Greg Kirstein
Marya C. Kolman

James K.L. Lawrence
Sherri B. Lazear
Hon. Algenon Marbley
Ingrid Mattson
Hon. Stephen McIntosh
Richard M. Mescher
Robert J. Miller
Karen M. Moore
Tanya J. Potet
Ted L. Ramirez
Frank A. Ray
Douglas Rogers
Dan D. Sandman
Hon. Edmund A. Sargus

Hon. Jennifer Sargus
Edward M. Segelken
Elizabeth Sherowski
Kimberly Shumate
Scott V. Simpson
Douglas Squires
Hon. Jeffrey S. Sutton
Mark R. Weaver
Robert Weiler
Reid Wilson
Stephanie Ziegler