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

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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.”).

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 tangible\(^8\) or intangible\(^9\) 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 situs\(^11\)—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,
uncashed payroll checks, and the unredeemed portions of stored-value cards.  

All fifty states and the District of Columbia have unclaimed property laws—compliance with which is mandatory.  

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. These laws require companies to turn over both tangible and intangible property to the state following a statutorily prescribed dormancy period. 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. 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. 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. 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 practice—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

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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.
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 domicile—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 and Delaware v. New York—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

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. 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.* Historically, under the doctrine of escheat, when a tenant died without heirs, any unowned real property passed to the tenant's feudal lord. 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. With the abolition of subinfeudation in 1290, the justification for escheat became one of royal prerogative—abandoning the more traditional justification of continuing necessary services to a tenant's lord.


26 Escheat is defined as "[r]eversion 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).


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* emerged to apply to personal property. 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. *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. Furthermore, collecting unclaimed personalty under the doctrine of *bona vacantia* was, at least initially, custodial, whereas traditional escheat vested immediate ownership in the sovereign.

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. The American doctrine that emerged was a unified version of both escheat and *bona vacantia* and did not closely resemble the

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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.


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

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. Perhaps unsurprisingly, 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...." 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." 38

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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 Linquist'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.").

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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 acts\(^4\) that regulate the distribution of unclaimed property,\(^5\) of which forty-four states and the District of Columbia have adopted at least one version.\(^4\) The evolution of these acts has traced the developments in Supreme Court case law governing interstate escheat rules.\(^4\) 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,\(^4\) 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.\textsuperscript{49} Fundamentally grounded in the derivative rights doctrine,\textsuperscript{50} the Act’s predominant purpose was to protect a true owner’s interest in her missing property.\textsuperscript{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,\textsuperscript{52} that relieved holders of abandoned property of the liability and responsibility incident to maintaining possession,\textsuperscript{53} and that precluded these holders from reaping the financial benefits derived from the continued use of the property.\textsuperscript{54}

\textsuperscript{49} \textit{Unif. 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:

\begin{quote}
[It] 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 . . . .
\end{quote}

\textit{Reid, supra} note 5, at 5–6.

\textsuperscript{50} See \textit{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.”); \textit{see also} Millar & Coalson, \textit{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.”).

\textsuperscript{51} \textit{1954 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 \textit{1954 Handbook}] (“The Uniform Disposition of Unclaimed Property Act, if adopted by the states, will serve to protect the interests of owners . . . .”); \textit{see also} Ray H. Garrison, \textit{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. \textit{See} Kelly, \textit{supra} note 24, at 1054–55; \textit{see also} Clarold L. Britton, \textit{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”).

\textsuperscript{52} \textit{1954 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”).

\textsuperscript{53} \textit{Id.} (observing that the Act would serve “to relieve the holders from annoyance, expense and liability”).

\textsuperscript{54} R. Perry Sentell, Jr., \textit{A Study of Escheat and Unclaimed Property Statutes} 74 (1962) (quoting \textit{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.\textsuperscript{55} The Act also codified the Supreme Court's decision in \textit{Connecticut Mutual Life Insurance Co. v. Moore},\textsuperscript{56} which based the ability to make a claim for abandoned property upon whether or not the court had personal jurisdiction over the debtor.\textsuperscript{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.\textsuperscript{58} By adopting the jurisdictional rule from \textit{Connecticut Mutual Life Insurance}, the Act attempted to "protect a holder of intangible property from the dangers of multiple escheat."\textsuperscript{59}

The impetus for two subsequent revisions to the 1954 Act was the need to keep pace with developing Supreme Court case law.\textsuperscript{60} In an attempt to codify the Court's decision in \textit{Texas v. New Jersey}\textsuperscript{61} and to address the shortcomings of the 1954 and 1966 versions of the Act, the NCCUSL drafted a major revision in 1981.\textsuperscript{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.\textsuperscript{63} Their efforts were frustrated by a general lack of compliance by holders of abandoned property.\textsuperscript{64} This trend was attributable, in part, to confusion over the new dual-priority structure articulated as a euphemism for revenue generation. \textit{See} 1954 HANDBOOK, \textit{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. \textit{See} \textit{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").

\textsuperscript{55}1954 HANDBOOK, \textit{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.").
\textsuperscript{56}333 U.S. 541 (1948).
\textsuperscript{57}McThenia & Epstein, \textit{supra} note 13, at 1440.
\textsuperscript{58}\textit{Id}.
\textsuperscript{59}\textit{Britton, supra} note 51, at 784.
\textsuperscript{60}\textit{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 \textit{Texas v. New Jersey}, and subsequently reaffirmed in \textit{Pennsylvania v. New York} and \textit{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.
\textsuperscript{61}379 U.S. 674 (1965). \textit{See infra} Part III.A for a more detailed examination of the Court's dual-priority, interstate escheat framework.
\textsuperscript{62}\textit{UNIF. UNCLAIMED PROP. ACT (1981), Prefatory Note, 8C U.L.A. 153 (2003)}.
\textsuperscript{63}\textit{Id}.
\textsuperscript{64}\textit{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,

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65 Id. at 153–54.
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:

[Intangible 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. 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 law—a holding with substantial implications for the emerging third-priority rule. 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. Some exceptions continued the developing trend of shortening dormancy periods, whereas others called upon the commissioners’ experience in justifying the continuation of longer dormancy periods.

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” 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

71 Id.
72 See infra Part III.B.
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. Generally defined as the period of time after which a state takes custody of property presumed to be abandoned by its true owner, dormancy periods—which at one time were as long as thirty years for some types of property—have undergone a drastic shortening in duration over the last decade. Perhaps unsurprisingly, these reductions have become

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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.


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.”).

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

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. 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. Furthermore, the

81 Some 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).

82 See, 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.”).

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

84 For 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. Luckett, 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. This section concentrates on two of the more recent and controversial types of intangible property that states have targeted: uninvoiced receivables and promotional incentives.

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.” 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 . . . .”).


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, un invoiced 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 un claimed property statutes.91

Promotional incentives are a second type of intangible property that state un claimed 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.
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.”).
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. The Treasurer of the State of Iowa, following an audit conducted by a third-party company, 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. The suit was joined by forty-five other states which collectively sought over $120 million in damages 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. 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. 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. 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-4322-80d7-915b7af1c29/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.


97 Id.


99 Peters, supra note 96.

100 Zoeller, supra note 96.
it is in possession does not absolve the company issuing the initial obligation from liability.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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?\textsuperscript{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,

\textsuperscript{101}Id.
\textsuperscript{102}Peters, supra note 96.
\textsuperscript{103}Welcom, supra note 98. As of February 2010, Sprint agreed to a $22 million settlement with Iowa and thirty-six additional states. \textit{See} Press Release, Iowa Dep't of Justice, supra note 94.
\textsuperscript{104}\textit{REID}, supra note 5, at 15.
\textsuperscript{105}Id. at 12.
\textsuperscript{106}Id. ("If a holder cannot find the true owner, the states require that holder to remit the property to the state for safekeeping.").
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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. \textit{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.\textsuperscript{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.\textsuperscript{111} The average percentage rate of compensation for these
auditors is twelve percent of the unclaimed property obligations discovered.\textsuperscript{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 them\textsuperscript{113}
and to push the envelope in discovering "liabilities that go well beyond
traditional legal interpretations."\textsuperscript{114}

\textsuperscript{108} \textit{Id.} at 16–22, 34.
\textsuperscript{109} \textit{Id.} at 3 (as of 2008).
\textsuperscript{110} Robert S. Peters & Matthew J. Beintum, \textit{Going Fishing: State Budget Deficits Drive
an Expanding Net of Unclaimed Property Collections}, \textit{J. MULTISTATE TAX'N & INCENTIVES},
July 2009, at 26, 29.
\textsuperscript{111} Scott D. Smith, \textit{Loyalty Reward Programs Raise a Host of Questions Under State
com/loyalty-reward-programs-raise-a-host-of-questions-under-state-unclaimed-property-
laws-06-30-2011/.
\textsuperscript{112} \textit{REID, supra} note 5, at 46.
\textsuperscript{113} Millar & Houghton, \textit{supra} note 86, at 723; \textit{see also} \textit{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 . . . ").
\textsuperscript{114} Peters & Beintum, \textit{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 years—\(^ {120}\) a time constitutes 'unclaimed property' and have placed an undue burden on business to meet compliance requirements." \(\text{Id.}\) at 29–30.

\(^{115}\) Millar & Houghton, supra note 86, at 723.


\(^{117}\) Millar & Houghton, supra note 86, at 723.

\(^{118}\) Musyl et al., supra note 116, at 1.

\(^{119}\) Smith, supra note 111, at 2.

\(^{120}\) \(\text{Id.; see also}\) 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. \(\text{Id.}\) 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. \(\text{Id.}\) 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. 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. 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. 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. 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. 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. 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. 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, this often a single state cannot claim the sole right to escheat the property in question. 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 property—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 jurisdiction—attempted to create a uniform and easily administrable solution 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. 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, a majority of states have carved out an exception to the dual priority framework: 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. These statutes—especially deemed owner address provisions—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.”).
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. Although the 1954 Uniform Disposition of Unclaimed Property Act endeavored to end conflicts between states asserting concomitant claims to the same intangible property, by 1961 the Act had only been adopted in twelve states and was largely ineffectual at ending the rash of interstate litigation over the rights to unclaimed intangible property. Four years later, the Supreme Court concluded that the time had come for a bright-line set of priority rules 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. 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

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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.\textsuperscript{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.\textsuperscript{145} New Jersey claimed the right to escheat because Sun Oil was incorporated therein.\textsuperscript{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.\textsuperscript{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.\textsuperscript{148} From each of these differing perspectives emerged four proposed rules\textsuperscript{149} regarding which state should be given exclusive jurisdiction of intangible property in an interstate escheat dispute: the state with the most significant contacts,\textsuperscript{150} the state of the corporate holder's domicile or incorporation,\textsuperscript{151} the state where the corporate holder's

\textsuperscript{144} Id. at 675.
\textsuperscript{145} Id. at 675–76.
\textsuperscript{146} Id. at 676.
\textsuperscript{147} Id.
\textsuperscript{148} Texas, 379 U.S. at 676.
\textsuperscript{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 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. Similarly, 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.

\textsuperscript{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.'").

\textsuperscript{151} Texas, 379 U.S. at 679.
principal place of business is located, or the state of the creditor’s last known address as shown by the corporate holder’s books and records. 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.” 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.

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. In either situation, the Court held that the intangible property would escheat to the state of the corporate debtor’s domicile. 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.” 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.”

To help illustrate the interplay between these priority rules, consider the following example. 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

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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.’”).


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.\footnote{Millar & Coalson, supra note 135, at 381.} The most common of these attempts is the location-based "third-priority rule,"\footnote{See id. at 381 n.2.} which has been adopted by thirty-seven states and the District of Columbia.\footnote{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.stratatomic.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.")}. 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."\footnote{Millar & Coalson, supra note 135, at 381 n.2; see also UNIF. UNCLAIMED PROP. ACT §3 (1981), 8C U.L.A. 189 (2003).} 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.\footnote{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.} Nevertheless, the jurisdictions that have adopted this rule have done so under the assumption that the Court's decision in \textit{Texas} does not limit their power to escheat unclaimed intangible property in the event that the primary or secondary priority rules are inapplicable.\footnote{See Noel E. Hall, Jr., Matthew B. Chenowth, & 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 \textit{Texas} framework. \textit{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. 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. 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. 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
recently, was rarely considered and only at the state and federal district court level.\textsuperscript{174} This section concludes by arguing that the traditional third-priority rule is preempted by the Court's decision in \textit{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 \textit{Texas} decision rests with Congress.

1. \textbf{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.\textsuperscript{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."\textsuperscript{176} Thus, when state statutory law comes into conflict with "federal common law set out in a decision based upon the Supreme Court's

\begin{footnotesize}

\textsuperscript{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.").

\textsuperscript{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," 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. 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. In no part of the opinion did the Court address a scenario where both the primary and secondary rules failed, nor did it reference a location-based, third-priority rule. 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*, 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. 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. 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.” Although not identical, a location-based, third-priority rule has many overlapping characteristics with the

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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 Srvs. 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. 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." 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. 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. 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. 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." 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

\[\text{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. Ascertainin}
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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. Ascertain 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.


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. 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.

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. 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.’” 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, 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.” In other words, absent conflicting claims by more than one state, a third-priority rule might coexist constitutionally with the Court’s Texas decision.

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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.


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.”).

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 commerce\(^{198}\)—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 jurisdiction—an understanding that has led
the Court to do so highly infrequently. 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.” 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.” 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’” 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
(“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))).


202 Id.

Framework. 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.” 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. A state that was already well positioned during the recent economic crisis, Delaware’s financial outlook is bright thanks—in no small part—to the revenue it derives from the collection of abandoned property. Currently, abandoned property receipts are the state’s third-largest source of revenue behind income taxes and corporate franchise taxes. In

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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.
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


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.

INEQUITABLE ESCHEAT?

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.\textsuperscript{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 \textit{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 \textit{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 \textit{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”\textsuperscript{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.\textsuperscript{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 incorporation\textsuperscript{218}—would be supplanted by a rule that looks to the location where the relationship between creditor and debtor was formed. In other words,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{215} See supra notes 126–27 and accompanying text.
\item \textsuperscript{216} \textit{Texas v. New Jersey}, 379 U.S. 674, 682 (1965).
\item \textsuperscript{217} In this way, the rule maintains the equitable spirit of the \textit{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.” \textit{Id.} at 681.
\item \textsuperscript{218} See supra notes 157–59.
\end{itemize}
\end{footnotesize}
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." 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. 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." 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." Because it has become a common occurrence for property to escheat to a holder's state of incorporation—either because a corporate

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. 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].” 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.

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. A

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

\[225\text{ Id. at 220; Texas, 379 U.S. at 680.}\]

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

\[227\text{ Pennsylvania, 407 U.S. at 221 (Powell, J., dissenting) (“The majority adheres to the existing rule because of some apprehension that flexibility in this case will deprive the Court}\]
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.
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The Corporate Preference for Trade Secret

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